CCH *Trade* CASES

1932 • 1939

TRADE CASES

1932-1939

Cited 1932-1939 Trade Cases

Texts of decisions rendered by federal and state courts throughout the United States in cases involving antitrust, Federal Trade Commission, and other trade regulation law problems, with table of cases and topical indexes

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FOREWORD

Trade Cases reports the full, official texts of selected decisions rendered by the higher courts, state and federal, in cases involving antitrust, Federal Trade Commission, and other trade regulation law problems. In addition, the more important lower court decisions and attorney generals' opinions are included. For good measure, antitrust consent decrees are included in full text.

The Sherman and Clayton Antitrust Acts, the Robinson-Patman Price Discrimination Act, and the Federal Trade Commission Act are the principal federal laws interpreted and applied by these decisions. The state fair trade acts (involving resale price maintenance), unfair practices acts (involving sales below cost), and price discrimination and basic antitrust laws are the state laws construed and applied in these cases.

This volume, cited 1932-1939 Trade Cases, selects and reproduces the more important decisions originally reported in CCH Trade Regulation Reports, Court Decisions Supplement 1932-1937, and in CCH Trade Regulation Reports, Eighth Edition, Volume 3, from May 1932 through December 1939.

Each decision is preceded by: the full name of the case; the name of the court and the date of the decision; an accurate, succinct and informative headnote, with emphasis on the main issue; and the names of attorneys representing the litigants, whenever available.

Effective indexing is provided to afford quick and convenient contact with any case by reference to its paragraph number. The indexing system includes:

(a) Table of Cases. Alphabetical, with complete listings under plaintiffs' names and cross references under defendants' names. The official and national reporter citations are included when available.

(b) Indexes. Complete and detailed. In addition to the General Topical Index, covering all of the decisions in the volume, special indexes are provided for:

- (i) Antitrust Consent Decrees
- (ii) Attorney Generals' Opinions
- (iii) Federal Trade Commission Cases
- (iv) Price Discrimination Cases
- (v) State Fair Trade Act Cases
- (vi) State Unfair Practices Act Cases

This thorough indexing affords instant contact with any case (a) by case name, and (b) by subject matter.

In planning and producing TRADE CASES, the aim of the publishers throughout is to make this volume of the utmost utility in the important and extensive field of trade regulation. The user's time is saved by concentration on the subject of trade regulation (no time is lost leafing through irrelevant cases); by the single reporting medium for courts of all jurisdictions; and by the explanatory headnotes—clearly stated captions written by specialists in trade regulation law.

COMMERCE CLEARING HOUSE, INC.

TRADE CASES

A Reporter of Selected Decisions Rendered by Federal and State Courts Throughout the United States on Antitrust, Federal Trade Commission, and Other Trade Regulation Law Problems

1932-1939

TABLE OF CASES
for
TRADE CASES
1932-1939

A COMPLETE LIST OF THE CASES REPORTED IN THIS VOLUME, ARRANGED ALPHABETICALLY BY NAMES OF PLAINTIFFS, WITH CROSS REFERENCES UNDER DEFENDANTS' NAMES *

Each case name is followed by the name of the court rendering the opinion, the official or national reporter citation if available at the time of printing, and the number of the paragraph in this volume at which the case is reported.

* Cases in which the "Federal Trade Commission" or the "United States" is a party are listed under the name of the other party only.

New

COURT DECISIONS

—Cited 1932-1939 Trade Cases—

[¶ 55,001] United States of America v. Balaban & Katz Corporation, Lubliner & Trinz Theatres, Inc., Balaban Katz Midwest Theatres Inc., Great States Theatres Inc., Paramount Famous Lasky Corporation, Metro-Goldwyn-Mayer Distributing Corporation, Publix Theatres Corporation, Universal Film Exchanges Inc., United Artists Corporation, First National Pictures Inc., Fox Film Corporation, Pathe Exchange Inc., Vitagraph Inc., Columbia Pictures Corporation, Educational Film Exchanges Inc., F. B. O. Pictures Corporation, The Gotham Photoplays Corporation, Warner Bros. Pictures Inc., Publix Great States Theatres Inc., Paramount-Publix Corporation.

U. S. District Court, Northern District of Illinois. Decree filed April 6, 1932.

Decree entered enjoining defendants from (1) granting to affiliated theatres in the Chicago area any arbitrary or unreasonable protection or clearance over competing unaffiliated theatres, (2) restraining unaffiliated theatres from contracting for first run pictures by the use of block booking or any other device which places an unreasonable burden upon such exhibitors in leasing first run pictures, (3) acquiring the management or booking control, without a substantial proprietary interest therein, of substantially all first run motion picture theatres in the Chicago Exchange Territory, or (4) leasing more first run pictures than is reasonably necessary for the conduct of their respective businesses.

Final Decree

United States of America filed its amended and supplemental petition herein on ———— 1932, and each of the defendants having duly appeared by their respective counsel, the United States of America by George E. Q. Johnson, United States Attorney for the Northern District of Illinois, Honorable John Lord O'Brian, the Assistant to the Attorney General, and John Harlan Amen, Special Assistant to the Attorney General, moved the court for an injunction as prayed in the petition and each of the defendants consented to the entry of this decree without contest and before any testimony had been taken.

WHEREFORE, it is ordered, adjudged and decreed as follows: that

I. The term "affiliated exhibitors" as used herein shall include persons, firms, partnerships or corporations which are engaged in the exhibition of motion pictures at theatres which are owned, operated or controlled, directly or indirectly, by any producer or distributor of motion pictures.

II. The term "unaffiliated exhibitors" as used herein shall include persons, firms, partnerships or corporations which are engaged in the exhibition of motion pictures at theatres which are not owned, operated or controlled, directly or indirectly, by any producer or distributor of motion pictures.

III. The Court has jurisdiction of the subject matter hereof and of all persons and parties hereto and the amended and supplemental petition herein states a cause of action against the defendants under the Act of Congress of July 2, 1890, commonly known as the Sherman Antitrust Act.

IV. The words "concertedly," "concerted," "collusive," "collusively," "collective," "collectively," and "concert or agreement" as used in this decree shall include any mutual agreement, understanding, plan, device or contrivance between any two or more defendants and shall not be construed to include merely simultaneous and/or similar action if shown to have been independently taken on the part of two or more defendants.

V. The conspiracy to restrain and to monopolize interstate trade and commerce in motion picture films described in the amended and supplemental petition herein is hereby declared illegal and in violation of said Act of Congress of July 2, 1890, commonly known as the Sherman Antitrust Act.

VI. The defendants and each of them, their respective officers, directors, agents, servants, employees and all persons acting or claiming to act on behalf of them or any of them be, and they hereby are, perpetually enjoined and restrained from carrying out, directly or indirectly, expressly or impliedly, by any means whatsoever, the conspiracy described in the amended and supplemental petition herein and from entering into or carrying out, directly or indirectly, expressly or impliedly, any similar conspiracy of like character or effect in the Chicago exchange territory.

VII. The defendants and any two or more of them, when acting as distributors

of motion pictures in the Chicago exchange territory in such instance, or the defendants and any two or more of them, when acting as exhibitors of motion pictures in the Chicago exchange territory in such instance, or the defendants and any two or more of them, when one or more is acting both as a distributor and an exhibitor in the Chicago exchange territory in such instance, their respective officers, agents, servants, employees and all persons acting or claiming to act on behalf of them or any of them, be enjoined from collusively, collectively or by concert or agreement:

(a) Restricting the course of interstate trade and commerce in motion picture films distributed by defendant distributors for first run exhibitions in the territory served by the Chicago Exchanges and for first and second suburban run exhibitions in the City of Chicago, Illinois, to motion picture theatres managed or booked by any one or more of defendant exhibitors.

(b) Preventing unaffiliated exhibitors of motion pictures in the Chicago Exchange Territory from contracting for or from securing in the course of interstate trade and commerce any motion picture film or films suitable for first run exhibition or first or second suburban run exhibition in any city or town in the territory served by the Chicago Exchanges in which any one of the defendant exhibitors operates or books one or more motion picture theatres.

(c) Restraining unaffiliated exhibitors in the Chicago Exchange Territory from contracting in the course of interstate trade and commerce, for any motion picture or pictures to exhibit and from securing any positive print of any motion picture so contracted for, until such time after the release and prior exhibition of each said motion picture in any theatre operated or booked by any one of defendant exhibitors in said territory that the exhibition value thereof has been lost.

(d) Restraining unaffiliated exhibitors in the Chicago Exchange Territory, which exhibitors do not compete with any motion picture theatre or theatres operated or booked by any one of defendant exhibitors, from contracting in the course of interstate trade and commerce for any motion picture to exhibit first run prior to or at the same time as any first run exhibition of the same motion picture in any motion picture theatre operated or booked by any one of defendant exhibitors, and not in competition with said unaffiliated exhibitor or exhibitors.

(e) Excluding distributors of motion picture films other than defendant distributors from contracting, in the course of interstate trade and commerce to license first run exhibitions of the feature motion pictures distributed by them in first class, first run motion picture theatres in the City of Chicago, Illinois, and in other cities and towns in the Chicago Exchange Territory.

(f) Acquiring the management or booking control, without a substantial proprietary interest therein, of substantially all first class, first run motion picture theatres in the City of Chicago, Illinois; acquiring the management or booking control, without a substantial proprietary interest therein, of substantially all first class, first run motion picture theatres in all the principal cities and towns throughout the Chicago Exchange Territory, or acquiring the management or booking control, without a substantial proprietary interest therein, of substantially all first class, first and second suburban run motion picture theatres in the City of Chicago, Illinois.

(g) Granting to motion picture theatres, owned, operated or controlled by defendant exhibitors in the territory served by the Chicago Exchanges, arbitrary or unreasonable protection or clearances over competing theatres owned, operated or controlled by unaffiliated exhibitors.

VIII. The defendant exhibitors and any two or more of them, their respective officers, directors, agents, servants, employees and all persons acting or claiming to act on behalf of them or any of them be enjoined from coercing or compelling or attempting to coerce or compel defendant distributors, their officers, agents or employees with the intent, for the purpose or with the effect of accomplishing the performance of any of the acts enjoined in the foregoing paragraph VII hereof.

IX. The defendants and any two or more of them, when acting as distributors of motion pictures in the Chicago Exchange territory in such instance, or the defendants and any two or more of them, when acting as exhibitors of motion pictures in the Chicago Exchange territory in such instance, or the defendants and any two or more of them, when one or more is acting both as a distributor and an exhibitor in the Chicago Exchange territory in such instance, their respective officers, agents, servants, employees and all persons acting or claiming to act on behalf of them or any of them, be enjoined from preparing, publishing, adopting, enforcing or attempting to enforce any uniform plan, system or schedule of zoning or clearance with the intent, for the purpose or with the effect of accomplishing the performance of any of the acts enjoined in the foregoing paragraph VII hereof.

X. The defendant exhibitors and each of them, and each and all of their respective officers, agents, servants, employees

and all other persons, acting or claiming to act on behalf of them or any of them be, and they hereby are, perpetually enjoined and restrained from entering into or performing any contracts, agreements, franchises or licenses with any one or more of the defendant distributors for the exhibition of motion pictures in the territory served by the Chicago exchanges, the individual or collective effect of which will unreasonably lessen competition in interstate trade and commerce between the defendants or any two or more of them, or effect a combination in unreasonable restraint of interstate trade and commerce in motion pictures or create a monopoly of interstate trade and commerce in motion pictures in said territory.

XI. The defendants and any two or more of them, when acting as distributors of motion pictures in the Chicago exchange territory in such instance, or the defendants and any two or more of them, when acting as exhibitors of motion pictures in the Chicago exchange territory in such instance, or the defendants and any two or more of them, when one or more is acting both as a distributor and an exhibitor in the Chicago exchange territory in such instance, their respective officers, agents, servants, employees and all persons acting or claiming to act on behalf of them or any of them, be and they hereby are perpetually enjoined and restrained from collusively, collectively or by concert or agreement between them, formulating, adopting or practising a policy either generally or with respect to particular communities:

(a) Whereby the supply of motion pictures distributed by defendant distributors is engrossed for exhibition in theatres owned, operated or controlled by defendant exhibitors in the territory served by the Chicago Exchanges; that is to say, whereby more motion pictures are bought for exhibition by said defendant exhibitors than is reasonably necessary for the proper conduct of their respective businesses in said territory for the purpose or with the intent of preventing competing unaffiliated exhibitors therein from obtaining said motion pictures.

(b) Whereby defendant exhibitors obtain the exclusive first choice of motion pictures distributed by defendant distributors in the territory served by the Chicago Exchanges; that is to say, whereby said defendant exhibitors are permitted to contract for the exhibition of such motion pictures distributed by defendant distributors as they may deem most profitable before the same have been offered to unaffiliated exhibitors in said territory for the purpose or with the intent of preventing said unaffiliated exhibitors from obtaining said motion pictures.

(c) Whereby motion pictures distributed by defendant distributors are leased to unaffiliated exhibitors in said Chicago Exchange Territory only in groups containing a fixed minimum number of such pictures for the purpose or with the effect of restraining competing unaffiliated exhibitors in said territory from leasing such individual motion pictures as they may require and of compelling said unaffiliated exhibitors to contract for the exhibition of more motion pictures distributed by defendant distributors than are needed for the legitimate conduct of their respective businesses.

(d) Whereby defendant distributors leasing feature pictures, news reels and short subjects make it a condition of sale to unaffiliated exhibitors in said Chicago Exchange Territory, that the latter purchase the news reels and/or short subjects, as a condition precedent to obtaining the feature pictures and do not make the same condition of sale to defendant exhibitors, for the purpose or with the intent of restraining competing unaffiliated exhibitors in said territory from leasing such individual motion pictures as they may require and of compelling said competing unaffiliated exhibitors to contract for the exhibition of more motion pictures distributed by defendant distributors than are needed for the legitimate conduct of their respective businesses.

XII. Nothing in this decree contained shall be construed so as to prevent the defendant distributors, acting separately, from entering into and/or carrying out contracts with the defendant exhibitors, acting separately, or to prevent the defendant exhibitors, acting separately, from entering into and/or carrying out contracts with the defendant distributors, acting separately, for motion picture films to be exhibited at theatres maintained and operated by defendant exhibitors; or at theatres for which, the defendant exhibitors contract for motion picture films; or to prevent defendant exhibitors, acting separately, from selecting for exhibition a certain number of motion picture films from the annual product of such distributors, or any of them, before said distributors enter into negotiations or contracts with unaffiliated exhibitors for [such films]; or permit unaffiliated exhibitors to select, motion picture films, from time to time, for exhibition purposes; or to prevent defendant exhibitors, acting separately, from entering into contracts for or making selections of motion picture films for exhibition purposes before the time when unaffiliated exhibitors, or any of them, have entered into such contracts or made such selections.

XIII. Nothing in this decree contained shall be construed to declare a classification of theatres according to the method described in the amended petition as first, second and third or subsequent run or runs theatres, or such other reasonable classification as may hereafter from time to time be in use in the motion picture industry, or zoning of such theatres for clearance and/or protection of motion picture films for exhibition purposes as between theatres, including clearance and/or protection according to runs or price of admission, to be illegal as such or in violation of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce," commonly known as the Sherman Antitrust Act, or as prohibiting any defendant from selecting its own customers and bargaining with them in accordance with law, or as prohibiting defendant distributors and defendant exhibitors from bargaining separately with each other in accordance with law, or any affiliated exhibitor from exhibiting at any time its own films in theatres owned or controlled by it.

XIV. Nothing in this decree contained shall be construed as prohibiting any lawful conduct by any one or more defendants in the distribution and/or exhibition of motion pictures anything in this decree to the contrary notwithstanding.

XV. For the purposes of this decree, in case any defendant owns the controlling interest in any other defendant or defendants, either directly or indirectly, such defendants (so long as such relationship continues), and/or the respective subsidiaries of any defendant herein, shall be deemed one defendant.

XVI. Jurisdiction of this case be and it hereby is retained for the purpose of enforcing and modifying this decree.

XVII. The Petitioner have and recover from the defendants its costs herein.

(Signed) *Charles E. Woodward,*
United States District Judge.

[¶ 55,002] United States v. Corn Derivatives Institute et al.

U. S. District Court, Northern District of Illinois. April 6, 1932.

Consent decree entered ordering defendants to (1) dissolve the Corn Derivatives Institute, (2) discontinue use of the so-called basing point system in fixing prices, and (3) discontinue allotting customers.

Final Decree

This cause having come on to be heard at this term; upon consideration thereof and upon motion of the petitioner, by George E. Q. Johnson, United States Attorney for the Northern District of Illinois, John Lord O'Brian, The Assistant to the Attorney General, Russell Hardy and Walter L. Rice, Special Assistants to the Attorney General, for relief in accordance with the prayer of the petitioner, the answers of the several defendants having been filed, and no testimony or evidence having been taken but all of the defendants herein having duly appeared by their attorneys and having consented in open court to the entry of this decree; it is

Ordered, Adjudged and Decreed: 1. That the court has jurisdiction of the subject matter and of all persons and parties hereto; that the petition states a cause of action against the defendants under the Act of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies;" and that the "Reporting Plan," all agreements, understandings, concert of action, plans and the defendants' activities thereunder, as set forth in the petition, are declared illegal and in violation of said Act.

2. That the words "acting in concert" as used in this decree shall mean by mutual agreement, understanding, plan, device, or contrivance entered into or employed by any two or more defendants and shall not be construed to include merely simultaneous or similar action independently taken on the part of two or more defendants. Corn Derivatives Institute shall be hereinafter referred to as the "Institute." The term "Manufacturer" will include any individual, corporation, or association engaged in the manufacture, sale and distribution of corn sugar, corn syrup, corn starch, or other products derived from corn. Corn sugar, corn syrup, corn starch, and other corn products will be hereinafter described collectively by the word "Products." The word "prices" when hereinafter used will include differentials in prices. The word "conditions," as used in this decree, shall mean the conditions of any transaction in the purchase or sale of products.

3. That the defendants and each of them, their members, officers, directors, managers, agents, servants, employees, and

all persons acting or claiming to act under or in behalf of the defendants, or any of them, be and they hereby are, ordered and directed within thirty (30) days after the entry of this decree to dissolve and to forever discontinue the Institute, and they are perpetually enjoined from, either directly or indirectly, forming, participating in, or contracting with, any institute, association, bureau, or other organization similar to the Institute in respect of the practices herein enjoined.

4. That the defendants and each of them, their members, officers, directors, managers, agents, servants, employees, and all persons acting or claiming to act under or in behalf of the defendants, or any of them, be, and they hereby are, permanently and perpetually enjoined and restrained:

(a) From in any way maintaining, continuing, or reviving, either directly or indirectly, in whole or in part, by any means whatsoever, the combination and conspiracy described in the petition, or from entering into or participating in any combination or conspiracy, similar to or having the same purpose and/or effect as said conspiracy.

(b) From arranging, agreeing, entering into any understanding or otherwise "acting in concert," amongst themselves, with the Institute, with any one or more of its members or with any manufacturer—

(1) To fix or determine the prices, terms, conditions, concessions, exceptions or transportation charges in the purchase and sale of Products; or

(2) To maintain, adhere to, charge or allow uniform prices, terms, conditions, concessions in the purchase or sale of Products; or

(3) To cause uniform or substantially uniform and simultaneous changes in prices, terms, conditions, concessions in the purchase or sale of Products; or

(4) To prevent, obstruct, retard, or restrain any change in prices, terms, conditions, concessions in the purchase or sale of Products; or

(5) To refrain from competing with each other in the manufacture, sale, and distribution of Products; or

(6) To make any discrimination amongst purchasers in the price, terms, conditions, concessions or transportation charges in the purchase or sale of Products, for the purpose of eliminating competition in the manufacture, sale, or distribution of Products; or

(7) To cut or manipulate prices in the purchase or sale of Products, for the purpose of restraining competition or trade, or for the purpose of coercing or inducing any manufacturer to cooperate with the defendants or with others in any institute, bureau or association, or in any plan to limit production, maintain or enhance prices of Products; or

(8) To assign or allot any purchaser of Products as the exclusive customer of any of the defendants, or to regard or designate any purchaser who has been or is trading with any of the defendants as the exclusive customer of that defendant, or to limit or curtail production; or

(9) To obstruct or restrain, the manufacture, sale, or distribution of any Product, or prevent any individual corporation or association from undertaking to manufacture, sell, or distribute Products; or

(10) To refuse to quote prices for products f.o.b. point of manufacture, or to refuse to sell products at prices to apply at the point of manufacture.

(11) To sponsor or encourage the accomplishment of any of the acts or purposes enjoined by clauses 1 to 10, inclusive, of this paragraph (b) of section 4 of this decree.

(c) From doing any of the following described acts or things, in pursuance of any arrangement, agreement, understanding, action in concert, or conspiracy described in the foregoing paragraph (b) hereof, or for the purpose of creating or carrying into effect any arrangement, agreement, concert of action, or conspiracy, similar to or having the same purpose and/or effect as said conspiracy.

(1) Making, disseminating or publishing any statements, facts, predictions, plans or reports, which cause uniform and simultaneous changes in prices, terms, conditions, concessions, exceptions or transportation charges in the purchase or sale of Products, or which prevent, obstruct, retard or restrain any change in prices, terms, conditions, concessions or transportation charges in the purchase or sale of Products; or

(2) Reporting, disseminating or exchanging amongst themselves, directly or indirectly, or through the instrumentality of the Institute, or otherwise, prices, terms, conditions, concessions, exceptions or transportation charges in any current or future purchase or sale of Products, or quotations of prices, terms and conditions, concessions and transportation charges in any future purchase or sale of Products; or

(3) Suggesting or indicating to any manufacturer or person affiliated with any manufacturer, the prices, terms, conditions, concessions, exceptions or transportation charges applying to any current, future or contemplated purchase or sale of Products; or

(4) Gathering, compiling, distributing or otherwise dealing with or using, figures, or other information relating to the cost of Products, for the purpose or with the effect of causing uniform, enhanced or more onerous prices, terms, conditions, concessions, exceptions or transportation charges in the purchase or sale of Products; or

(5) Investigating, inquiring into, discussing or obtaining disclosures, orally or in writing, pursuant to a reporting plan or otherwise, with regard to the prices, terms, conditions, concessions, exceptions or transportation charges made, or to be made, by any manufacturer in the sale of products, for the purpose or with the effect of influencing, coercing, intimidating any manufacturer with regard to prices, terms, conditions, concessions, exceptions or transportation charges made or to be made by him as aforesaid.

5. That nothing in this decree shall be construed—

(a) To prevent the defendant manufacturers or any of them from exchanging either directly or through a committee or other agency, information concerning the financial or moral responsibility of any manufacturer or dealer; always provided, that there shall not be made, in connection with or in supplement of such exchange of information, any comment in the nature of a recommendation as to any action to be taken thereon; or

(b) To prevent the defendant manufacturers or any of them from reporting any statistical information to any government or governmental agency requesting such information, or from compiling or publishing any statistical information for the purpose of making such a report; or from associating amongst themselves for the purpose of collecting, compiling or distributing statistical information as to production, stocks on hand, prices, terms, conditions, concessions, exceptions or transportation charges in purchases or sales which have been made, when not done in pursuance of or for the purpose of creating an agreement, combination or conspiracy to restrain trade or in violation of the aforesaid Act of July 2, 1890; or

(c) To prevent the defendant manufacturers or any of them from taking concerted action to revise the rates charged by common carriers for the transportation of products, or incidental to any proposed or actual proceeding before any governmental agency.

6. That jurisdiction of this cause be and it is hereby retained for the purpose of enforcing or modifying this decree upon application of the petitioner or any of the defendants.

7. That this decree shall not be construed as a contract between the parties hereto, but shall be construed in the same manner as a decree entered after full hearing by the court.

8. That the petitioner have and recover from the defendants the costs of this suit.

(Signed) *Charles E. Woodward,*

United States District Judge.

[¶ 55,003] Federal Trade Commission v. Paramount Famous-Lasky Corp'n, Adolph Zukor and Jesse L. Lasky.

United States Circuit Court of Appeals for the Second Circuit. Decided April 4, 1932.

The method of contracting for lease of motion picture films called "block-booking" where the producer or distributor offers a group of films together as one unit held not unlawful as an unfair method of competition under the Federal Trade Commission Act where there is no showing that the producer or distributor is a monopoly or a member of an unlawful combination in restraint of trade.

On application for enforcement of an order of the Federal Trade Commission. Denied.

Before: MANTON, AUGUSTUS N. HAND and CHASE, Circuit Judges.

Petition to enforce an order of the Federal Trade Commission, entered against respondents Famous Players-Lasky Corporation, Adolph Zukor and Jesse L. Lasky, which order directed them to cease and desist from practices found by the Commission to constitute unfair methods of competition in violation of § 5 of the Federal Trade Commission Act (15 U. S. C. A. § 45). Order reversed and the petition to enforce denied.

Robt. E. Healy, Esq., Chief Counsel for Federal Trade Commission; *Martin A. Morrison, Esq.*, Assistant Chief Counsel, Attorneys for Petitioner; *Cravath, De Gersdorff, Swaine & Wood, Esqs.*, Attorneys for Respondents; *Frederick H. Wood, Esq., Bruce Bromley, Esq.*, of Counsel.

MANTON, Circuit Judge. The Federal Trade Commission issued an order against the respondents directing them to cease and desist from certain practices found by it to constitute methods of unfair competition in violation of § 5 of the Federal Trade Commission Act (38 Stat. 717, 15 U. S. C. A. § 45). That part of the order sought to be enforced directs the respondents to cease and desist "from leasing or offering to lease for exhibition in a theater or theaters motion picture films in a block or group of two or more films at a designated lump sum price for the entire block or group only and requiring the exhibitor to lease all such films or be permitted to lease none; and from leasing or offering to lease for exhibition such motion picture films in a block or group of two or more at a designated lump sum price for the entire block or group and at separate and several prices for separate and several films, or for a number or numbers thereof less than the total number, which total or lump sum price and separate and several prices shall bear to each other such relation as to operate as an unreasonable restraint upon the freedom of an exhibitor to select and lease for use and exhibition only such film or films of such block or group as he may desire and prefer to procure for exhibition; or shall bear such relation to each other as to tend to require an exhibitor to lease such entire block or group or forego the lease of any portion or portions thereof; or shall bear such relations to each other that the effect of such proposed contract for the lease of such films may be substantially to lessen competition or tend to create a monopoly in any part of the certain line of commerce among the several States, or with foreign nations, involved in the said proposed sale, to wit: the business of the production, distribution and exhibition of motion picture films to the public, or the business of production and distribution, or of production or distribution of moving picture films for public exhibition." No review of all or any part of the order entered has been sought by the respondents. However, upon an application to enforce the order, it is not essential to establish a violation of the Commission's order, for the first question we must examine in the proceeding is whether or not there has been a violation of the law. *Fed. Trade Comm. v. Balme*, 23 Fed. (2d) 615 (C. C. A. 2); certiorari denied, 277 U. S. 598. The statute grants jurisdiction to the court to enter, upon the pleadings, testimony and proceedings, a decree affirming, modifying or setting aside an order entered by the Commission and in so doing, the court has the power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the Commission. *Fed. Trade Comm. v. Curtis Pub. Co.*, 260 U. S. 568. Section 5, which is alleged to have been violated, has reference to unfair methods of competition in commerce, which are declared to be unlawful, and, in determining whether given acts amount to unfair methods of competition within the meaning of the act, the standard is the one "established by the Sherman Act in the words 'restraint of trade or commerce' and 'monopolize or attempt to monopolize,' and by the courts in construing the Sherman Act with reference to acts 'which operate to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade,' and 'restrict the common liberty to engage therein.'" *Fed. Trade Comm. v. Beech-Nut Co.*, 257 U. S. 441; *Standard Oil Co. of N. J. v. Fed. Trade Comm.*, 282 Fed. 81 (C. C. A. 3). A practice which is against public policy because of its dangerous tendency unduly to hinder competition or create a monopoly, is declared to be unfair and unlawful by § 5. *Fed. Trade Comm. v. Gratz*, 253 U. S. 421. And public policy is the policy of the common law, equity or statutory, with statutes paramount. *Chicago, B. & A. R. R. v. McGuire*, 219 U. S. 549.

The Famous Players-Lasky Corporation is a New York corporation engaged in the business, interstate and foreign, of producing, leasing, transporting and distributing to exhibitors and exhibiting for profit, motion picture films. These films are produced at their studios located in several states of the United States and are distributed and transported therefrom in interstate commerce to theaters located in several other states. It is in competition with other producers. The individual respondents are officers of the corporation and as such, operate and control its business activities. The Commission found that it adopted a method of leasing its films under a system known as "block booking." Under such plan, films were offered in blocks only. A block is a group of films offered as a unit, containing a number of individual motion pictures which are available for lease by exhibitors for three months or for one year. Such blocks contain 13 or 26 films, or 52 or 104 films, according to whether the theater changes films once or twice a week. The individual films in blocks being

offered are not always identical. The blocks offered to an exhibitor contain certain films which the exhibitor may not want to lease but he must lease all or none. He may not select some of the individual films and reject others contained in the block unless he exercises the option to pay prices found by the Commission to be arbitrarily fixed from 50 to 75 per cent higher than the estimated prices of such films as part of the block. If the exhibitor declines to take all, the block is successively offered to his competitors until a lease is made. Only if all competitors refuse the block are the individual films offered to exhibitors upon some other basis arrived at by negotiation between the producer and exhibitors. The Commission determined this method of distribution to be unfair, and that the purpose and effect of the alternative offer is to coerce and intimidate an exhibitor into surrendering his free choice in the leasing of films, and into leasing films in blocks as offered, thereby denying to such exhibitor the opportunity and profit of leasing and exhibiting certain other films of higher qualities and which such exhibitor's patrons demand and which such exhibitor desires to exhibit. It is thus concluded by the Commission that this distribution policy lessens competition and tends to create a monopoly in the motion picture industry by tending to exclude from the market and industry independent producers and distributors of films, and denies to the exhibitors freedom of choice in leasing films.

There are seven other producers of major rank and some smaller, who are in competition with the respondents. The evidence discloses the total number of feature pictures released annually, and the percentage thereof produced by the respondent in the years 1919 to 1923, is shown in the table (a) below. Since 1919 there has been a reduction in the percentage of feature films released by the respondent, and table (b) below sets forth the percentage which film rentals received by the respondent from feature pictures were of the total rentals paid to all producers and distributors for feature pictures for the same period.

From this, it is apparent that the general production of feature pictures has likewise declined since 1919, and these tables demonstrate that there is free competition among producers and distributors for the distribution and marketing of their pictures. There is a lack of monopolization by the respondent and, in fact, lack of ability to achieve a monopoly and therefore not a business operation which would unduly hinder competitors, as indicated by the foot-note (c) showing first, the total number of feature pictures released during the years 1919 and 1923 respectively; second, the number and percentage of total released by the respondent; third, the number and percentage of total released by each of the respondent's principal competitors, and fourth, the number and percentage released by smaller distributors. These tables indicate a state of free competition in the industry and sufficiently negative the finding of the Commission that the respondent dominates the industry. The percentages disclosed by the evidence sufficiently demonstrate that the respondents have not absorbed the exhibition time of the first-run theaters, to the exclusion of other producers, large or small. Nor has the method of negotiation for the leasing of its films shown effective or destructive injury to first-run houses. About one-half of the houses of the key cities are disclosed not to have shown the respondent's pictures, and of those showing its pictures, but a small percentage have shown them in substantial numbers. In the last two years, approximately three-fourths of those showing respondent's pictures show less than 25% thereof. There is no finding by the Commission that the method of negotiation in block booking, which it condemns, was generally successful in the distribution of their pictures to the detriment of respondent's competitors, nor is there a finding in respect to the existence or absence of free and active competition in the industry generally. The record discloses that the respondent's releases in 1923 were but 12% of the total releases, and this shows a decline in percentage since 1919. The small producer or distributor, as distinguished from the larger companies, has not been shown to have been effected by any combination between the large companies. The respondent's sales methods have not been shown to have any effect upon its competitors — the smaller producers — when the whole field is surveyed, and it is impossible to say on the evidence that the effect of block booking as practiced by the respondent, or its accumulative effect as practiced independently by the respondent and others, has unfairly affected competition. On the other hand, it may fairly be said that all persons engaged in the production of pictures have been able successfully to distribute their product. This has permitted fair competition in the industry.

It is admitted that the purpose of the respondent's method of negotiation and block booking is to sell the entire product to a single exhibitor in a single locality, but the method is said to deny to exhibitors freedom of choice in leasing films. Where an offer, unaccompanied by any declaration that the exhibitor must take all or none, is accepted, there is no restraint upon the exhibitor's freedom of choice. If the offer is rejected and the respondent refuses to consider the lease of less than the block until the block has been successively offered to the exhibitor's competitors, there is no restraint placed upon the freedom of choice of the exhibitor if all refuse the block. But if, under these circumstances, the exhibitor is induced to take all, by refusal of respondent at that time to consider the lease of less, the result is not due to denial or freedom of choice, but to the exercise of his choice of two alternatives, namely, to refuse at that time to take the block and await developments as to other competitors, or to take the block and thereby forestall any of his competitors from obtaining it. After this, there is the insistence of an increase in price by the respondent if individual films are accepted. But these we regard as merely ordinary incidents of bargaining and negotiating between seller and buyer, out of which a contract may or may not result. In either case, the buyer exercises his legal right to purchase or not, as he chooses. A distributor of films by lease or sale has the right to select his own customers and to sell such quantities at given prices, or to refuse to sell at all to any particular person for reasons of his own. *Fed. Trade Comm. v. Raymond Co.*, 363 U. S. 565; *United States v. Colgate*, 250 U. S. 300; *Natl. Biscuit Co. v. Fed. Trade Comm.*, 299 Fed. 733 (C. C. A. 2); *Great A. & P. Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (C. C. A. 2). But in the sale or lease, it is unlawful if the sale is attempted to be brought about by an agreement, either actual or implied, as to the maintenance of resale prices. *United States v. A. Schrader's Sons, Inc.*, 252 U. S. 85; *Harriet Hubbard Ayer, Inc. v. Fed. Trade Comm.*, 15 Fed. (2d) 274 (C. C. A. 2). No such effort was made here.

The Commission did not find that the method of negotiation for the leasing of the films in question was carried on by the respondent as the result of a conspiracy or agreement with other producers, and, in the absence of such finding, they had an undoubted right to sell in blocks or to adhere to a policy of terms of sale, price of sale, and person to whom they sold. Of course, there are some exceptions to a sales policy which we think are not applicable here. The Commission may not interfere with the respondent's attempt to effectively dispose of their products as a whole before entering upon negotiations for the disposition of less than all. Nor is this method of negotiation and sales creative of a dangerous tendency to unduly hinder competition or to create a monopoly. *Beech-Nut Co. v. Fed. Trade Comm.*, 257 U. S. 441; *Fed. Trade Comm. v. Gratz*, 253 U. S. 421. We see nothing in the method of competition which is disclosed by the efforts of salesmanship involved in the respondent's business which has or can have any dangerous tendency unduly to

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(a)

Year	All Companies	FPL Released	Per Cent. FPL Released
1919	815	139	17
1920	735	116	16
1921	830	120	14
1922	707	95	13
1923	527	61	12

(b)

Period	Percentage of film rentals for FPL Features
Fiscal year June 30, 1919 to June 30, 1920	29.8
Fiscal year June 30, 1920 to June 30, 1921	28.2
June 30, 1921 to January 1, 1922	30.8
Calendar year 1922	25.5
Calendar year 1923	22.1
Calendar year 1924	20.5

(c)

	Number of Features 1919	% of Total 1919	Number of Features 1923	% of Total 1923	% of increase or decrease in % of total distribution
Total of all producers	815	100	527	100	0
Respondent	139	17.05	61	11.57	—32.3
Universal Film Mfg. Co.	64	7.85	63	11.95	52.2
Fox Film Corp.	70	8.58	55	10.43	21.5
Pathe	58	7.11	26	4.93	—30.7
Warner Brothers			11	2.10	new comer
Metro-Goldwyn	83	10.18	60	11.38	11.8
First National	21	2.57	46	8.72	34
United Artists	3	.36	11	2.08	477.7
Miscellaneous State rights companies	117	14.35	108	20.49	42.8

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hinder competition or to create a monopoly. The method of distribution by sale or lease, or the practice of selling through a common distributor is open to every other producer, large or small, to the extent of his pictures produced. To the extent that the method of negotiation carried on by the respondent is successful, the greater number of pictures produced by it and the greater number which may be placed at wholesale in a single contract, may result from the size of its business and the industry it employs. But the size alone does not give rise to a violation of the law. *United States v. Internatl. Harvester Co.*, 273 U. S. 693; *United States v. U. S. Steel Corp.*, 240 U. S. 442. The mere fact that a given method of competition makes it difficult for competitors to do business successfully is not of itself sufficient to brand the method of competition as unlawful and unfair. *Fed. Trade Comm. v. Curtis Pub. Co.*, 260 U. S. 568; *Fed. Trade Comm. v. Sinclair Refining Co.*, 261 U. S. 463. From the tables referred to above, it is apparent that the respondent did not have a monopoly in the film industry.

It is true that the Commission in its findings (Para. 11) determined that the "acts, practices, and things done, as hereinbefore set forth, have unduly hindered and are now unduly hindering, the competition in interstate commerce of competing producers and distributors of motion picture films; and * * * have a dangerous tendency to create * * * a monopoly in the motion picture industry." This finding relates to and includes block booking for it says (Para. 10), "the purpose and necessary effect of such distribution policy is to lessen competition and to tend to create a monopoly in the motion picture industry, tending to exclude from the market and the industry small independent producers and distributors of films and denying to exhibitors freedom of choice in leasing of films." An examination of the record reveals, however, that this is a conclusion of the author of this finding, which is not sustained by the evidence. Without support by evidence in the record, it will not sustain the order to cease and desist. *Natl. Biscuit Co. v. Fed. Trade Comm., supra; Mennen Co. v. Fed. Trade Comm.*, 288 Fed. 774 (C. C. A. 2). The Commission is required to make findings of fact, but whether a given method of competition is fair or unfair within the meaning of the act, is a question of law for the courts. *Fed. Trade Comm. v. Gratz, supra; Fed. Trade Comm. v. Beech-Nut Co., supra.* The respondent is not required, under the law, to so conduct its business that every competitor may conduct his with an equal degree of success according to his size and importance. It was not the purpose of the act to equalize opportunity or insure an equal degree of success upon the part of all competitors in a given industry, but it was its purpose to preserve for the benefit of the public, active competition therein, and where there is no question of monopoly involved, the question is whether the method of competition described has a dangerous tendency unduly to hinder competition. *Fed. Trade Comm. v. Gratz, supra.* As the Supreme Court put it in *Fed. Trade Comm. v. Curtis Pub. Co.* (*supra*),

> "Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or make insuperable the difficulties which rivals must face."

In the instant case, there is no finding that the respondent combined with other large producers for the purpose of hindering those outside the large combination, and the evidence would not warrant such a finding. In the absence of combination or agreement, the fact that the method of negotiation as practiced by the respondent tends to exclude other independent producers, is of itself insufficient to establish any probable tendency toward the creation of the evils prohibited by the Sherman Act. Where a practice is not inherently unlawful and unfair, and its legality depends upon its effect, a finding that it has a dangerous tendency unduly to hinder competition or create a monopoly, must be based upon its effect as demonstrated upon the experience of competitors. *Standard Oil Co. v. Fed. Trade Comm.*, 261 U. S. 463.

The cases of *Paramount Famous Lasky Corp. v. United States* (282 U. S. 30) and *United States v. First Natl. Pictures* (282 U. S. 44), in no way support the decision of the Commission. The freedom of contract therein protected was the right to contract independently of a restraint placed upon either party by an agreement with others, and the vice of the agreement condemned was that by unlawful agreement or conspiracy the distributors had agreed among themselves not to contract with exhibitors, except in accordance with a form of agreement to which all distributors agreed to adhere. That question is not involved in this case. The basis of the order here sought to be enforced is that by refusing to consider an offer for less than a block of pictures, until the possibility of selling the same block to others had been exhausted, the respondent exerts pressure upon the exhibitor for the purpose of compeling or inducing him to take the block, and that is said to be unfair and unlawful, for it is claimed to deny to the exhibitor freedom of choice in the purchase of his pictures. But that freedom is denied only if the distributor is able to find

some other exhibitor who will take the block. If, on the other hand, he cannot, the first bidder for the picture may buy at the increased price.

Moreover, the evidence in the record discloses that the effect of this method of negotiation has not been to unduly restrain the exhibitor's freedom of choice. It is only a small percentage of contracts made which are for blocks offered. The greater number are shown to be for a few pictures only. The record shows that the respondent succeeded in making a total of 9,128 contracts with exhibitors for pictures in groups and of these 57½% were for ten pictures or less. This, it would seem, demonstrates that the method of negotiation prohibited by the cease and desist order has not had the effect of unduly restraining the exhibitor's freedom of selecting from among the pictures offered those which he desires.

Nor is the alternative offer permitted to be made for the films, that is, to lease less than a block at higher prices, a coercive or intimidating method. The Commission found that the alternative prices are "so high as to make it impossible for him (the exhibitor) successfully to compete with rival theaters." The exhibitor can freely accept or refuse this offer. If the distributor has the right to sell or attempt to sell his films and the right to make terms which are reasonable, this offer of sale under such terms in no way restrains competition in trade; it constitutes merely a part of the ordinary process of bargaining with the customer for the sale of one's product. Each sale, because of the difference in films, presents an individual problem which must be considered by the buyer and seller according to the circumstances and in conformity with their best judgments. At no time did the respondent refuse to sell if its terms were met. It engaged in a lawful effort to market its products at what it deemed to be desirable terms.

Nor may the order be supported upon the theory that the contracts made for the leasing of the films are unlawful as tying or exclusive contracts and opposed to public policy. A tying contract is one in which one or more different articles are tied together for sale. Such contracts are not unlawful as opposed to public policy *per se* but only when insisted upon in a sale by a corporation which has a monopoly. *Fed. Trade Comm. v. Gratz, supra.* Section 3 of the Clayton Act makes it unlawful to lease or make a contract for the sale of goods "on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise * * * of a competitor * * * of the lessor or seller, where the effect of such lease, sale, or contract * * * may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

No such contract is made here. When pictures are leased in blocks, they are not tied together, and the respondent's pictures are not indispensable to any exhibitor. And as said in *Fed. Trade Comm. v. Gratz* (*supra*):

"All questions of monopoly or combination being out of the way, a private merchant, acting with entire good faith, may properly refuse to sell except in conjunction, such closely associated articles as ties and bagging. If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved. *U. S. v. Colgate & Co.*, 250 U. S. 300; *U. S. v. A. Schrader's Son, Inc.*, 252 U. S. 85."

It is true that respondent's pictures are copyrighted and that one cannot use them except under lease or license, but by reason thereof, no monopoly in the pictures has been created, and moreover, the respondent's pictures are not indispensable to any exhibitor, as found by the Commission. Exhibitors need pictures, to be sure, but not necessarily respondent's. Its competitors have pictures which are also covered by copyrights and subject to lease; any person can make a picture and copyright it and any exhibitor is free to lease a copyrighted picture or refuse to do so.

The respondent has lawfully exercised its right to sell its product to the best advantage and in such quantities and to such persons as it chooses. It neither has a monopoly and, apparently, not the ability to acquire one. The percentage of the pictures produced in the film rentals received have progressively declined during the period covered. The means and methods employed in marketing its leases of films to prospective customers are matters within the business judgment of a private producer of films and carries with it the legal right to bargain and negotiate as the respondent did. The method of negotiation which has been condemned by the Commission, does not disclose a dangerous tendency unlawfully to hinder competition, nor does it create a monopoly. The findings are insufficient in law to support the conclusions of fact reached and therefore the petition to enforce Paragraph 2 of the order to cease and desist must be denied.

Petition denied.

[¶ 55,004] James S. Kirk & Company and Procter & Gamble Company v. Federal Trade Commission.

United States Circuit Court of Appeals, Seventh Circuit. Decided April 15, 1932.

Use of the term "Castile" to describe soap composed of other oils than olive oils does not constitute an unfair practice since such term has been recognized by the U. S. Bureau of Standards as denoting other than pure olive oil soaps.

Before ALSCHULER, EVANS, and SPARKS, *Circuit Judges.*

The original petitioner, James S. Kirk & Company, hereinafter referred to as petitioner, brought this proceeding to review and set aside a cease and desist order entered by the Federal Trade Commission against petitioner pursuant to the provisions of Federal Trade Commission Act of 1914, c. 311, 38 Stat. 715, and certain amendatory acts.

The provisions of the statute which are pertinent to the issues in controversy are found in Par. 5 of the original Act as amended in 1925, c. 229, Par. 2, 43 Stat. 939, 15 USCA 45, and are set forth in the margin.[1]

The Commission's complaint, which was filed January 9, 1924, alleges that petitioner is in competition with others in the manufacture and sale of soap in interstate commerce; that among its competitors are a number who manufacture or import castile soap from various countries; that genuine castile soap took its name from the province of Castile, Spain; that it is a hard soap, the oil ingredient of which always has been, and now is, olive oil exclusively; that because of the qualities of olive oil as a soap material, and for other reasons, it is considered by the trade and the public generally as an excellent soap, free from substances harmful to the skin or delicate fabrics; that by the medical profession and drug trade it is considered to have qualities requisite for bathing infants and sick persons and for use in medical prescriptions, and is so used; that, in addition to making several brands containing various percentages of olive oil, Kirk & Company, for more than four years, has made seven brands of soap—all called castile but none of which contain the word "olive" or "olive oil" in their names, and four of which contain the word "cocoa"—and that none of them have any olive oil content; that such labeling has the capacity and tendency to deceive the trade and public into the erroneous belief that they are genuine castile soaps; that genuine castile soaps are more costly than other soaps because of the higher cost of olive oil, and by reason thereof petitioner sells its soaps for less than its competitors who import, or manufacture, and sell genuine castile soap; that such fact has the capacity and tendency to cause the trade and public to purchase petitioner's so-called castile soaps in preference to the genuine and more costly castile soaps; and that all acts of petitioner as referred to are prejudicial to the public.

On December 12, 1928, the Commission made its findings of fact and issued to petitioner an order to cease and desist from using the word "olive," or any representation indicating an olive oil source, or the word "castile" and the words "olive oil soap," either alone or in conjunction with any other word or words which are the name of, or are descriptive or suggestive

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[1] 15 USCA 45:

Par. 1. "Unfair methods of competition in commerce are declared unlawful.

Par. 2. "The commission is empowered and directed to prevent * * * corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Par. 3. "Whenever the commission shall have reason to believe that any such * * * corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such * * * corporation a complaint stating its charges in that respect, * * *. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this subdivision of this chapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such * * * corporation an order requiring such * * * corporation to cease and desist from using such method of competition.

Par. 4. "If such * * * corporation fails or neglects to obey such order * * * the commission may apply to the Circuit Court of Appeals of the United States for the enforcement of its order, * * * the court shall have jurisdiction of the proceeding * * * and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission.

Par. 5. "Any party required by such order of the commission to cease and desist * * * may obtain a review of such order in said Circuit Court of Appeals by filing in the court a written petition praying that the order * * * be set aside. * * * Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive."

of, an oil or fat, in labeling, branding or otherwise describing soap for sale or sold in commerce, the oil or fatty composition of which is not wholly derived from olives; except that when an oil or fat of a soap is composed of two or more oils or fats including olive oil or fat, and in such proportion that the soap in any of its qualities is substantially affected by any ingredient from olives, the word "olive" shall not be used in the manner above enumerated unless the name of each oil or fat therein is used immediately in conjunction with the word "olive" or with said representation indicating an olive oil source, and in a manner equally conspicuous with and similar to that in which the word "olive" or said representation is so used, in order to indicate clearly that such soap is not made wholly from oil or fat derived from olives.

Findings of the Commission, which bear directly on petitioner's contentions, and its conclusion are set forth in the margin.[2]

On July 7, 1930, The Procter and Gamble Company purchased the soap business and brands of Kirk & Company, and it was permitted to intervene as a co-petitioner.

SPARKS, *Circuit Judge.* The basis of the Commission's complaint is to the effect that castile soap is one in which olive oil constitutes the sole oily or fatty ingredient. The Commission has found this to be true, as a matter of fact, and it is supported by some evidence. The respondent, therefore, insists that such finding is conclusive and that unfair competition is established.

In *Federal Trade Commission v. Curtis Publishing Company,* 260 U. S. 568, the court said:

"We have heretofore pointed out that the ultimate determination of what constitutes unfair competition is for the court, not the Commission * * *. *Federal Trade Commission v. Gratz,* 253 U. S. 421, 427.

"Manifestly, the court must inquire whether the Commission's findings of fact are supported by evidence. If so supported, they are conclusive. But as the statute grants jurisdiction to make and enter, upon the pleadings, testimony and proceedings, a decree affirming, modifying or setting aside an order, the court must also have power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the Commission. If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think, should be remanded to the Commission—the primary fact-finding body—with direction to make additional findings, but if from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without further delay the court has full power under the statute to do so. The language of the statute is broad and confers power of review not found in the Interstate Commerce Act."

It is contended first by petitioner that there are certain material facts, not covered by the findings, which were proven by the evidence and were not contradicted, and which conclusively disprove unfair competition.

For instance, by far the greater number of witnesses, from all parts of the United States, testified that castile soap meant to them a pure high-grade toilet soap; or that it implied no special vegetable oil as an ingredient; or that they had never associated any brand of castile soap with olive oil as an ingredient; or that it meant a

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[2] Paragraph Five: Castile Soap is a hard soap produced from oil or fat which is derived solely from olives and without the addition or admixture of any artificial perfume, or any substance as a filler or builder. It derives its odor solely from the olive oil constituent in its composition.

"Castile Soap is produced by the saponification of olive oil by the use of an alkaline salt. Caustic soda (sodium hydroxide) is the saponifying agent most commonly used in modern times in conjunction with olive oil to produce Castile Soap."

"Paragraph Eighteen: The word, 'Cocoa,' which has been and is being used by respondent as part of the brand name or description of some of its soaps which respondent sold and is selling as Castile Soap describes or indicates an ingredient known as Cocoa or Chocolate."

"Paragraph Twenty-one: The use by respondent, either alone or together, of the word, 'olive,' or the words 'olive oil,' in labeling, branding or otherwise describing soap made partly of oil or fat derived from olives and partly of other oil or fat and offering such soap for sale and selling or causing the same to be sold as herein set forth without stating, immediately in conjunction with, or in association with, said word or words, and in a manner equally conspicuous with and similar in all respects to that in which said word or words are used, the name or names of the other oils or fats in the composition of the soap or that such soap is not made wholly of oil or fat derived from olives has the tendency and capacity to deceive members of the public into the belief that such soap was and is composed, as to its fatty composition, exclusively of oil or fat derived from olives.

"Paragraph Twenty-two: Relying upon the representations of respondent in the labeling, branding and description of its soaps, sold and caused to be sold by respondent as and for Castile Soap and Olive Oil Soap, as set forth above, and because respondent is and has been enabled to offer for sale and has offered and sold its said soaps at a lower price by reason of their composition than the prices at which respondent's competitors can offer and sell and have offered and sold Castile Soap, members of the public, including physicians, pharmacists, druggists and others have been deceived into purchasing and using respondent's said soaps instead of and in place of Castile Soap or Olive Oil Soap, among other purposes for use in the compounding of medical prescriptions and for use in connection with the care of babies.

"Paragraph Twenty-three: There are among the competitors and respondent referred to herein many who make and sell soap made, as to its oil, or fatty composition, only of oil or fat derived from olives and who properly represent their said soap as Castile Soap and as Olive Oil Soap, and respondent's acts and practices as above set forth tend to and do divert business from such competitors and otherwise injure and prejudice them."

"CONCLUSION

"The practices of the respondent under the conditions and circumstances set forth in the foregoing findings are to the prejudice of the public and of respondent's competitors, and are unfair methods of competition in commerce and constitute a violation of Section 5 (of Act of 1914) * * *."

soap which would lather satisfactorily in hard water. One hundred fifteen witnesses testified that castile soap meant to them a soap made from cocoanut oil; while one hundred ten witnesses testified that the name indicated that the oily or fatty ingredient was exclusively of olive oil. Regardless of which of these witnesses, if any, were giving the proper meaning of the word "castile" when used in connection with soap, the substance of all their testimony proves beyond question, so far as individual opinions are concerned, that the word "castile" when used with soap means different things to different persons. This diversity of opinion is quite a pertinent fact in the determination of the issues before us. It not only bears directly on the issue of whether petitioner's alleged acts have the capacity and tendency to deceive the trade and the general public; but it is quite material in determining the real meaning of the word "castile" when used in connection with soap, or whether it has more than one meaning, as contended by petitioner.

As a general rule we look to the lexicographer for definitions of words; but, on the other hand, the lexicographer bases his definition upon the use which the public has given the word. Unfortunately, or fortunately, there are many words whose meanings, once correctly and definitely defined, have subsequently through usage acquired different or additional meanings, and such enlarged meanings have been recognized and approved in later dictionaries. Indeed, there are many instances in which it is difficult to trace the connection between the root meaning of a word and its present meaning as established and recognized by usage.

It is contended by petitioner that the word "castile" when used in relation to soap means nothing as to the constituent elements, but refers to the quality of the soap as a whole. The word "Castile" alone does not mean soap of any kind, nor is it the name of a constituent element of any soap ever made. It is the name of a province in Spain, and the Commission finds as a fact that castile soap derives its name from the fact that it was first made in the province of Castile in Spain, in a very early day, and that its oily or fatty ingredient was derived exclusively from olives; that by custom and usage any soap whose sole oily or fatty ingredient is derived from olives is known as castile soap, regardless of its place of manufacture. We are convinced from the record before us that during the earlier years castile soap was recognized and considered as a soap whose sole oily and fatty ingredient was derived from olives, and the dictionaries of the various countries, including America, so defined it, and the pharmacopoeias designated it as the one to be used in all medical preparations and prescriptions in which soap was required because its sole oily or fatty ingredient was olive oil. The words "castile soap" thereby became synonymous with "olive oil" soap, and such synonymity still prevails with many people.

In the earlier years of the last century, however, some foreign manufacturers made and sold soaps which they called "castile" soap whose oily or fatty ingredient was not solely of olive oil, and much of those products was imported into America. At that time the soap industry in America was begun, and many of our earlier soap makers did the same thing and have continued the practice up to the present time. During seventy-five years last past that practice has grown to such an extent that practically all of our soap makers are resorting, more or less, to that custom. So far as the record shows, Holbrook & Company is the only soap manufacturer in the United States whose entire product is made solely of olive oil as the fatty ingredient and is labeled "Pure Olive Oil Castile." That company admitted that it was not a competitor of petitioner, and that almost all of its product was used by the textile trades.

The United States Pharmacopoeia from its beginning valiantly attempted to preserve the meaning of the words "castile soap" as a soap whose oily or fatty ingredient consisted solely of olive oil, and such a soap was the only one recognized by it as the equivalent of "sapo," which is the medical term for soap.

In the last edition of that work, however, the equivalent of "sapo" is given as "olive oil castile soap." Petitioner claims that this fact is an implied recognition on the part of the authors of the existence of other castile soaps. Such conclusion does not necessarily follow. The action of the authors may well have been an effort to protect the medical profession and the public by designating what they regarded as genuine castile soap as distinguished from quasi castile soap.

A perusal of the very voluminous record in the case convinces us that the present contrariety of opinion as to the meaning of the words "castile soap" is a result of an effort on the part of certain soap manufacturers, both foreign and American, extending from very early times to the present, to corrupt and change the public's understanding of the meaning of those words to the manufacturers' advantage. That this effort has been in a great degree successful can no more be denied than the methods employed can be approved. As a result of such effort it is not at all surpris-

ing that the present laity should have such diversified views as to the meaning of the words, for the record supports us in saying that a greater part of the laity knows very little and cares less as to the constituent elements of any soap.

That in former years the methods used did deceive and had the capacity and tendency to deceive is fully supported by the evidence, and were it not for the action of the Bureau of Standards of the United States Department of Commerce that capacity and tendency would still exist. In *Federal Trade Commission v. Winsted Hosiery Company*, 258 U. S. 483, Justice Brandeis, speaking for the court, said:

"The fact that misrepresentation and misdescription have become so common in the * * * trade that most dealers no longer accept labels at their face value, does not prevent their use being an unfair method of competition."

By the Act of 1901, 31 Stat. 1449, 15 USCA 271, *et seq.*, Congress established the National Bureau of Standards and authorized that bureau's director to issue bulletins for public distribution containing such information as might be of value to the public or facilitate the bureau in the exercise of its functions. Pursuant thereto, the following bulletin was promulgated and distributed:

United States Department of Commerce, Bureau of Standards

Circular No. 62, "Soap," 3rd Edition, published January 24, 1923, at p. 9:

"Castile Soap was originally made from low-grade olive oils. The name now represents a type of soap, the term 'castile' being applied to a soap intended for toilet or household use, sold usually in large, unwrapped, unperfumed bars, which are cut up when sold or when used. It is often drawn directly from the kettle without 'crutching,' but is sometimes crutched a little or even enough to make it float and is sometimes milled. It is also sold in small bars both wrapped and unwrapped. The type is not one easily defined, so now when made from olive oil it is invariably sold as olive-oil castile. There are soaps made entirely from coconut oil which are sold as coconut castiles or hard-water castiles. Many other castiles are made from a mixture of coconut oil and tallow."

This circular was discussed in petitioner's brief and it was ignored by respondent. We deem it quite pertinent and decisive of the question before us. The Government, through its agency, the Bureau of Standards, has thus committed itself to the proposition that castile soap may be made of oily and fatty elements other than olive oil. Being solely a question of fact we deem it expedient for other departments of the Government, including the judiciary, to accept such construction, if for no other reason than that of consistency.

This being true it necessarily follows that petitioner's methods which are the basis of this action do not constitute unfair competition in so far as they relate to the use of the word "castile."

The Commission's findings point out various of petitioner's soaps which are branded or labeled with the words "olive" or "olive oil" and having oil content of less than one hundred per cent olive oil,[a] and the order to cease and desist prohibits petitioner also from using the words "olive" or "olive oil" in connection with its soap product, except under certain conditions named in the order. The complaint does not refer to the use of those words nor ask any order concerning them, but it is contended by respondent that, inasmuch as the words "castile soap" indicate one hundred per cent olive oil content and are synonymous with the words "olive" or "olive oil" as applied to soap, the allegations of the complaint, and the evidence, are sufficient to support the findings in that respect. But inasmuch as we find against respondent's contention of such synonymity, its contention in this respect cannot prevail.

The order to cease and desist is therefore reversed, with permission to respondent, if it shall so desire, to amend its original complaint against petitioner in such manner as to include petitioner's use of the words "olive" and "olive oil" in connection with soap having oil content of less than one hundred per cent olive oil,

[a] Paragraph Fifteen.

1. "Oreno Olive Oil Castile": of which it was said in catalog illustration of the soap, "Oreno Olive Oil Castile, made in North Chicago, U. S. A., from Genuine Olive Oil." The fatty composition of this soap is tallow, cocoanut oil, and olive oil, of unknown percentages.

2. "Oreno Genuine Olive Oil Castile": contains 90% olive oil and 10% cocoanut oil.

3. "Baby Bath Castile": having on each cake the phrase "Olive Oil Soap," and on the box-end, "Made with pure olive oil." The composition of this soap is 55% tallow, 10% cocoanut oil, and 35% olive oil. Since 1926, there is printed in small type on each cake the words, "Contains olive oil, cocoanut oil, and refined tallow."

4. "Olive Oil Castile": with those words stamped on the soap, and in the catalog the statement "large white cakes of milled olive oil soap." Its fatty content is 80% tallow, 10% cocoanut oil, and 10% olive oil.

5. "Nursery Olive Oil Castile": Fatty content, 90% olive oil, 10% cocoanut oil.

6. "Field's Olive Oil Castile": Made partly of olive oil and partly of other oils or fats, percentages not disclosed.

7. "Glendora Castile Soap": having stamped on the bars "Glendora 90% Olive Oil Soap." It has 90% olive oil and 10% other oils.

8. "Harmony Olive Oil Castile": having fatty content of 60% tallow, 10% cocoanut oil, and 30% olive oil.

10. "Washrag Castile": having on the labels the words "Olive Oil Castile," and the statement "This is a real milled olive oil castile soap of highest quality," and beneath an illustration the words "No. 425 Olive Oil Washrag Castile." Its fatty content is tallow 60%, cocoanut oil 10%, olive oil 30%.

Paragraph 16.

"A toilet soap having printed on the wrappers 'Kirk Olive. Trade Mark registered,' and having fatty content of tallow 60%, cocoanut oil 10%, palm oil 15%, olive oil 15%."

or otherwise to proceed in respect to such use of the words "olive" and "olive oil"; and in such case to permit further evidence to be taken, if either party desires so to do, and for all other necessary proceedings not inconsistent with this opinion.

[¶ 55,005] The United States of America, Appellant, v. Swift & Company, et al. American Wholesale Grocers Association, et al., Appellants, v. Swift & Company, et al. National Wholesale Grocers Association, Appellant, v. Swift & Company, et al.

Supreme Court of the United States. Nos. 568, 569 and 570.—October Term. 1931. Decided May 2, 1932. Petition for rehearing denied, May 23, 1932.

On Appeal from the Supreme Court of the District of Columbia.

While the so-called "packers consent decree" is subject to modification both by its terms and by the nature of chancery jurisdiction, the present modification is reversed upon the ground that the defendants have failed to prove that the conditions which led to the suit are now so changed that there is no longer any danger of the defendants effecting a monopoly, or that new and unforeseen conditions have worked a grievous wrong upon the defendants.

Mere size is not an offense against the Sherman Act, unless magnified to the point at which it amounts to a monopoly, but size carries with it an opportunity for abuse that should not be ignored particularly if there has been evidence of past abuses of the defendants as in lowering prices temporarily to eliminate competition.

The defendants consented to the original decree with their eyes open and the threat of monopoly by reason of the defendants' ability to distribute other foodstuffs with virtually no increase in overhead is held to be as great today as when the original decree was entered.

The modification of the so-called "packers consent decree" by the Supreme Court of the District of Columbia, to permit the defendants to engage in the manufacture and wholesale distribution of food products other than meat and meat products, reversed.

Mr. Justice Cardozo delivered the opinion of the Court.

A decree of the Supreme Court of the District of Columbia has modified an earlier decree of the same court which enjoined the continuance of a combination in restraint of trade and commerce.

Separate appeals, one by the United States of America, and the others by associations of wholesale grocers intervening by leave of court, have brought the case here (Judicial Code, § 238; U. S. Code, Title 28, § 345).

In February, 1920, a bill was filed by the Government under section 4 of the Act of July 2, 1890 (c. 647, 26 Stat. 209, U. S. Code, Title 15), known as the Sherman anti-trust act, against the five leading meat-packers in the United States to dissolve a monopoly. The packers joined as defendants were Swift & Company, Armour & Company, Wilson & Company, the Morris Packing Company, and the Cudahy Packing Company, together with their subsidiaries and also their chief officers. The charge was that by concert of action the defendants had succeeded in suppressing competition both in the purchase of live stock and in the sale of dressed meats, and were even spreading their monopoly into other fields of trade. They had attained this evil eminence through agreements apportioning the percentages of live stock to which the members of the combinations were sever-

ally entitled; through the acquisition and control of stockyards and stockyard terminal railroads; through the purchase of trade papers and journals whereby cattle raisers were deprived of accurate and unbiased reports of the demand for live stock; and through other devices directed to unified control. "Having eliminated competition in the meat products, the defendants next took cognizance of the competition which might be expected" from what was characterized as "substitue foods." To that end, so it was charged, they had set about controlling the supply of "fish, vegetables, either fresh or canned, fruits, cereals, milk, poultry, butter, eggs, cheese and other substitute foods ordinarily handled by wholesale grocers or produce dealers." Through their ownership of refrigerator cars and branch houses as well as other facilities, they were in a position to distribute "substitute foods and other unrelated commodities" with substantially no increase of overhead. Whenever these advantages were inadequate, they had recourse to the expedient of fixing prices so low over temporary periods of time as to eliminate competition by rivals less favorably situated. Through these and other devices there came about in the view of the Government an unlawful monopoly of a large part of the food supply of the nation. The prayer was for an injunction appropriate to the case exhibited by the bill.

The defendants consented to dismemberment, though answering the bill and traversing its charges. With their answer there was filed a stipulation which provided for the entry of a decree upon the terms therein set forth and provided also that the decree "shall not constitute or be considered as an adjudication that the defendants, or any of them, have in fact violated any law of the United States." The decree entered on February 27, 1920, enjoined the defendants from maintaining a monopoly and from entering into or continuing any combination in restraint of trade and commerce. In addition they were enjoined both severally and jointly from (1) holding any interest in public stockyard companies, stockyard terminal railroads or market newspapers, (2) engaging in, or holding any interest in, the business of manufacturing, selling or transporting any of 114 enumerated food products, (principally fish, vegetables, fruit and groceries), and thirty other articles unrelated to the meat packing industry; (3) using or permitting others to use their distributive facilities ,for the handling of any of these enumerated articles, (4) selling meat at retail, (5) holding any interest in any public cold storage plant, and (6) selling fresh milk or cream. No injunction was granted in respect of the sale or distribution of poultry, butter, cheese and eggs, though these had been included in the bill among the substitute foods which the defendants were seeking to engross. The decree closed with a provision whereby jurisdiction of the cause was retained for the purpose of taking such other action or adding at the foot such other relief "as may become necessary or appropriate for the carrying out and enforcement" thereof, "and for the purpose of entertaining at any time hereafter any application which the parties may make" with reference thereto.

The expectation would have been reasonable that a decree entered upon consent would be accepted by the defendants and by those allied with them as a definitive adjudication setting controversy at rest. The events that were to follow recount a different tale. In April, 1922, the California Co-operative Canneries Corporation filed an intervening petition alleging that the effect of the injunction was to interfere with the performance by Armour & Company of a contract by which Armour had agreed to buy large quantities of California canned fruit, and praying that the decree be vacated for lack of jurisdiction. Leave to intervene was granted by the Court of Appeals of the District, which ordered "that such further proceedings thereupon be had as are necessary to determine the issue raised." In November, 1924, motions for like relief were made by Swift and by Armour, their subsidiaries and officers. The motions were denied by the Supreme Court of the District, and thereafter were considered by this court, which upheld the consent decree in the face of a vigorous assault. *Swift & Co. v. United States,* 276 U. S. 311. In the meantime, however, an order had been made on May 1, 1925, by the Supreme Court of the District at the instance of the California Canneries whereby the operations of the decree as a whole was suspended "until further order of the court to be made, if at all, after a full hearing on the merits according to the usual course of chancery proceedings" (see *United States v. California Canneries,* 279 U. S. 553, 555). This order of suspension remained in force till May, 1929, when a decision of this court swept the obstacle aside. *United States v. California Canneries, supra.*

The defendants and their allies had thus been thwarted in the attempt to invalidate the decree as of the date of its entry, and again the expectation would have been reasonable that there would be acquiescence in its restraints. Once more the expectation was belied by the event. The defendants, or some of them, discovered as they thought that during the years that had intervened between the entry of the decree

and its final confirmation, conditions in the packing industry and in the sale of groceries and other foods had been transformed so completely that the restraints of the injunction, however appropriate and just in February, 1920, were now useless and oppressive. The discovery or supposed discovery had its fruit in the proceeding now before us. On April 12, 1930, the defendants Swift & Company and Armour & Company and their subsidiaries, being no longer under the shelter of an order suspending the injunction, filed a petition to modify the consent decree and to adapt its restraints to the needs of a new day. The prayer was that the petitioners be permitted (1) to own and operate retail meat markets; (2) to own stock in stockyard companies and terminal railroads; (3) to manufacture, sell and deal in the 144 articles specified in paragraph fourth of the decree, which for convenience will be spoken of as "groceries"; (4) to use or permit others to use their distributive facilities in handling such commodities; and one of the defendants, Swift & Company, asked in addition that the defendants be permitted to hold interests in public cold-storage warehouses and to sell fresh milk and cream. Of the five defendants named in the original suit, one, Morris & Company, sold out to Armour & Company in 1923, and discontinued business. The two other defendants, Wilson and Cudahy, did not join in the petition to modify the decree, but stated in open court that they would consent to such modification as the court might order provided it be made applicable to the defendants equally. All the requests for modification were denied except numbers 3 and 4, of which 4 is merely ancillary to 3 and calls for no separate consideration. The modification in respect of number 3 gave permission to deal at wholesale in groceries and other enumerated commodities, but maintained the injunction against dealing in them at retail. In every other respect, the decree of February 27, 1920, was continued in force as originally entered. The modifying decree, which was entered January 31, 1931, is the subject of this appeal.

We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent. The power is conceded by the Government, and is challenged by the interveners only. We do not go into the question whether the intervention was so limited in scope and purpose as to withdraw this ground of challenge, if otherwise available. Standing to make the objection may be assumed, and the result will not be changed. Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. *Ladner v. Siegel,* 298 Pa. St. 487, 494, 495; *Emergency Hospital v. Stevens,* 146 Md. 159; *Larson v. Minn. N. Electric Ry. Co.,* 136 Minn. 423; *Lowe v. Prospect Hill Cemetery Assn.,* 75 Neb. 85. The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative (*Ladner v. Siegel, supra*). The result is all one whether the decree has been entered after litigation or by consent (*American Press Assn. v. United States,* 245 Fed. 91). In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong. We reject the argument for the interveners that a decree entered upon consent is to be treated as a contract and not as a judicial act. A different view would not help them, for they were not parties to the contract, if any there was. All the parties to the consent decree concede the jurisdiction of the court to change it. The interveners gain nothing from the fact that the decree was a contract as to others, if it was not one as to them. But in truth what was then adjudged was not a contract as to any one. The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.

Power to modify existing, we are brought to the question whether enough has been shown to justify its exercise.

The defendants, controlled by experienced business men, renounced the privilege of trading in groceries, whether in concert or independently, and did this with their eyes open. Two reasons, and only two, for exacting the surrender of this adjunct of the business were stated in the bill of complaint. Whatever persuasiveness the reasons then had, is theirs with undiminished force to-day.

The first was that through the ownership of refrigerator cars and branch houses as well as other facilities, the defendants were in a position to distribute substitute foods and other unrelated commodities with substantially no increase of overhead. There is no doubt that they are equally in that

position now. Their capacity to make such distribution cheaply by reason of their existing facilities is one of the chief reasons why the sale of groceries has been permitted by the modified decree, and this in the face of the fact that it is also one of the chief reasons why the decree as originally entered took the privilege away.

The second reason stated in the bill of complaint is the practice followed by the defendants of fixing prices for groceries so low over temporary periods of time as to eliminate competition by rivals less favorably situated.

Whether the defendants would resume that practice if they were to deal in groceries again, we do not know. They would certainly have the temptation to resume it. Their low overhead and their gigantic size, even when they are viewed as separate units, would still put them in a position to starve out weaker rivals. Mere size, according to the holding of this court, is not an offense against the Sherman act unless magnified to the point at which it amounts to a monopoly (*United States v. United States Steel Corp.*, 251 U. S. 417; *United States v. International Harvester Co.*, 274 U. S. 693, 708), but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past. The original decree at all events was framed upon that theory. It was framed upon the theory that even after the combination among the packers had been broken up and the monopoly dissolved, the individual units would be so huge that the capacity to engage in other forms of business as adjuncts to the sale of meats should be taken from them altogether. It did not say that the privilege to deal in groceries should be withdrawn for a limited time, or until the combination in respect of meats had been effectually broken up. It said that the privilege should be renounced forever, and this whether the units within the combination were acting collectively or singly. The combination was to be disintegrated, but relief was not to stop with that. To curb the aggressions of the huge units that would remain, there was to be a check upon their power, even though acting independently, to wage a war of extermination against dealers weaker than themselves. We do not turn aside to inquire whether some of these restraints upon separate as distinguished from joint action could have been opposed with success if the defendants had offered opposition. Instead, they chose to consent, and the injunction, right or wrong, became the judgment of the court. Groceries and other enumerated articles they were not to sell at all, either by wholesale or by retail. Even the things that they were free to sell, meats and meat products, they were not to sell by retail. The court below annulled the restraint upon sales of groceries by wholesale, but retained the prohibition in respect of sale by retail both for groceries and for meats. The one prohibition equally with the other was directed against abuse of power by the individual units after the monopoly was over; and the death of the monopoly, the breaking up of the combination, if an adequate reason for terminating one of them, is an adequate reason for terminating both.

We have said that the defendants are still in a position, even when acting separately, to starve out weaker rivals, or at least that the fear of such abuses, if rational in 1920, is still rational today. The meat monopoly has been broken, for the members now compete with one another. The size of the component units is substantially unchanged. In 1929, the latest year for which any figures are furnished by the record, the sales made by Swift and Armour, each, amounted to over a billion dollars; those made by all the defendants together to over $2,500,000,000; and those made by their thirteen chief competitors to only $407,000,000. Size and past aggressions induced the fear in 1920 that the defendants, if permitted to deal in groceries, would drive their rivals to the wall. Size and past aggressions leave the fear unmoved today. Changes there have been that reduce the likelihood of a monopoly in the business of the sale of meats, but none that bear significantly upon the old-time abuses in the sale of other foods. The question is not whether a modification as to groceries can be made without prejudice to the interests of producers of cattle on the hoof. The question is whether it can be made without prejudice to the interests of the classes whom this particular restraint was intended to protect. Much is made in the defendants' argument of the rise of the chain stores to affluence and power, and especially of chains for the sale of groceries and other foods. Nothing in that development eradicates the ancient peril. Few of the chain stores produce the foods they have for sale, and then chiefly in special lines. Much, indeed most, of what they offer, they are constrained to buy from others. They look to the defendants for their meats, and if the ban of this decree is lifted, they will look to the defendants for other things as well. Meats and groceries today are retailed at the same shops, departments of a single business. The defendants, the largest packers in the country, will thus hold a post of vantage, as compared with other wholesale grocers, in their dealings with the chains. They will hold a post of vantage in their dealings with others outside the chains. When they add

groceries to meats, they will do so, they assure us, with substantially no increase of the existing overhead. Thus in the race of competition they will be able by their own admission to lay a handicap on rivals overweighted at the start. The opportunity will be theirs to renew the war of extermination that they waged in years gone by.

Sporadic instances of unfair practices even in the meat business are stated in the findings to have occurred since the monopoly was broken, practices as to which the defendants' officers disclaim responsibility or knowledge. It is easy to make such excuses with plausibility when a business is so huge. They become less plausible when the size of the business is moderate. Responsibility is then centered in a few. If the grocery business is added to the meat business, there may be many instances of unfair pressure upon retailers and others with the design of forcing them to buy from the defendants and not from rival grocers. Such at any rate was the rationale of the decree of 1920. Its restraints, whether just or excessive, were born of that fear. The difficulty of ferreting out these evils and repressing them when discovered supplies an additional reason why we should leave the defendants where we find them, especially since the place where we find them is the one where they agreed to be.

There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes to the grocery business as it has to every other. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

The case comes down to this: the defendants had abused their powers so grossly and persistently as to lead to the belief that even when they were acting separately, their conduct should be subjected to extraordinary restraints. There was the fear that even when so acting they would still be ready and able to crush their feebler rivals in the sale of groceries and kindred products by forms of competition too ruthless and oppressive to be accepted as fair and just. Wisely or unwisely, they submitted to these restraints upon the exercise of powers that would normally be theirs. They chose to renounce what they might otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall.

What was then solemnly adjudged as a final composition of an historic litigation will not lightly be undone at the suit of the offenders, and the composition held for nothing.

The decree should be reversed and the petitions dismissed.

The CHIEF JUSTICE, Mr. Justice SUTHERLAND and Mr. Justice STONE took no part in the consideration and decision of this case.

MR. JUSTICE BUTLER, dissenting.

The facts on which the District supreme court allowed modification of parts of the 1920 consent injunction are set forth in its findings prepared in accordance with Equity Rule 70½. They are discussed and amplified in a painstaking opinion contained in the record. I think they are sustained by the evidence and are sufficient to support the decree.

Conditions affecting competition in the lines of business carried on by defendants have changed since 1920. Indeed the Government, after the introduction of evidence by appellees, formally stipulated that they "are in active competition with each other" etc.[1] The facts negative any suggestion

[1] Census figures in respect of slaughtering and meat packing establishments in 1921 and 1927 are as follows:

Value of Production per Year	1921	1927
$5,000 to $20,000	142	64
$20.000 to $100.000	304	267
$100.000 to $500.000	360	429
$500,000 to $1,000,000	112	163
$1,000,000 and over	266	327
Total	1184	1250

The relation between each of the defendant packers' production of meat and lard and total production of these articles in the United States during the years 1920 and 1929 are as follows:

	1920	1929
Swift	13.2%	15.2%
Armour (including Morris)	15.8%	14.1%
Wilson	5.2%	4.3%
Cudahy	4.0%	4.7%

that danger of monopolistic control now exists. Each of the principal packers has suffered discouraging operating losses. One of them, retiring from business, sold its plants to another. The purchaser, in order to avoid failure, was compelled to refinance and has not earned reasonable profits in any year. Another, being embarrassed, passed into the hands of a receiver, was subsequently adjudged bankrupt and later re-organized. Only two have continued able to sustain themselves. It is shown without dispute that defendants' earnings, whether considered in relation to sales or to the worth of property invested, are low and substantially less than those of others carrying out the same lines of business.[2]

Since 1920 the manufacture and distribution of food have grown greatly and to a large extent have come to be carried on by integrated concerns in strong hands, which have taken over and are handling many products from the sources of production to consumers. More and more, meat—formerly distributed through shops selling little if anything else—is sold in stores carrying groceries and other articles of food. The diversification of the business of defendants permitted by the modification of the injunction is in harmony with present legitimate tendencies in the business of producing and selling meat, groceries and other articles of food. In all branches of such activities there is strong and active competition. The use by defendants of their employees and facilities for the sale and distribution of groceries as well as meat would not give them any undue advantage over their competitors. Under present conditions the relief granted below would not enable them to inflict the evils of monopoly upon any part of the food industry. The denial of that relief makes against competition intended to be preserved by the Sherman Act. Defendants should be permitted more efficiently to use their help and equipment to lessen their operating expenses. That makes for lower prices and so is in the public interest.

The wholesale grocers, represented here by objecting intervenors, are not entitled to the court's protection against the competition of non-members or of defendants carrying on separately and competing actively. They may not avoid the burden of sustaining themselves in a free and open market by protestation of fear that, if allowed to engage in the grocery business at all, defendants will unfairly compete in violation of the federal anti-trust laws. If and whenever shown necessary for the protection of the commerce safeguarded by the original decree, the Government may have the modified provisions restored or new ones added.

There is nothing in the original complaint that makes for reversal here. The Government's allegations were denied by answer. The decree was entered without evidence or findings pursuant to a written stipulation between the Government and the defendants expressly providing that "this stipulation shall not constitute or be considered as an admission, and the rendition or entry of the decree, or the decree itself, shall not constitute or be considered as an adjudication that the defendants, or any of them, have in fact violated any law of the United States." And that provision was in exact words incorporated in and made a part of the decree. Thus the Government consented to, and the court adopted, this provision quite as much as the defendants consented to the other parts of the decree.

The fact that defendants thereafter applied to have the decree vacated upon grounds directed only to the power of the court to enter it ought not to be regarded as militating against them or their good faith—particularly when it is recalled that this court, when reviewing that proceeding, deemed the questions presented of sufficient importance to call for their argument a second time. 276 U. S. 311.

I am of opinion that the facts found, taken with those conceded or established by uncontradicted evidence, justly entitle appellees to the measure of relief given below, and that the modifying decree should be affirmed.

I am authorized to say that MR. JUSTICE VAN DEVANTER concurs in this opinion.

[2] The following table groups the defendants' earnings and compares them with the combined earnings of 15 competitors from 1920 to 1929:

Year	*Percentage of Defendants' Earnings on Sales*	*Percentage of Competitors' Earnings on Sales*	*Percentage of Defendants' Earnings on Net Worth*	*Percentage of Competitors' Earnings on Net Worth*
1920	.18	.76	.88	2.48
1921	3.05 (Loss)	.17 (Loss)	10.27 (Loss)	5.80 (Loss)
1922	.10	2.72	.35	10.87
1923	1.58	3.40	5.65	12.00
1924	1.77	3.39	6.46	13.28
1925	1.44	2.03	5.82	9.11
1926	1.35	2.65	5.03	12.24
1927	.63	2.07	2.49	9.83
1928	1.24	3.17	5.13	14.10
1929	1.06	2.68	4.55	14.02

[¶ 55,006] Indiana Quartered Oak Co., Petitioner, v. Federal Trade Commission.

United States Circuit Court of Appeals, Second Circuit. May 9, 1932.

Prior decree, prohibiting use of the term "Philippine Mohogany" in designating certain types of hardwood coming from the Philippine Islands and the products made from such wood, modified to permit use of the term "Philippine Mahogany" consistent with a subsequent order of the Commission upon a retrial of the issues here involved in certain other cases.

Before MANTON, SWAN and CHASE, Circuit Judges.

Motion to modify an order to cease and desist entered herein. Motion granted.

Robert E. Healy, Esq., Chief Counsel for Federal Trade Commission. Harry D. Nims, Esq., Solicitor for Petitioner.

MANTON, Circuit Judge. An order was issued against the petitioner, on August 16, 1927, to cease and desist from advertising, selling or offering for sale certain woods of the Philippine Islands as mahogany or Philippine mahogany. An application was made by the petitioner to review the order in this court and the order was affirmed on May 14, 1928. See: *Indiana Quartered Oak Co. v. Federal Trade Comm.*, 26 Fed. (2d) 340; certiorari denied, 278 U. S. 623. The order and mandate of this court was entered against the petitioner on October 14, 1929. It required the petitioner to refrain from designating its goods as mahogany or Philippine mahogany.

It appears from the petition now filed that at the time of the entry of the order to cease and desist against the petitioner, other dealers and users of similar woods of the Philippine Islands were established in business and they advertised, sold and designated their same woods as Philippine Mahogany. Subsequent to the order of affirmation of this court, these dealers petitioned the Federal Trade Commission to institute new proceedings against one of their number, alleging that a more complete disclosure of the facts regarding the subject matter would effect a different result. This the Federal Trade Commission did, selecting the Gillespie Furniture Company of Los Angeles, California, as respondent, and issued its complaint against it on December 14, 1929. The allegations of that complaint were the same as contained in the complaint issued against this petitioner. An answer was filed, the trial proceeded on the issues thus framed, and a very voluminous record of 8000 pages was made. On this record, the Federal Trade Commission, one Commissioner dissenting, dismissed the complaint against the Gillespie Furniture Company. Between the time of the issuance of the complaint against the Gillespie Furniture Company and the dismissal of that complaint by the Commission, complaints were filed against 14 other dealers or users of the same kind of wood, also advertised and sold as Philippine Mahogany. Subsequent to the dismissal of the petition against the Gillespie Furniture Company, these complaints were dismissed by the Commission upon a stipulation and order of dismissal reading "Respondent hereby stipulates and agrees that in its sale, description and advertisement of the wood of the Philippine Islands which it has heretofore designated and described as 'Philippine Mahogany' and articles of commerce made therewith, it will not employ the word 'mahogany' in connection with the sale of said wood without the modifying term 'Philippine'."

It is here alleged that the 15 dealers referred to above, against whom complaints were issued, and other dealers and users of the same wood who are not bound by the orders of any court do now freely advertise, sell and designate their wood and products composed thereof by the common and accepted name of Philippine Mahogany, whereas this petitioner by reason of the order and decree of this court is restrained from designating its same wood by that designation. The petition alleges that the defendant is handicapped in responding to the invitations to bid offered by architects and builders when Philippine mahogany is designated in the specifications and therefore is not free to compete with other dealers in the same wood. It claims it is thus penalized by reason of the order of this court while its competitors are under no restraint, due to the subsequent action taken by the respondent with reference to its competitors. It points out that similar orders were entered against other dealers in the Eighth and Ninth Circuit Courts of Appeals, and that the Federal Trade Commission on April 15, 1932, directed its chief counsel to prepare a petition to be filed in those courts, in which the Federal Trade Commission and the dealers against whom orders of the court were entered, similar to the order against this peti-

tioner, will jointly ask for a modification so that they will be free to designate their wood as Philippine Mahogany and not as mahogany without qualification.

The prayer for relief is that this court modify its former order and decree to the extent of permitting petitioner to be free to use the term "Philippine Mahogany" consistent with the order of the Commission entered against the 14 other dealers and users of wood, or that we vacate our order and decree so entered and remand the proceedings, together with the record therein, to the Federal Trade Commission for further consideration.

The Circuit Courts of Appeals are granted exclusive jurisdiction to enforce, set aside, or modify orders of the Commission. Judicial Code, § 128, 43 Stat. 813 (28 U. S. C. A. § 225); Fed. Trade Comm. Act, § 5, 38 Stat. 719 (15 U. S. C. A. § 45). This court therefore has original jurisdiction in the matter of setting aside or modifying orders of the commission. With such original jurisdiction, it has the power to vacate its own order upon good cause shown and where equity demands such action. Such power is inherent in a court of equity where a modification of an injunctive order is sought. *United States v. Swift,* U. S. Sup. Ct. decided May 2, 1932; *In re Jackson.* 9 Fed. 493; *Lowe v. Prospect Mill Cemetery Assn.,* 75 Neb. 85; *Larson v. Minnesota El. Ry. Co.,* 136 Minn. 423.

The allegations of the petition, which are all admitted by the respondent, set forth sufficient reason why we should modify the order entered. The subsequent investigation made by the Commission satisfied it that using the qualifying term "Philippine" in the sale of the petitioner's wood and selling it as "Philippine Mahogany" would eliminate the unfair competition charged against it originally when this case was here before, and now if the order to cease and desist in its original form stands against the petitioner it places it in a position where it would be unable to fairly compete with its competitors. Under these circumstances, this court should act and will do so. An order will therefore be entered by this court modifying the order of affirmance directing the petitioner to cease and desist, so that petitioner will be permitted to use the term "Philippine Mahogany" consistent with the provisions of the order of the Commission entered on November 7, 1931, as against other named respondents and petitioners in the trade of the petitioner.

Motion granted.

[¶ 55,007] Atlantic Cleaners and Dyers, Inc., Globe Dry Cleaners and Dyers, Arcade-Sunshine Co., et al. v. United States.

United States Supreme Court. No. 667. October Term, 1931. Decided May 23, 1932

On appeal from the Supreme Court of the District of Columbia.

The word "trade" as used in Section 3 of the Sherman Act is broad enough to include the rendering of services in the business of cleaning, dyeing and renovating wearing apparel.

Congress has all the powers of a State legislature in legislating for the District of Columbia and may prohibit restraints of trade purely local in character.

Mr. Justice Sutherland delivered the opinion of the Court.

This is a suit brought by the United States against appellants to enjoin them from continuing, in the District of Columbia, an alleged combination and conspiracy in restraint of trade and commerce in cleaning, dyeing and otherwise renovating clothes, contrary to § 3 of the Sherman Anti-trust Act, c. 647, 26 Stat. 209; U. S. C., Title 15, § 3. Appellants answered, setting up affirmatively that they were engaged solely in the performance of labor and rendering service in cleaning, dyeing and renovating wearing apparel and other articles which had passed into the hands of the ultimate consumers thereof, and that this did not constitute trade or commerce within the meaning of the Anti-trust Act. Upon motion the answer was stricken from the files, on the ground that the matter pleaded was not a valid defense. Appellants elected to stand upon their answers; and a decree was entered as prayed. The case comes here by appeal under the provisions of the Act of February 11, 1903, c. 544, 32 Stat. 823; U. S. C., Title 15, § 29. *Swift & Co. v. United States,* 276 U. S. 211,

322; *United States v. California Canneries,* 279 U. S. 553, 558.

Upon the facts which stand admitted and those affirmatively pleaded by the answers, the sole question to be determined is whether, within the meaning of § 3 of the Sherman Act, appellants are engaged in trade or commerce in the District of Columbia.

The facts, established as above, are that they are carrying on the business of cleaning, dyeing and renovating wearing apparel at plants located in the District, in part, and in some cases principally, at wholesale pursuant to contracts or engagements with numerous so-called retail dyers and cleaners who maintain shops in the District for receiving from the public clothing to be cleaned, dyed or otherwise renovated. Appellants, in August, 1928, met together in the District and agreed to raise the then current prices charged for cleaning, dyeing and renovating clothes, and formulated and agreed upon certain minimum and uniform prices, which they, and each of them, should thereafter charge and receive for the performance of such service. They further agreed to assign and allot to one another the retail dyers and cleaners, who, thereupon, were to be held, respectively, as exclusive customers. The agreement to maintain prices and assign and allot customers has been and is being carried into effect.

Sections 1 and 3 of the Sherman Act provide as follows:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . "

"Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. . . ."

The words describing the activity declared to be illegal are the same in both sections, namely, "restraint of trade or commerce." The contention on behalf of appellants is that the words, being identical, should receive the same construction in § 3 as in the preceding § 1; that § 1 rests solely on the commerce clause of the Constitution; that the words "trade or commerce" in § 1 cannot be broader than the single word "commerce" as used in that clause; and that commerce does not include a business such as that carried on by appellants.

Assuming, but not deciding, that if the acts here charged had involved interstate transactions appellants would not come within the provisions of § 1, because the scope of the words "trade or commerce" must there be limited by the constitutional power to regulate commerce, it does not follow that the same words contained in § 3 should be given a like limited construction. Most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section. Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning. *Courtauld v. Legh,* L. R., 4 Exch. 126, 130. But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent. Where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed. See *State v. Knowles,* 90 Md. 646, 654; *Henry v. Trustees,* 48 Ohio St. 671, 676; *Feder v. Goetz,* 264 Fed. 619, 624; *James et al. v. City of Newberg et al.,* 101 Ore. 616, 619; *County-Seat of Linn Co.,* 15 Kans. 500, 527.

It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance. *L. & N. R. Co. v. Gaines,* 3 Fed. 266, 277-278. Thus, for example, the meaning of the word "legislature," used several times in the federal Constitution, differs according to the connection in which it is employed, depending upon the character of the function which that body in each instance is called upon to exercise. *Smiley v. Holm,* — U. S. —, decided April 11, 1932. And, again in the Constitution, the power to regulate commerce is conferred by the same words of the commerce clause with respect both to foreign commerce and interstate commerce. Yet the power when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce. In the regulation of foreign commerce an embargo is admissible; but it reasonably cannot be thought that, in respect of legitimate and unobjectionable articles, an embargo would be admissible as a regulation of interstate

commerce, since the primary purpose of the clause in respect of the latter was to secure freedom of commercial intercourse among the states. See *Groves et al. v. Slaughter,* 15 Pet. 449, 505; *Steamship Company v. Portwardens,* 6 Wall. 31, 32-33; *Buttfield v. Stranahan,* 102 U. S. 470, 492. Compare *Russell Co. v. United States,* 261 U. S. 514, 520, 521.

Section 1 having been passed under the specific power to regulate commerce, its meaning necessarily must be limited by the scope of that power; and it may be that the words "trade" and "commerce" are there to be regarded as synonymous. On the other hand, § 3, so far as it relates exclusively to the District of Columbia, could not have been passed under the power to regulate interstate or foreign commerce since that provision of the section deals not with such commerce but with restraint of trade purely local in character. The power exercised, and which gives vitality to the provision, is the plenary power to legislate for the District of Columbia, conferred by Art. I, § 8, cl. 17 of the Constitution. Under that clause, Congress possesses not only every appropriate national power, but, in addition, all the powers of legislation which may be exercised by a state in dealing with its affairs, so long as other provisions of the Constitution are not infringed. *Capital Traction Company v. Hof,* 174 U. S. 1, 5. Undoubtedly, under that extensive power, it was within the competency of Congress to prohibit and penalize the acts with which appellants are here charged; and the only question is whether by § 3 it has done so.

A consideration of the history of the period immediately preceding and accompanying the passage of the Sherman Act and of the mischief to be remedied, as well as the general trend of debate in both houses, sanctions the conclusion that Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed. In passing § 1, Congress could exercise only the power conferred by the commerce clause; but in passing § 3, it had unlimited power, except as restricted by other provisions of the Constitution. We are, therefore, free to interpret § 3 dissociated from § 1 as though it were a separate and independent act, and thus viewed, there is no rule of statutory construction which prevents our giving to the word "trade" its full meaning, or the more extended of two meanings, whichever will best manifest the legislative purpose. See *United States v. Hartwell,* 6 Wall. 385, 396; *Sacramento Nav. Co. v. Salz,* 273 U. S. 326, 329-330.

We perceive no reason for holding that Congress used the phrase "restraint of trade" in § 3 in a narrow sense. It is true that the word "trade" is often employed as importing only traffic in the buying, selling or exchanging of commodities; but it is also true that frequently, if not generally, the word is used in a broader sense. This is pointed out in *The Schooner Nymph,* 1 Summ. 516, 517-518; 18 Fed. Cas. 506, No. 10,388. Construing § 32 of the Coasting and Fishery Act of 1793, c. 8, 1 Stat. 305, 316, which declares that any licensed ship, etc., which shall be employed in any other "trade" than that for which she is licensed shall be forfeited, Mr. Justice Story in that case said:

"The argument for the claimant insists, that 'trade' is here used in its most restrictive sense, and as equivalent to traffic in goods, or buying and selling in commerce or exchange. But I am clearly of opinion, that such is not the true sense of the word, as used in the 32d section. In the first place, the word 'trade' is often and, indeed, generally used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a *trade.* Thus, we constantly speak of the art, mystery, or trade of a housewright, a shipwright, a tailor, a blacksmith, and a shoe-maker, though some of these may be, and sometimes are, carried on without buying or selling goods."

A like view was taken by Pollock, B., in *Bank of India v. Wilson,* L. R., 3 Exch. Div. 108, 119-120.* See also *Buckelew v. Martens,* — N. J. —, 156 Atl. 436; *American Laundry Co. v. E. & W. D. C. Co.,* 199 Ala. 154; *Campbell v. Motion Picture M. Op. Union,* 151 Minn. 220, 231-232.

We think the word "trade" was used in § 3 of the Sherman Act in the general sense attributed to it by Justice Story and, at least, is broad enough to include the acts of which the Government complains.

Decree affirmed.

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* One of the earliest decisions under the common law is *Diers Case,* 2 Henry V, 5, pl. 26, which arose in the time of Henry V (1414). There a weaver had bound himself for a moderate consideration not to follow his craft within the town for a limited time. Before the expiration of the time, however, his necessities sent him back to the loom, and an action against him for damages was brought. The learned Judge, in deciding the case not only held the obligation to be void, but quite evidently considered it criminal as well. With some display of feeling he said—"The obligation is void as being contrary to the common law and by G—if the plaintiff were here he should go to prison until he paid a fine to the King." And even a century or two later, when the rule in respect of contracts in restraint of trade had become less strict, in *Mitchell v. Reynolds,* 1 Peere Williams 181, 193, Parker, C. J., referring to *Diers Case,* approved the indignation of the judge, 'tho' not his manner of expressing it."

[¶ 55,008] Northam Warren Corporation v. Federal Trade Commission.

United States Circuit Court of Appeals, Second Circuit. June 6, 1932.

The use of paid testimonials without disclosing that such testimonials are paid for is not an unfair method of competition within the jurisdiction of the Federal Trade Commission.

In order to have jurisdiction for a proceeding under the Federal Trade Commission Act, there must be some practice tending towards monopoly or undue restraint of trade involving some dishonesty in labeling or marketing the goods.

Before MANTON, SWAN and CHASE, Circuit Judges.

Petition to review an order of the Federal Trade Commission ordering the petitioner to cease and desist in its methods of advertising. Northam Warren Corporation, petitioner, seeks the review. Order reversed.

Breed, Abbott & Morgan, Esqs., Attorneys for Petitioner. Dana T. Ackerly, Esq., Edward A. Craighill, Jr., Esq., of Counsel. Robert E. Healy, Esq., Chief Counsel, Federal Trade Commission. Martin A. Morrison, Esq., Assistant Chief Counsel. Richard P. Whiteley, Esq., Attorney for Respondent. Blake & Voorhees, Esqs., Amicus Curiae. Clinton H. Blake, Esq., Miner W. Tuttle, Esq., of Counsel. Covington, Burling & Rublee, Esqs., Attorneys for Standard Brands. J. Harry Covington, Esq., Dean Acheson, Esq., H. Thomas Austern, Esq., of Counsel.

MANTON, Circuit Judge. This is a petition to review an order of the Federal Trade Commission of December 14, 1931, ordering the petitioner to cease and desist in its advertising and use of testimonials and endorsements of its toilet articles and preparations, for which testimonials or endorsements the petitioner has paid substantial sums of money without disclosing that fact in the advertisements. The petitioner concedes that it paid to certain well-known persons of the theatrical and social life of the community, substantial sums for consent to use their testimonials with their signatures thereto. The statements contained in the testimonials, the Commission expressly found, were truthful expressions of opinion of and concerning petitioner's products. They accurately set forth the opinion of each of the several authors of the testimonials or recommendations. The Commission, however, found that the failure to disclose that the petitioner paid substantial sums of money to the persons named for the testimonials "has the capacity and tendency to mislead and deceive the ultimate purchasers of said preparations into the erroneous belief that said testimonials are entirely voluntary and unbought, and tends to and does divert trade from competitors who do not use purchased testimonials in advertising their products."

The petitioner is a New York corporation engaged in manufacturing toilet articles, and particularly preparations for the care of finger nails and cuticle which are sold under the trade name of "Cutex." These preparations are sold in interstate commerce through jobbers and retailers. It has an annual sales volume of between two and three million dollars.

The question is therefore presented whether Congress has conferred upon the Federal Trade Commission jurisdiction, in the interest of the public, to prohibit as an unfair method of competition, tending to create a monopoly or unduly to restrain trade, the use of admittedly truthful testimonials, unless accompanied by a statement that payment has been made for their use.[1] There is no claim of misbranding, falsity or insufficiency in the statement labeling the product. In such case action by the Commission would be justified under the provisions of the act, for such would be deception necessarily tending to promote unfair competition with those who were selling the true article as the genuine product. *Eastman Kodak Co. v. F. T. C.*, 274 U. S. 619; *Fed. Trade Comm. v. Western Meat Co.*, 272 U. S. 554; *Berkey & Gay Furniture Co. v. Fed. Trade Comm.*, 42 Fed. (2) 427 (C. C. A. 6). The quality of the petitioner's products is not brought into question; nor is there a charge that its products were inadequately labeled or so testified to, by testimonials, as to induce the public to purchase from it under practices of deception. The endorsements are said to be neither exaggerations nor untruthful. There is no claim of monopoly. It would seem, therefore, that there was no violation of the Sherman Anti-Trust or Clayton Acts. While the testimonials, if having merit, may tend to increase the volume of business, still, if an honest opinion is expressed under the signature of the

[1] New York Civil Rights Law (Art. 5, § 50) forbids any firm or corporation to use, for advertising purposes or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person. such use, without consent, is a misdemeanor.

giver of such testimonial, the public cannot be presumed to be induced to purchase the petitioner's products in any way or manner that might be said to tend to divert trade from competitors who do not use testimonials in advertising their products. It is doubtful if the public is gullible enough to believe that such testimonials are given without compensation. But if they are paid for, providing they are truthful, no one is deceived.

Section 5 of the Federal Trade Commission Act (U. S. C., Title 15, § 45; 38 Stat. 717) was recently considered by the Supreme Court in *Federal Trade Comm. v. Raladam Co.* (283 U. S. 643), where the court pointed out that the act was supplementary to the Sherman Anti-Trust Act and the Clayton Act (*Fed. Trade Comm. v. Beech Nut Co.*, 257 U. S. 441), and said:

"The object of the Trade Commission Act was to stop in their incipiency those methods of competition which fall within the meaning of the word 'unfair.' * * * In a case arising under the Trade Commission Act, the fundamental questions are, whether the methods complained of are 'unfair,' and whether, as in cases under the Sherman Act, they tend to the substantial injury of the public by restricting competition in interstate trade and 'the common liberty to engage therein.' The paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree, and this presupposes the existence of some substantial competition to be affected, since the public is not concerned in the maintenance of competition which itself is without real substance. *Internatl. Shoe Co. v. Fed. Trade Comm.*, 280 U. S. 291."

The Supreme Court, referring to the words "unfair method of competition," said in *Fed. Trade Comm. v. Gratz* (253 U. S. 421, at page 427):

"They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."

The Federal Trade Commission Act does not purport to establish a decalogue of good business manners or morals. Its purpose is to strike down at their inception practices which are unfair and which, if permitted to run their full course, would result in the creation of a monopoly and an undue restraint of trade. Even if a practice may be regarded as unethical, it would still be beyond the purview of the act if it lacks the public interest necessary to support the Commission's jurisdiction. *Fed. Trade Comm. v. Klesner*, 280 U. S. 19. The Commission does not suggest that these testimonials tend to create a monopoly; they do not have a tendency to create an undue restraint of trade. The strongest argument the respondent makes is that failure to state the price paid for the testimonial amounts to deception and misrepresentation concerning the petitioner's product and in that way the petitioner is able to deprive honest manufacturers of a market. *Fed. Trade Comm. v. Winsted Hosiery Co.*, 258 U. S. 483. But where unlawful restraint of trade has been ordered to be discontinued it has always appeared that there was some dishonesty in labeling or marketing the goods. *Fed. Trade Comm. v. Winsted Hosiery Co., supra; Guarantee Veterinary Co. v. Fed. Trade Comm.*, 285 F. 853 (C. C. A. 2); *Royal Baking Powder Co. v. Fed. Trade Comm.*, 281 Fed. 744 (C. C. A. 2); *Procter & Gamble v. Fed. Trade Comm.*, 11 Fed. (2) 47 (C. C. A. 6). In order that the Commission proceed in the public interest, the courts have insisted not only upon a showing that the practice is unfair and disapproved, but also that the public are misled thereby. *Fed. Trade Comm. v. Klesner, supra.*

The use of testimonials, which are truthfully stated under the signature of the giver, cannot in any sense be regarded as unfair competition or as involving a tendency to restrain competition unduly, and the Commission was without jurisdiction to interfere. In *N. J. Asbestos Co. v. Fed. Trade Comm.* (264 Fed. 509), this court held that a long-standing practice of entertainment of buyers and employees of customers, such as furnishing liquor, cigars, meals and theatre tickets is not an unlawful practice giving the Commission jurisdiction to act. In *Ostermoor & Co. v. Fed. Trade Comm.* (16 Fed. [2] 962), we held that an advertisement showing a picture of a mattress uncovered at one end and extending to a surprising degree, exaggerating the actual thickness and resiliency of the layers, was not an unfair method of competition. We said:

"In our judgment, this pictorial representation of the process of manufacturing Ostermoor mattresses and of the materials used therein, even though exaggerated as to their characteristics, cannot deceive the average purchaser * * *. There is no basis for the finding that substantial numbers of purchasers had been misled and deceived by the grossly exaggerated pictorial representation."

Because a prominent person ventures an opinion without being requested to do so is no guaranty either of veracity or good judgment. If the testimonials involved here represent honest beliefs of the endorsers, there is no misrepresentation concerning the product, and no unfair competition is created. We have no right to presume that endorsers of commercial products falsify their statements because they have received compensation. There are no misrepresentations and the Commission was without jurisdiction. Order reversed.

[¶ 55,009] The Dextone Co. v. Building Trades Council of Westchester County et al.

United States Circuit Court of Appeals, Second Circuit. July 11, 1932.

Those found to have been guilty of participating in a combination or conspiracy to restrain trade in violation of the Sherman Anti-Trust Act are liable for everything done during the existence of the alleged combination or conspiracy regardless of the exact time he became a member or the extent of his participation.

The attorney's fees are fixed by the court and not by the jury; and the defendants should be held jointly liable for the attorney's fees.

Before: MANTON, SWAN and AUGUSTUS N. HAND, Circuit Judges.

Appeal from the District Court of the United States for the Southern District of New York.

Action by The Dextone Company under section 4 of the Clayton Act (15 USCA sec. 15) for treble damages. The jury rendered a verdict against one group of defendants (called the New York defendants) for $11,000 and against another group (called the Westchester defendants) for $2,000 jointly with the New York defendants. These sums being trebled and a $10,000 attorney's fee added, of which $3,000 was charged jointly against both groups, judgment, including costs, was entered in favor of the plaintiff for $43,115.55 against the New York defendants and for $9,115.55 against the Westchester defendants. The plaintiff appeals only from that part of the judgment entered against the Westchester defendants. Citation on appeal was issued to all the defendants, but only those constituting the Westchester group have appeared. Judgment reversed and cause remanded with directions.

Gleason, McLanahan, Merritt & Ingraham, Attorneys for Appellant, *Walter Gordon Merritt,* of Counsel. *Sydney A. Syme,* Attorney for Appellees.

SWAN, Circuit Judge: For the purpose of this appeal a very brief statement of the facts will suffice. A more complete account of the controversy between the parties may be found in *Decorative Stone Co. v. Building Trades Council,* 18 F. (2d) 333 (S. D. N. Y.), aff'd, 23 F. (2d) 426. In that suit the present plaintiff, suing in its former corporate name, obtained a decree enjoining the present defendants from continuing the acts upon which the judgment herein is based. A similar decree was also rendered in a suit brought by the United States. Shortly thereafter the present action for damages was begun. The plaintiff was engaged in the production of cast stone in New Haven, Connecticut, which it shipped in interstate commerce to the metropolitan district of New York. The defendants conspired to exclude the plaintiff from this market by a course of conduct that violated the Sherman Act. This conspiracy in restraint of interstate commerce was formed in 1923 by the New York defendants. Two years later the Westchester defendants, namely, Building Trades Council of Westchester County and William M. McGeory, joined the combination. The trial court instructed the jury that although the New York defendants were liable for all the damages caused by the conspiracy from its inception, the Westchester defendants were liable only for that part of the damages which accrued after they joined the combination. The jury returned a verdict assessing the plaintiff's total damages at $11,000 but finding the Westchester defendants liable for only $2,000 of that amount Judgment was then entered as already described.

The principal error assigned relates to that portion of the charge which resulted in a verdict against the Westchester defendants for less than the entire loss inflicted upon the plaintiff. It is contended that every person who participates in a conspiracy is liable for everything done during the period of its existence regardless of the exact time at which he becomes a member or the extent of his participation. As applied to the circumstances of the case at bar where the Westchester defendants, knowing of the prior existence of the conspiracy, allied themselves with the New York defendants in order to promote the object for which it was organized, we think this contention is clearly correct. *Lincoln v. Claflin,* 7 Wall. 132, 138; *United Mine Workers v. Coronado Coal Co.,* 258 F. 829. 838 (C. C. A. 8), reversed in 259 U. S. 344, 393 on grounds not affecting the validity of the rule; *Eyak River Packing Co. v. Huglen,* 255 P. 123, 126 (Wash.); *Patch Mfg. Co. v. Protection Lodge,* 60 Atl. 74, 80 (Conn.); *Jayne v. Loder,* 149 F. 21, 30 (C. C. A. 3); and cases cited infra relating to entry of judgment upon the verdict. Indeed, the Westchester defendants cite no authority to the contrary, but now contend that there were "two separate and distinct combinations," with the first of which they had no connection. It is true they had no connection with the early activities of the com-

bination in the sense of actively participating therein; but this is exactly what the rule does not require the plaintiff to prove. If the argument means that there were two distinct conspiracies, one relating to acts in New York City and the other to acts in Westchester County, it is without support in the record. The conspiracy was from the first to keep the plaintiff's stone out of the metropolitan area. In its early stages it was more effectively put into operation within the city than outside, and only after the Westchester defendants joined did it become thoroughly effective in Westchester County, but there is no evidence that there were two distinct conspiracies. Nor was the case tried on any such theory. Under the authorities above cited the appellees' affiliation with the conspiracy was sufficient to render them liable for all the damages is caused. The court erred in giving the instruction complained of.

It remains to determine what effect the error had and how it is to be cured. It resulted in the jury attempting to apportion the plaintiff's damages between the two groups of defendants and in the entry of a judgment for a different amount against each group. Such apportionment of damages and the judgment entered thereon were clearly wrong. In *Washington Gas Light Co. v. Lansden,* 172 U. S. 534, 552, Mr. Justice Peckam wrote for the court:

"All the defendants joined in a plea of not guilty, and the jury could not find a verdict of guilty against all, and apportion the damages among the several defendants by giving a certain amount as against the company and a certain other amount as against the individual defendants. Those of the wrongdoers who are sued together and found guilty in an action of tort are liable for the whole injury to the plaintiff, without examining the question of the different degrees of culpability."

In the case at bar, the plaintiff elected to sue all the defendants jointly and to the extent of $9,115.55 it has procured a joint judgment against both groups of defendants. While the form of the jury's verdict was wrong in its attempted apportionment of damages, the meaning of their verdict was made entirely clear by questions put to them by the court. They found the plaintiff's total loss to be $11,000, and they found all the defendants guilty of the conspiracy. Indeed, as to the latter issue they were given a peremptory instruction, the only questions left to them being the amount of the plaintiff's loss and its apportionment between the two groups of defendants. The verdict therefore established the guilt of all the defendants and the total damages they cause the plaintiff by their wrongful combination. Hence the jury's attempt to apportion to the Westchester group only a part of the damages should have been ignored as surplusage, and judgment should have been entered for the full amount against all the wrongdoers. Such a defect in the verdict may be cured either by the trial court or by the appellate court without the granting of a new trial. *Polsey v. Waldorf-Astoria, Inc.,* 216 App. Div. 86; *Farber v. Demino,* 254 N. Y. 363, 365; *Hall v. McClure,* 212 P. 875 (Kan.); *Simpson v. Perry,* 9 Ga. 508; *Halsey v. Woodruff,* 9 Pick. 555; *Olson v. Nebraska Telephone Co.,* 127 N. W. 916 (Neb.); *Lake Erie & W. R. R. Co. v. Halleck,* 136 N. E. 39 (Ind. App.); cf. *Ohio Valley Bank v. G. S. Bank & Trust Co.,* 11 F. (2d) 87 (C. C. A. 4); *City of Birmingham v. Hawkins,* 196 Ala. 127.

There is in this no infringement of the constitutional rights of the litigants to a trial by jury such as vitiated the action of the appellate court in directing judgment non obstante veredicto in *Slocum v. N. Y. Life Ins. Co.,* 228 U. S. 364. As the Supreme Court has recently explained in *Gasoline Products Co., Inc. v. Champlin Refining Co.,* 283 U. S. 494, 499, the *Slocum* case means that the Seventh Amendment does not permit the entry of judgment on a trial at law before a jury upon an issue of fact without the verdict of a jury, but it does not require a new trial of an issue once determined by a verdict according to law, even though another and separable issue must be tried again. In the present case the jury has determined the amount of the plaintiff's loss and the defendants' responsibility for it. Merely the form of their verdict was wrong and we do not trespass upon the province of the jury in correcting that defect in form and ordering such judgment as should properly have been entered on such verdict. See *Fort Scott v. Hickman,* 112 U. S. 150, 165. There is no necessity for a new trial, for the erroneous instruction complained of did not affect the jury's determination of the total damages suffered by the plaintiff.

The attorney's fees were fixed by the court and not by the jury. In view of the foregoing argument it is apparent that all the defendants should have been held jointly liable for the $10,000 allowed by the trial court as a reasonable fee.

Other errors assigned by the appellant do not require detailed discussion. It will suffice to say that we think the court's charge as to damages, aside from the instruction already discussed as to apportionment, was correct and adequate. If there was error in permitting the defendants to offer evidence in respect to their motives, it was cured by the charge that they must pay for the damage done plaintiff, even though they mistakenly thought they were doing right.

Judgment reversed and cause remanded with direction to enter a judgment against the Westchester defendants for $43,115.55

[¶ 55,010] William N. Youngclaus v. Omaha Film Board of Trade, et al.

United States District Court, Lincoln Division, Nebraska. July 2, 1932.

A combination of moving picture distributors to refrain from competition among themselves by agreeing that they will each grant a period of protection to one exhibitor over another as to the exhibition of first run pictures, is an unreasonable restraint of trade.

MUNGER, D. J. In this suit the plaintiff seeks to enjoin the defendant from enforcing a plan of operation, which he alleges is in violation of the anti-trust laws of the United States. The plaintiff is engaged in business as an exhibitor of moving pictures in Madison, Nebraska. At Norfolk, Nebraska, less than fifteen miles away, is a rival moving picture exhibitor. Norfolk is a city having a population of over 9,000 and less than 12,500. The defendant distributors and others entered into an agreement among themselves not to license the use of a picture by the plaintiff for a period of time (not exceeding ten days) after the picture had been displayed by the rival theater at Norfolk.

It has been the custom of distributors of moving pictures to place in contracts licensing the use of such pictures by exhibitors a provision that the licensee is to have the right to exhibit the picture a certain number of days before it may be exhibited in other theaters in the same territory, although such other theaters may have licenses to exhibit the same picture, and to place in the license contracts of such other theaters a provision, that the picture must not be exhibited until the end of this so-called protection period.

The agreement of which the plaintiff complains is as follows:

"UNIFORM ZONING AND PROTECTION PLAN
for
THE OMAHA DISTRIBUTION TERRITORY
July 22, 1930

The following Zoning and Protection Plan is the result of careful study of the protection and run situations in the City of Omaha and the Omaha Distribution Territory by a General Committee representing all interests and established for the purpose of working out a uniform plan for runs and protection that would be fair and reasonable to all concerned.

The General Committee and Sub-committees held a series of meetings from June 23 to July 22, 1930, at Omaha, Nebraska, considering complaints and suggestions that have been made or filed concerning runs and protection.

A CONTINUING ZONING COMMITTEE was appointed by the General Committee for the season of 1930-31 as follows:

R. S. Ballantyne, W. H. Creal, R. W. Thayer, W. A. Bowker, S. W. Fitch, Sam Epstein, Harry Goldberg, H. B. Day, Phil Monsky, C. A. Brown, E. R. Cummings, C. E. Williams, Regina Molseed, Secretary to Committee.

The above committee will meet as the occasion requires hereafter as determined by the Committee, to hear any complaints of any Exhibitor or Distributor in the territory with reference to this Zoning and Protection Plan, and to determine what is proper and fair zoning or classification of any theatre not covered herein or that may be constructed during such season. A circular letter is being sent to all exhibitors in the territory advising them of the existence of the Continuing Zoning Committee and any requests or complaints for the attention of the Committee should be addressed to Regina Molseed, Secretary to the Continuing Zoning Committee, Omaha Film Board of Trade, Medical Arts Building, Omaha, Nebraska.

Protection and run clauses in all contracts should be complete, explicit and impossible to misinterpret. Verbal protection is unenforcible. By having the runs in the territory uniform and clearly defined, costly and disagreeable blunders and mistakes in booking may be avoided and eliminated. By restricting protection within reasonable limits enterprising exhibitors can book attractions at earlier dates when they will produce greater revenue at their theaters. We ask that you do your part in carrying out the Zoning Plan as agreed upon in spirit as well as in contract, thereby making the plan and its provisions a part of your contract by reference.

First run theatres may specify protection over suburban theatres by naming the theatres and number of days' protection in their contracts, provided the theatre and number of days are within the maximum defined in the Zoning Plan. Subsequent runs may define the prior run theatres they will or will not follow in their contracts. Adjacent suburbs and towns within ten miles of the city limits are considered as part of the same city in determining first run theatre protection over the city theatres in such town or city.

Classification of admission to be arrived at by night prices. In theatres charging various admissions, classification to be determined by admission on the particular picture as to the admission charged, e. g., if a theatre charges 30c admission on Sunday, Monday and Tuesday they would be entitled to protection period set aside for 30c run. If admission of 25c is charged on other days of the week protection provided for this classification must prevail on the run of the picture.

All plans or devices to avoid a true admission classification or run for any theatre, such plan or device for the evasion of a true admission price classification or run may cause the reclassification of such theatre by Zoning Committee, who in their discretion may classify the theatre in accordance with the actual admission value of such theatre.

RUNS AND PROTECTION

PARAMOUNT, WORLD and ORPHEUM, OMAHA, maximum protection in the City of Omaha after the last day of exhibition over all subsequent runs as follows:

38 days over theatres charging admission of 35c
42 days over theatres charging admission of 30c
56 days over theatres charging admission of 25c
77 days over theatres charging admission of 20c
98 days over theatres charging admission of 15c
120 days over theatres charging admission of 10c

STATE, OMAHA, maximum protection after the last day of exhibition over all subsequent runs as follows:

28 days over theatres charging admission of 35c
35 days over theatres charging admission of 30c
42 days over theatres charging admission of 25c
63 days over theatres charging admission of 20c
84 days over theatres charging admission of 15c
106 days over theatres charging admission of 10c

PARAMOUNT, WORLD and ORPHEUM, OMAHA, maximum protection after the last day of exhibition, thirty (30) days over STRAND

BROADWAY and LIBERTY, COUNCIL BLUFFS. Seven (7) days additional for each five (5c) cents less charged in admission.

STATE, OMAHA, maximum protection after the last day of exhibition, twenty-eight (28) days over STRAND, BROADWAY and LIBERTY, COUNCIL BLUFFS. Seven (7) days additional for each five cents (5c) less charged in admission.

STRAND and BROADWAY, COUNCIL BLUFFS, maximum protection after the last day of exhibition, fourteen (14) days over the LIBERTY, charging an admission of 30c and seven (7) days additional for each five cents (5c) less in admission.

PARAMOUNT, WORLD AND ORPHEUM, OMAHA, maximum protection after the last day of exhibition as follows:

28 days over theatres located within a radius of from 1 to 25 miles of Omaha.

7 days over theatres located within a radius of from 25 to 35 miles of Omaha.

COUNCIL BLUFFS, maximum protection after the last day of exhibition as follows:

7 days over theatres located in Iowa within 35 mile radius of Omaha.

SIOUX CITY, IOWA

CAPITOL and ORPHEUM, SIOUX CITY, IA., maximum protection after the last day of exhibition as follows:

38 days over theatres charging admission of 35c
42 days over theatres charging admission of 30c
56 days over theatres charging admission of 25c
77 days over theatres charging admission of 20c
98 days over theatres charging admission of 15c
120 days over theatres charging admission of 10c

IOWA and PRINCESS, SIOUX CITY, IA., maximum protection after the last day of exhibition as follows:

28 days over theatres charging admission of 35c
35 days over theatres charging admission of 30c
42 days over theatres charging admission of 25c
63 days over theatres charging admission of 20c
84 days over theatres charging admission of 15c
106 days over theatres charging admission of 10c

FIRST RUN THEATRES, SIOUX CITY, IOWA, maximum protection after the last day of exhibition as follows:

21 days over all theatres located within a radius of from 1 to 25 miles of Sioux City.

STUART, ORPHEUM and LINCOLN, LINCOLN, NEBRASKA, maximum protection after the last day of exhibition as follows:

38 days over theatres charging admission of 35c
42 days over theatres charging admission of 30c
56 days over theatres charging admission of 25c
77 days over theatres charging admission of 20c
98 days over theatres charging admission of 15c
120 days over theatres charging admission of 10c

COLONIAL and RIALTO, LINCOLN, NEBRASKA, maximum protection after the last day of exhibition as follows:

28 days over theatres charging admission of 35c
35 days over theatres charging admission of 30c
42 days over theatres charging admission of 25c
63 days over theatres charging admission of 20c
84 days over theatres charging admission of 15c
106 days over theatres charging admission of 10c

FIRST RUN THEATRE, LINCOLN, NEBRASKA, maximum protection after the last day of exhibition as follows:

14 days over all theatres located within a radius of from 1 to 20 miles of Lincoln.

OUT-STATE PROTECTION BETWEEN TOWNS

Towns of 20,000 to 15,000 population to have 14 days protection within a radius of 15 miles.

Towns of less than 15,000 to 12,500 population to have 12 days protection over a radius of 15 miles.

Towns of less than 12,500 to 9,000 population to have protection of 10 days over a radius of 15 miles.

Towns of less than 9,000 to 5,000 population to have protection of 10 days over a radius of 10 miles.

Towns of less than 5,000 population shall not have protection to exceed 7 days over a radius of 10 miles.

This same provision was intended to apply and has always applied in favor of out-state exhibitors as well as city exhibitors.

(2) The Plan limits normally subsequent run theatres contracting for a prior run only so far as it limits the amount of protection that may be accorded.

(3) Any exhibitor whose protection is provided for under the Plan may agree with the distributor for a less amount of protection than is provided in the Plan."

The defendants contend that this plan was a mere statement of the maximum protection period which could be granted to the Norfolk theater. Obviously the plan is mandatory upon the distribution to grant some period of protection. The course of dealing under it shows that it was intended that the distributors should grant whatever period (not exceeding ten days) which the Norfolk theatre should request. Whatever the length of the period, whether for one day or more, the distributors limited their freedom to contract according to their individual judgments, as to the period of protection to be accorded to the Norfolk theater and to be imposed upon the plaintiff. This agreement has been enforced against the plaintiff.

Whatever may be the right of the distributors separately and individually to license the exhibition of pictures by contracts giving to the licensees the exclusive right of exhibition for a period of time, a combination of distributors, such as exists here, controlling a large part of the trade in interstate commerce, to refrain from competition among themselves in making such licensing agreements with exhibitors, by agreeing that they will each grant a substantial period of protection to one exhibitor over a rival distributor in competitive territory, is an unreasonable restraint of interstate trade, and is condemned by the anti-trust laws of the United States.

The plaintiff is entitled to the right to bargain with distributors who are free from a combination among themselves not to bargain with the plaintiff unless he shall consent that his rival shall have had the first opportunity to exhibit a picture.

The recent cases of *Paramount Famous Corp. v. United States*, 282 U. S. 30 and *United States v. First National Pictures, Inc.*, 282 U. S. 44, state the principles which are applicable in this case.

An argument has been made in this case of the need of protection for the exhibitor who purchases the right to display a picture but the same contention in principle was presented to the court in the *Paramount Famous Lasky Corporation* case, wherein the right was asserted to contract for arbitration as a method of settling disputes, and the court said:

"The Sherman Act seeks to protect the public against evils commonly incident to the unreasonable destruction of competition and no length of discussion or experimentation amongst parties to a combination which produces the inhibited result can give validity to their action. Congress has so legislated 'as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted.' *Eastern States Lumber Assn. v. United States, supra,* 613.

"It may be that arbitration is well adapted to the needs of the motion picture industry; but when under the guise of arbitration parties enter into unusual arrangements which unreasonably suppress normal competition their action becomes illegal.

"In order to establish violation of the Sherman Act it is not necessary to show that the challenged arrangement suppresses all competition between the parties or that the parties themselves are discontented with the arrangement. The interest of the public in the preservation of competition is the primary consideration. The prohibitions of the statute cannot '. . . be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results,' *Standard Sanitary Mfg. Co. v. United States,* 226 U. S. 20, 49."

A decree is entered accordingly.

[¶ 55,011] Federal Trade Commission v. Thomas E. Powe and F. C. Harrington, trading as Thomas E. Powe Lumber Co.

United States Circuit Court of Appeals, Eighth Circuit. July 2, 1932.

Decree modified on petition of the Federal Trade Commission to permit use of term "Mahogany" with modifying term "Philippine."

Order Modifying Decree

This Court on June 28, 1929, on the duly verified petition of the Federal Trade Commission, petitioner herein, having entered its decree affirming an order to cease and desist entered against Thomas E. Powe and F. C. Harrington, partners, trading as Thomas E. Powe Lumber Company, their officers, directors, agents, employees and successors forthwith to comply with said order to cease and desist, and to cease and desist from the practices in said decree described; and the said Thomas E. Powe and F. C. Harrington, partners, trading as Thomas E. Powe Lumber Company, respondents herein, having petitioned this Court to modify said decree; and the said Federal Trade Commission having joined with the said Thomas E. Powe and F. C. Harrington, partners, trading as Thomas E. Powe Lumber Company, in their petition to modify said decree;

It is Hereby Ordered, Adjudged and Decreed, that the said decree of this Court entered on June 28, 1929, against said Thomas E. Powe and F. C. Harrington, partners, trading as Thomas E. Powe Lumber Company, be and the same is hereby modified, so that as modified, said decree be and the same is hereby made to provide as follows:

It is Hereby Ordered, Adjudged and Decreed, that said Thomas E. Powe and F. C. Harrington, partners, trading as Thomas E. Powe Lumber Company, their agents and employees forthwith cease and desist from advertising, describing or otherwise designating or offering for sale or selling in commerce with foreign nations or among the states of the United States or in the District of Columbia, under the term "Mahogany," or any other term of similar import, woods known under the common or trade names "Red Lauan," "White Lauan," and "Tanguile" (all three of which are also sometimes called Bataan and Lamao), unless said term is accompanied by the modifying term "Philippine."

[¶ 55,012] Federal Trade Commission, Petitioner, v. A. E. Smith, Electric Bond & Share Co., et al.

United States District Court, Southern District of New York. August 19, 1932.

The defendant holding company is held to be engaged in interstate commerce because (1) although it does not own a majority of stock in any of its subsidiaries, it does exercise considerable control over such companies, one-fourth of whose business is interstate, and (2) its own activities in the purchase and shipment of materials for such subsidiaries is interstate in character, and therefore it is subject to the investigatory power of the Federal Trade Commission under Sec. 6a of the Federal Trade Commission Act.

KNOX, D. J. The above entitled proceeding is now before the Court for the second time. When previously here, respondent's objections to certain subpoenas duces tecum issued by the Commission were sustained for the reason that, upon the disclosures then made to the court, the process was so all-inclusive in its requirements as to be outside the boundaries of the Commission's authority, and in violation of respondent's rights and privileges as conferred by the Fourth Amendment of the Federal Constitution. Upon the same occasion, I overruled objections made by respondent to certain questions which counsel for the Commission had propounded to individual witnesses.

The rulings then made were based upon an assumption that Electric Bond and Share Company

"as to a part of its business was engaged in interstate commerce."

It was said that,—

"if respondents wish to contest the propriety of this assumption, the matter will have to go to a master, or, if petitioner wishes an adjudication to the effect that the interstate business of the Electric Bond & Share Company is so intimately associated and connected with interstate commerce that all the company's activities are subjected to the jurisdiction of the commission, a reference will be required to establish the fact."

See *Federal Trade Commission v. Smith, et al.*, 34 Fed. (2d) 323. Thereupon the matter was referred to H. Snowden Marshall, Esq., to take testimony and report upon the interstate feature of the litigation. Before making a report, Mr. Marshall died. The parties subsequently entered into a stipulation of facts which, it has been agreed, shall stand in the place of evidence that might have been adduced before a Master. Upon such stipulation, and the conclusions to be drawn therefrom, the Court must now render a decision.

At the outset, notice should be taken that petitioner once more urges me to uphold the duces tecum subpoenas heretofore considered. That issue has gone against petitioner, and whatever inferences are here to be drawn from facts not previously before the court, they cannot, retroactively give vigor to process already found to have been without vitality.

In the light of the stipulation of the parties, attention should first be given to the question as to whether the business of Electric Bond and Share Company, or a substantial portion thereof, is of such character as fairly to bring it within the realm of interstate commerce. Such decision as may be rendered will be determinative of the propriety of the assumption in which indulgence was had when the case was first here. It, also, will serve as a declaration as to the investigatory authority, if any, of the Federal Trade Commission with respect to the affairs of Electric Bond & Share Company.

The stipulation shows the respondents to be a corporation of the State of New York, with its main office within this city. The corporation renders engineering, financial and advisory services of a technical and specialized character to certain groups of public utility companies and to certain holding companies, which, through stock ownership, control a number of specified public utility companies in the United States, and in foreign countries. Respondent also owns substantial investment interests in stock and other securities of companies controlling through stock ownership certain public utility companies in the United States, and elsewhere. It does not, however, own a majority of the voting stock of any company doing a public utility business in this country, or of any other company which owns securities of any company doing a public utility business in the United States.

As respects the holding companies which enter into the present inquiry, respondent's stock ownership is as follows:

American Power & Light Company,	21.73%
Electric Power & Light Corporation,	13.42%
Lehigh Power Securities Corporation,	13.25%
National Power & Light Company,	20.77%

The corporate enterprises just enumerated hold from a majority to one hundred per cent of the capital stock of sixty-eight subsidiary operating companies. Approximately one-fourth of these companies sell some of their product in interstate commerce.

Both litigants agree that the aforementioned holding companies are nothing more than is implied in the descriptive term applied to them. They do not maintain separate offices, their affairs being carried on by the staff employed by respondent at its headquarters in New York. The corporate officers of the holding companies are largely interlocking.

The subsidiary operating companies have their own official organizations, boards of directors and executives. In all cases, nevertheless, some of the official staffs of the subsidiaries are likewise officers of Electric Bond and Share Company, and in some instances these latter predominate. An example of the inter-relationship existing between the various organizations is to be found in the fact that in the years 1926 and 1927, the president of Electric Bond and Share Company was, at the same time, a director of American Power & Light Company, and of seven of its operating subsidiaries: a director of Electric Power and

Light Corporation and of two of its subsidiaries, and a director of National Power and Light Company, and of four other companies subsidiary thereto. Similarly, sixteen other officials of respondent were also officers or directors in a great number of the subsidiary holding and operating companies.

The stipulation likewise discloses the fifty largest holders of voting stock in the four holding companies. Among such stockholders are Electric Bond and Share Company, Electric Investors, officers, directors and employees of respondent, and other individuals closely associated with, or friendly to that organization.

From what has been made to appear to the Court, it is plain that the services performed by respondent on behalf of the holding and subsidiary operating companies, and which, broadly speaking, relate to legal, engineering, secretarial, fiscal, investigatory and general advisory matters, are not such as will here avail the petitioner. Without analyzing the services rendered by respondent within the foregoing classifications, I shall content myself by concluding that they have to do with activities which, under authoritative decisions, are not recognized as constituting interstate commerce. See *Graniteville Manufacturing Company v. Query,* 283 U. S. 376; *Hemphill v. Orloff,* 277 U. S. 537; *Moore v. New York Cotton Exchange,* 270 U. S. 593; *Blumenstock Brothers v. Curtis Publishing Company,* 252 U. S. 436; *Hall v. Geiger-Jones Co.,* 242 U. S. 539; *United States Fidelity & Guaranty Company v. Kentucky,* 231 U. S. 394; *New York Life Insurance Company v. Deer Lodge County,* 231 U. S. 495; *Engel v. O'Malley,* 219 U. S. 128 and *Federal Baseball Club v. National League,* 259 U. S. 200.

When, however, the services performed by respondent for its associated and affiliated companies, in certain other capacities are scrutinized, the issue before the court may not be disposed of so summarily.

Attached to the stipulation as one of its exhibits is a contract between respondent and General Electric Company which was in force throughout the years 1926 and 1927, the period with which the present dispute is concerned. It relates to the purchase of electrical apparatus and equipment for use by a group of corporations designated in the contract as "subsidiary companies" of the corporate respondent. This contract first came into existence in 1912. It contains, inter alia, the following provisions:

"That whereas, the General Company is engaged in the manufacture of electrical apparatus and desires to sell, subject to the terms and conditions hereof, *to the Bond and Share Company, and to the companies listed in Schedule attached* (hereinafter called Subsidiary Companies), which are engaged in the business of central station electric lighting or distributing electric power for other purposes, for its use and the use of the Subsidiary Companies, the apparatus manufactured by the General Company for central station lighting or for other purposes and the Bond and Share Company and said Subsidiary Companies are willing to buy such apparatus required by them from the General Company.

Now, Therefore, in consideration of the premises and other convenants hereinafter contained, it is agreed as follows:—

First: The General Company agrees to furnish to *the Bond and Share Company and to the Subsidiary Companies,* for use only of said companies, electrical apparatus and supplies, including steam turbines and adjuncts thereto, and including turbine or motor-driven centrifugal exhausters and compressors, manufactured by the General Company (but excluding incandescent lamps), required by the Bond and Share Company and the Subsidiary Companies for its and their business of central station lighting or for other purposes for cash or on such other terms as may be agreed upon at the lowest current prices to its most favored customers purchasing in like quantities and under similar conditions. The prices, terms and other conditions applying to various classes of supplies furnished by the General Company under this agreement, shall be as set forth in the riders, schedules or subsidiary agreements which are or which shall hereafter be attached to and made a part of this agreement.

Second: The Bond and Share Company agrees *to cause to be purchased* from the General Company such electrical apparatus, supplies and turbines required by it or by the Subsidiary Companies in its or their business of Central Station lighting or for other purposes. * * *

Sixth: It is further agreed that the terms of this agreement and of the riders, schedules, or subsidiary agreements which are, or which shall hereafter, be attached to or made a part of this agreement, shall apply to all companies not enumerated in attached schedule in which the Bond and Share Company shall obtain ownership or a controlling or operating interest (providing the General Company shall be free to sell to such company); and the Bond and Share Company agrees to promptly notify the General Company *in case they acquire ownership or a controlling or operating interest in any company not enumerated* in attached Schedule.

It is also agreed that *if at any time by reason of change in interest, ownership or control, the Bond and Share Company shall be unable to control the purchase of equipment by any of the Subsidiary Companies, due notice* shall be given the General Company and this agreement shall no longer be applicable to said subsidiary company." (Italics mine.)

From time to time reprints of the agreement, carrying supplements containing the names of corporations entitled to the benefits of the contract, together with revisions of the lists of apparatus covered thereby, were furnished to Electric Bond and Share Company. The exhibit also includes "a supplementary agreement covering construction work" between respondent and General Electric Company. This latter document bears date of January 1, 1924, and was in force during 1926 and 1927, but it is of slight importance to the controversy, save to indicate that General Electric, if required, will furnish certain classes of workmen to respondent and its subsidiaries, at stipulated rates.

The purchase contract provided for the

allowance of quantity discounts on the aggregate of all purchases as should be made thereunder. As the close of a specified contract period, checks for such discounts as had accrued under the agreement, and which had not previously been allowed, drawn to the order of the companies for whose accounts apparatus or material had been purchased, and proportionate thereto, would be forwarded by General Electric Company to respondent. The latter in due course, would forward the checks to the payees named therein, respectively, and retained for itself no portion of the discounts.

In passing, it may be noted that, although American Gas and Electric Company, and its subsidiaries, are scheduled in the purchase agreement as entitled to its benefits, respondent did no purchasing for that holding company, or its subsidiaries during the years mentioned. As to them, therefore, respondent had no discount checks to distribute.

As construed by the parties to the agreement, the discounts were to be allowed on an "if, as and when" purchase basis, and the contract imposed no obligation on respondent that purchases should be made from General Electric Company, in preference to other manufacturers of electrical apparatus and equipment. As a matter of fact, a similar purchasing arrangement, not in writing, was in force with Westinghouse Electric and Manufacturing Company during the years 1926 and 1927, and this was known to General Electric Company.

Notwithstanding, most of the purchases (in some classes of apparatus more than 90 per cent) were made from General Electric Company.

At this point, mention must be made of the Phoenix Utility Company. All of its capital stock is owned by respondent, and its general (New York) office is manned entirely by officers and employees of respondent. This concern, acting on the requisition of the operating companies, made in pursuance of the terms of supervisory agreements with respondent, purchased apparatus within the years 1926 and 1927, of an aggregate value of more than $5,000,000.00. This sum does not include the value of purchases made in connection with certain agreements of the operating companies relating to construction work. Purchase of this class of supplies, which were made by Phoenix Utility Company, on behalf of the operating companies, had a value of something like $23,000,000. In practice, purchase orders of the subsidiaries were signed by the Phoenix Utility Company as "Purchasing Agent" for the company that was to have the apparatus or material covered by the order. Shipments under such orders were made by the manufacturer or distributor of the apparatus or supplies direct to the company that was to use the same.

Most of the purchases made as aforesaid moved in interstate commerce.

Payment for material and supplies thus obtained by the operating companies were made by them either from their funds in New York banks, or at their local places of business, as bills were rendered. Such payments as were remitted from the New York office were made by check of the operating companies drawn on a New York bank, signed by officers of the operating companies who, also, were officers or directors of respondent.

Bills for construction apparatus or material were sent, in ordinary course, to the field office of Phoenix Utility Company and were paid at such office from funds then or theretofore supplied by the operating company.

Substantially all fees for services rendered by Phoenix Utility Company were paid to Electric Bond and Share Company.

As illustrative of the extent of the Company's activities, and the manner in which they were carried out, I quote a number of clauses taken from its contracts with the subsidiary holding companies which, it will be remembered, control the operating units. In its contract with American Power and Light Company, the Electric Bond and Share Company states:—

"C. *Supervision of Operation of Subsidiaries:* We propose to furnish, at our expense, the services of our Operating Department, in charge of one of our Vice-Presidents, including,—1. A 'Sponsor' who will be one of our operating specialists, who shall be known as 'sponsor for ——— group, American Power and Light Company properties.' * * *

"4. Purchasing Department, which will assist in the purchase of apparatus and material, and the routing and tracing of shipments. The subsidiaries will be included in the *large general purchase contracts made by us* for lamps, transformers, meters, etc., whereby, through the large volume of purchases, lower prices are secured." (Italics mine.) Exhibit M, pp. 3, 4.

The contract with the Electric Power and Light Corporation contains the following provisions:—

"20. We will serve your company in matters pertaining to purchasing and, where purchases can be made more advantageously by us than by your organization, we will conduct such purchases and fulfill all functions of a purchasing organization in so far as can be done in our New York office. For purchasing in connection with construction work, see Section 28.

We maintain an information service through which we will transmit to your company information in regard to market conditions and other matters pertaining to purchasing.

21. We regularly negotiate and place blanket contracts and orders for equipment, material, supplies, etc., generally used by public utilities, and the requirements of your company will be included.

therein, thereby gaining for you the benefits of favorable discount, prices and deliveries obtainable through large combined purchases and close contact with market conditions. * * *

23. We will serve your company in matters pertaining to transportation of materials and supplies, and will route and classify shipments supplied against contracts or purchase orders placed for it. We will furnish information concerning classification and routing of commodities, insurance in transit, freight rates, proper procedure in the filing of freight claims and the checking and auditing of transportation invoices, etc."

"28. We will, when authorized by separate agreement, procure ———————— or other responsible contractor to do for your company construction or reconstruction work of any character or magnitude. So long as a construction organization is continuously maintained by such contractor on your property, new jobs may be added to existing contract as supplementary to it. Whenever the construction organization has, in its entirety, been withdrawn from your property, any work requiring its return must be covered by a new contract.

The services which will be performed in connection with such work will include organization and direction of the construction operations, field engineering, purchasing materials and equipment, obtaining construction superintendents, assembling the necessary construction forces and construction plant, keeping proper records and books of account and all other things necessary or incidental to consummation of the work."

Similar provisions are to be found in the agreement with the National Power and Light Company, and in the general form of service contract set forth in Exhibit 4001.

The foregoing recital engenders an insistent thought that through the interlocking relationship of the several corporations concerned, the Electric Bond and Share Company had much to do with the determination by its denominated subsidiaries as to when and where they should purchase apparatus, materials and supplies which were required in carrying on their respective businesses, and also, that, in what was done, the parent company acted in other than a purely brokerage capacity. The phraseology of the contract with General Electric Company gives apparent recognition to the compulsory character of such influence as Electric Bond and Share Company chose to exercise over the affairs of the subsidiaries. Under the guise of supervisory and advisory services, the parent concern was afforded an opportunity actively to promote purchases from General Electric Company. That it did so in great volume is obvious. Not only did it charge a fee for advisory and supervisory services performed on behalf of the subsidiaries, but, through the medium of its stock ownership, it became a beneficiary of such profits as accrued to the subsidiaries as a result of the purchases.

The contract with General Electric Company, it should be noted, contained this paragraph:

"If * * * the Bond and Share Company shall be unable to control the purchase of equipment by any of the Subsidiary Companies due notice shall be given the General Company and this agreement shall no longer be applicable to said subsidiary company."

Words such as "control" and "Subsidiary Companies" and the phrase "cause to be purchased," which also appears in another portion of the agreement when used in any contract, usually carry implications that are definite and easy to understand. In this instance, such implications gather emphasis from the corporate relationship existing between Electric Bond and Share Company and its subsidiaries. The extent to which purchases were made, pursuant to the contract, together with the detail of their execution and shipment, tend to demonstrate that, in handling transactions of great volume and high value, Electric Bond and Share Company was a ruling agent and actively participated in the interstate movement of commerce.

But, irrespective of all that has been said, Electric Bond and Share Company insists that it is outside any and all jurisdiction of the Federal Trade Commission. In this, is the company right or wrong? If realities, rather than artificialities are determinative of the question, it is my belief that the company is wrong.

An examination of the decisions of the Supreme Court of the United States, dealing with the extent of the power of Congress over commerce among the states, discloses the error under which respondent labors.

In *Dahnke-Walter Co. v. Bondurant*, 257 U. S. 282, a Tennessee corporation, pursuant to its practice of purchasing grain in Kentucky to be transported to and used in its Tennessee mill, made a contract for the purchase of wheat, to be delivered in Kentucky on the cars of a public carrier, intending to forward it to the Tennessee destination as soon as delivery was made. The court held the transaction to be interstate in character, notwithstanding the contract was made and to be performed in its entirety in Kentucky, and that the possibility of a change of intention on the part of the purchaser with a consequent sale and consignment of the grain within the State of Kentucky would not affect the essential character of the transaction. In speaking of the scope of interstate commerce, the court said at page 290:

"Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. Where goods in one State are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. *Brown v. Maryland*, 12 Wheat. 419, 446-447; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 519. On the same principle, where goods are purchased

in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. *American Express Co. v. Iowa,* 196 U. S. 133, 143."

In *Lemke v. Farmers Grain Co.,* 258 U. S. 50, a North Dakota association, in the usual course of trade, bought grain in that state, placed it on its elevator, loaded it promptly on cars, and shipped it to other states for sale. The grain even after loading was subject to be diverted and sold locally if the price was offered; but local sales were unusual, the company's entire market, practically, being outside North Dakota. It was held that the business, including the buying of grain in North Dakota, was interstate commerce, and that, as applied to this business, a North Dakota statute requiring purchasers of grain to pay a license fee and to act under a defined system of grading, inspection and weighing and subjecting the prices paid and profits made to regulation, was a direct burden on interstate commerce. In *Shafer v. Farmers Grain Co.,* 268 U. S. 189, a later statute of North Dakota having the same general purpose was held invalid as applied to the same association. The foregoing cases, it will be noted, all involved *purchasers* who bought goods in sales that were completely consummated within a single state. If, as a practical matter, the Electric Bond and Share Company be regarded as controlling purchases made under the contract with the General Electric Company (and it agreed therein "to cause (apparatus, supplies and turbines) to be purchased"), a conclusion that it is engaged in interstate commerce is irresistible.

And, indeed, if respondent be regarded as the broker or agent, and if, in connection with such engagement, one of its functions was to arrange for the interstate shipment of supplies to the operating companies, it would thereby also be engaged in interstate commerce.

In *Di Santo v. Pennsylvania,* 273 U. S. 34, plaintiff was authorized by four steamship companies to sell tickets and orders for transpor ation entitling persons to passage to and from foreign countries, and to collect money for the tickets and orders sold. He was required to give bonds to the respective companies and to account for moneys received for the tickets, less a percentage for his remuneration. It was decided that the plaintiff was engaged in foreign commerce, and that, consequently, a state statute was invalid which required such ticket agents, other than railroad and steamship companies, to procure a license, pay a fee and file a bond as security against fraud. The court predicated its holding upon *Texas Transport Company v. New Orleans,* 264 U. S. 150, and *McCall v. California,* 136 U. S. 104. In the first of these two adjudications, it was held that a state license tax could not be laid upon the business of a corporation which acted as agent for the owners of vessels engaged in interstate and foreign commerce, in soliciting and engaging cargo, arranging for delivery on wharf and for stevedores, issuing bills of lading, collecting freight charges and performing other incidental services. In the latter case, plaintiff acted as an agent in San Francisco for the New York, Lake Erie and Western Railroad Company, which operated a continuous line of road from Chicago to New York. His only duty was to induce people to take that route, if they were taking a trip east from Chicago. He did not sell any tickets for that route. Nevertheless, he was declared to be engaged in interstate commerce and it was accordingly held that a municipal license tax for the privilege of doing business in San Francisco was unconstitutional as applied to him.

At this point, note should be taken of the fact that, in the cases just discussed, the Congress had not specifically undertaken to exercise supervision or control over the matters which were there under review. Nevertheless, the Supreme Court believed them to be within the protection of the commerce clause of the Constitution. In the case at bar, the Congress has taken a step of affirmative character, even though it has not yet chosen definitely to regulate holding companies which, through intercorporate net works, control the destinies of subsidiary operating companies doing interstate business. In other words, it has enacted Section 6-a of the Federal Trade Commission Statute. Unequivocally, the Federal Trade Commission was vested with power

"to gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations and partnerships."

This enactment, at the very least, requires a conclusion that a corporation, whose activities are such as to give it the protection of the Commerce clause under the decisions set forth above, should not be held to be beyond the reach of the Commission's authority.

Decisions of the courts upholding various state taxes, and others of a cognate nature, which are called to my attention in support of respondent's contention that Electric Bond and Share Company is not engaged in interstate commerce, do not rule the

question here presented. Most, if not all of them, depended upon factors far more complex than a finding as to whether a particular corporation, in the light of definite evidence, is engaged in interstate commerce. The question of the propriety of allowing a state to regulate a particular business in the absence of a regulation by Congress; of whether a particular regulation by Congress is a prohibition to the States; of how much, in fact, was regulated; of the actual economic effect of a tax—all these factors, and many more, were under consideration by the Courts in the cases cited by respondent, in their endeavor to delineate the sometime shadowy boundary between permissible State and Federal action.

But this case presents no such problem. A decision by this court that Electric Bond and Share Company is engaged in interstate commerce, so as to subject it to the investigatory power of the Federal Trade Commission, carries with it no concomitant denial of regulatory or taxing power upon the part of a state sovereignty.

This circumstance, when considered in connection with the decisions showing how much has been held to be included within the domain of interstate commerce, tends to clarify my conviction that Electric Bond and Share Company is "engaged in commerce" within the meaning of the Federal Trade Commission Act.

But, say respondents, since the jurisdiction of the Commission is limited to interstate commerce, the intrastate business and affairs of Electric Bond and Share Company are outside of the Commission's authority, even though concession should be made that the company, as to some matters, engaged in interstate trade. If intrastate trade could definitely be separated from that which is interstate, I should agree. For example, if the company charged its subsidiaries a specified fee for services rendered in connection with the purchase of apparatus and materials, it might well be that the investigation of the Commission should be limited to inquiries relevant to the reasonableness of such charges as were made upon this account. Such, however, is not the method of operation. The parent company makes a blanket charge for substantially all of its services, and this is based upon certain percentages of the gross earnings of the subsidiaries. The reasonableness of this charge cannot be ascertained merely by inquiring into the cost of rendering the purchasing services. The cost of rendering other services for which a fee is charged, must also be determined, because they are inextricably involved with the cost of work having to do with interstate activity. The Commission's jurisdiction must extend, therefore, to all services for which a fee covering an interstate activity is charged. See *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194.

Lest it be forgotten, it is well to remind one's self that approximately one-fourth of the operating subsidiaries are partly engaged in interstate commerce in the sale or distribution of electricity or gas. That the interstate transmission of electrical power is interstate commerce is settled beyond doubt. *Public Utilities Commission v. Attleboro Steam & Electric Company*, 273 U. S. 83. Although the interstate business of some of these subsidiaries is small, it comprises a substantial portion of the business of others. Rates charged for this power are unquestionably within the regulatory power of Congress. The fairness and reasonableness of rates in large measure depend upon the cost of furnishing the services. One of the costs of the operating subsidiaries is the charge which it pays to Electric Bond and Share Company. As to the pertinency of this factor, recourse may be had to the decision of the Supreme Court in *Smith v. Illinois Bell Telephone Company*, 282 U. S. 133. Under that authority, the cost of the services which Electric Bond and Share Company renders its operating subsidiaries, and for which it charges them a fee, is relevant to an investigation into the fairness of the rates charged by these companies for power transmitted across State lines. See also *Western Distribution Company v. Public Service Commission of Kansas*, 285 U. S. 119.

As bearing upon the practical control of the subsidiary corporations by the parent concern, even though it does not hold a majority stock interest in the four subsidiary holding companies, attention is directed to *Delaware & Hudson v. Albany & Susquehanna R. R. Co.*, 213 U. S. 435 and *United States v. Union Pacific R. R. Co.*, 226 U. S. 61.

Upon the basis of the control which respondent exercises over its subsidiary companies through such minority stock interests, as well as through the presence of many of its officers and directors upon the boards of officers and directors of the subsidiary companies, and in view of the character of the services rendered pursuant to the service contracts, petitioner asks me to disregard the corporate identities of the subsidary companies, and to hold that

"as the acts of the Electric Bond and Share Company are the acts of these operating companies, the former is engaged in interstate commerce to the extent that the operating companies are so engaged."

In consideration of what has heretofore been said, I am of opinion that there is no need to go to the lengths asked by the Commission.

By virtue of the control which respondent exercised over the subsidary operating companies, it had a direct effect upon all their business, including that in interstate commerce. The power of the national government over interstate commerce has been held to extend not only to activities which may be formally denominated subjects of interstate commerce, but to acts which in fact affect that commerce. See *Di Santo v. Pennsylvania, supra.* Compare also the following cases: *Western Union Telegraph Company v. The State of Kansas,* 216 U. S. 1, where a state tax upon the privilege of doing local business was held unconstitutional because its effect was to burden interstate commerce; *The Daniel Bell,* 77 U. S. 557, where the Federal license and inspection laws were held applicable to a vessel engaged in transportation entirely within one state, because the vessel carried goods bound for another state; *Southern Railway Company v. United States,* 222 U. S. 20, where the Federal Safety Appliance Acts were held applicable to cars moving in intrastate traffic and not connected with any cars used in interstate commerce, on the ground that such regulation promoted the safety of those engaged in interstate commerce: *Southern Pacific Company v. Industrial Accident Commission,* 251 U. S. 259, where a lineman wiping insulators supporting a main wire conducting electricity which, flowing from it through a transformer, and thence along the trolley wires of a railroad, moved cars in both interstate and intrastate commerce, was held employed in interstate commerce, within the Federal Employers' Liability Act.

It follows that the commerce power, in the exercise of which Congress enacted the Federal Trade Commission Act, is indubitably broad enough to comprehend the acts of respondent which have been shown to affect interstate commerce, and, in the light of the foregoing decisions, it would seem clear that respondent is "engaged in commerce" within the meaning of that Act.

The manner in which the affairs of the operating companies having to do with interstate commerce are affected by Electric Bond and Share Company, as well as its own activities in the purchase and shipment of materials and equipment in interstate commerce, are quite sufficient to bring respondent within the investigatory authority of the Federal Trade Commission.

Accordingly, an order will be entered directing the individual respondents to answer all questions relating to the cost to Electric Bond and Share Company of such services as it renders the operating companies in return for the payment of a fee based upon their gross earnings; to the cost of rendering purchasing services which result in interstate movements of materials, apparatus and supplies to or from any of its subsidiaries, for which a separate fee is charged; and to the cost of rendering any services to subsidiary companies engaged in the interstate transmission of electricity or gas, for which a separate fee is charged.

[¶ 55,013] Harry R. Mercer v. United States.

United States Circuit Court of Appeals, Third Circuit. August 26, 1932.

Prosecution for conspiracy to restrain interstate commerce may be commenced before completion of the purpose of such conspiracy.

Before Woolley and Davis, Circuit Judges, and Johnson, District Judge.

Johnson, District Judge: Michael J. Duffy, Harry R. Mercer and another, unknown, were indicted on the charge of conspiracy to restrain and monopolize interstate commerce in motor trucking between Philadelphia and New York in violation of the Sherman Anti-Trust Act, 26 Stat. 209, 15 U. S. C. A. Secs. 1 and 2. The indictment contains two counts: the first charging the defendants with conspiracy to restrain interstate commerce, and the second charging the defendants with conspiracy to monopolize interstate commerce. Before the trial Michael J. Duffy was killed. Defendant Mercer was tried before a court and jury and was found guilty on both counts. At the beginning of the trial the defendant Mercer filed a demurrer to the indictment which was overruled by the court. When the evidence of the Government was completed, counsel for the defendant entered a motion for the direction of a verdict of "not guilty" which was denied by the court. After the verdict, counsel for the defendant filed a motion for a new trial and a motion in arrest of judgment which were overruled. After the verdict, Mercer was sentenced to pay

a fine of $250.00 and undergo imprisonment for a period of three months. From this judgment an appeal was taken to this court.

The defendant has assigned five errors; first, the overruling of the demurrer to the indictment; secondly, the denying of the defendant's motion for a directed verdict; thirdly, the denying of defendant's motion in arrest of judgment; fourthly, the entry of judgment against the defendant; and fifthly, that the judgment of the court was contrary to law.

From these assignments of error, two main questions arise; first, the sufficiency of the indictment, and secondly, the sufficiency of the evidence. The first count of the indictment charges that, "Beginning at, to wit, some time prior to March 24, 1931 (the exact time being to the grand jurors unknown) and continuously thereafter until to wit, the date of the filing of this indictment, Michael J. Duffy, Harry R. Mercer, John Doe, Jacob Saul, Joseph Saul and Harry Miller, together with divers other persons to the grand jurors unknown (said defendants and other persons whether named or unknown being hereafter collectively described as conspirators) well knowing all matters of fact in this indictment set forth, within the State and District of New Jersey, entered into and engaged in a conspiracy in restraint of the trade and commerce described in paragraphs 1 and 2 of this indictment, which said conspiracy has, among others, the following objects:

"To cause the trucking companies aforesaid to cease to compete with each other in interstate commerce as aforesaid;

"To cause the trucking companies aforesaid to cease to compete with each other in the rates charged by them for their services in transporting goods, wares and merchandise in interstate commerce as aforesaid;

"To cause said trucking companies by agreement to increase the rates now charged by them for such transportation and to adopt by agreement arbitrary unreasonable and non-competitive rates;

"To coerce, by violence and threats of violence, trucking companies to become parties to such agreement and to abide by the rates so fixed;

"To coerce shippers, by destruction and delay of merchandise offered for shipment, to avail themselves of the services of trucking companies charging such arbitrary, unreasonable and non-competitive rates.

"And as part of the said conspiracy and to accomplish the objects thereof, the defendants aforesaid have cause by-laws to be written and have attempted to organize an association known as Motor Freight Transportation Association and have summoned representatives of a large number of trucking companies to attend meetings conducted by the said conspirators and have themselves attended such meetings and have at such meetings, by threats of violence, urged and attempted to coerce representatives of trucking companies to become parties to the said conspiracy, have in fact secured the agreement of a number of trucking companies to become members of the said Motor Freight Transportation Association and to become parties to the conspiracy as aforesaid."

The second count charges the defendants with conspiracy to monopolize interstate commerce in the same manner as that set forth in the first count.

The offense of conspiracy to restrain and monopolize interstate commerce in violation of the Sherman Act is sufficiently described in the indictment. In a conspiracy case it is not necessary to set out in detail the evidence of the conspiracy. Nor is it necessary to describe the conspiracy with the same degree of particularity required in describing a substantive offense. *United States v. Rosenwasser,* 255 Fed. 233; *United States v. United States Brewers' Asso.,* 239 Fed. 163, 170; *United States v. King,* 229 Fed. 275; *United States v. Norris,* 255 Fed. 423; *Mark Yick Hee v. United States,* 223 Fed. 732.

The evidence was sufficient for submission to the jury and to warrant the jury in their finding.

The appellant contends that the prosecution was premature and instituted before any crime had been committed, because the defendants had not reached any final determination upon a plan which would be a conspiracy within the meaning of the antitrust laws. The defendant's contention is based chiefly upon the assumption that there could be no conspiracy to restrain trade unless and until the association had been completely formed, but the Government need not wait until the conspirators have effectuated an actual restraint of trade before it takes action. *United States v. Trenton Potteries Company,* et al., 273 U. S. 392. In this case the Supreme Court of the United States, on page 402, held, "then it was immaterial whether the agreements were ever actually carried out, whether the purpose of the conspiracy was accomplished in whole or in part, or whether an effort was made to carry the object of the conspiracy into effect."

The evidence is overwhelming that prior to any meeting, the defendants, Duffy and Mercer, had worked out a plan to restrain interstate commerce. The actions of the defendants constitute conspiracy to re-

strain and monopolize interstate commerce between Philadelphia and New York. The evidence clearly shows that the defendants had entered into a conspiracy to restrain and monopolize commerce, and that in pursuance of this conspiracy they held meetings and actually attempted to carry out the purpose of the conspiracy. The evidence was sufficient for the consideration of the jury and the jury were warranted in their verdict. The court below was justified in entering judgment on the verdict and the judgment is affirmed.

[¶ 55,014] Marjorie C. O'Brien, Plaintiff, v. Goldman Sachs Trading Corporation, Waddill Catchings, Walter E. Sachs, Arthur R. Sachs, Howard J. Sachs, Sidney Weinberg, Henry S. Bowers, individually and as copartners trading under the firm name and style of Goldman, Sachs & Co.

United States District Court, Southern District of New York. Decided September 29, 1932.

Where the complaint is framed in part with reference to the federal anti-trust laws and predicates liability upon an alleged violation of those laws, it is clear that the case arises "under the laws of the United States" within Sec. 28, Judicial Code, although the federal statute is not mentioned by name, and removal to a federal court from a state court is proper.

Where the damaged claimed is said to have resulted from alleged wrongful and illegal use of the corporation's funds in purchasing stocks and other property for the purpose of creating a monopoly in interstate and foreign commerce, a case is stated in which the effect or construction of the federal statute is brought into question.

Daniel F. Cohalan, Esq., (*Lawrence Berenson, Esq.,* of counsel) Attorney for Plaintiff. *Sullivan & Cromwell, Esqs.,* (*David W. Peck* and *Edward J. McGratty, Jr., Esqs.,* of counsel) Attorneys for Defendants.

On motion to remand.

MACK, C. J. Plaintiff, a citizen of Massachusetts and stockholder in Goldman Sachs Trading Corp., a Delaware corporation, instituted suit in the state court against that company and certain individual defendents, all citizens of New York, copartners in the firm of Goldman, Sachs & Co. and directors of defendant corporation.

Two petitions for removal were filed: one by defendant corporation, alleging that the suit involved a controversy wholly between citizens of different states within the meaning of the third clause of Jud. Code Sec. 28 (28 U. S. C. Sec. 71) the other by all of the defendants alleging that the suit arose under the laws of the United States within the meaning of the first clause of that section.

1. Under the second clause of Sec. 28 only non-residents are given the right to remove and all defendants that are served must join in the petition for removal. Hence an action against residents and nonresidents cannot be removed under this clause.

By invoking the third clause instead of the second, defendant to avert the necessity of joining its co-defendants in the petition for removal (see *Cochran v. Montgomery County,* 199 U. S. 260, 270 (1905). But unlike the first case of *O'Brien v. Goldman Sachs Trading Corp.* in which I denied a motion to remand (October 13, 1931) there is in the present suit concededly no separable controversy as to the corporate defendant. In such circumstances, clause three is inapplicable. Early decisions in this district and elsewhere, cited by defendant, can no longer be deemed authoritative in view of the later cases. *Bowles v. H. J. Heinz Co.,* 188 Fed. 937 (C. C. N. Y. 1911); *O'Neill v. Birdseye,* 244 Fed. 254 (S. D. N. Y. 1917) and cases there cited; *Casey v. Baker,* 212 Fed. 247, 255 (N. D. N. Y. 1914); *Blackburn v. Blackburn,* 142 Fed. 901 (C. C. E. D. Ark., 1906). These decisions establish that clause three is applicable only if there is a separable controversy. While the Supreme Court has not decided the question, its expressions are in accord with these cases. See *Chicago, Rock Island &c. Ry. v. Martin,* 178 U. S. 245, 247 (1900); *Cochran v. Montgomery County, supra.* The obsolescence of the earlier cases in this district is indicated, too, by a comparison of Judge Lacombe's decisions in *Garner v. Second*

Nat. Bank, 66 Fed. 369 (1895) and in *Boston Safe Deposit & Trust Co. v. Mackay*, 70 Fed. 801 (1895) with his opinion in *Bowles v. H. J. Heinz Co., supra.*

2. All defendants have joined in the other petition for removal. The question to be determined is whether under the first clause of Sec. 28 Jud. Code (28 U. S. C. Sec. 71), this is a suit "arising under the laws of the United States." One of the grounds of plaintiff's suit as set forth in the bill is that the individual defendants through the medium of the corporate defendant and pursuant to an unlawful scheme, the operation of which embraced several states of the United States and foreign countries, have violated laws against monopolies, causing damage to the corporation for which plaintiff seeks to compel them to reimburse it. Whether or not the bill in this respect states a valid ground for the relief sought, I need not determine on the motion to remand. The complaint obviously is framed in part with reference to the federal anti-trust acts and predicates liability upon an alleged violation of those laws. It is, in my judgment, clear on the authorities that such a suit arises "under the . . . laws of the United States." *General Investment Co. v. New York Central R. R.*, 271 U. S. 228 (1925); *Hand v. Kansas City S. Ry.*, unreported (Judge Coleman, S. D. N. Y., April 8, 1931); *Chalmers Chem. Co. v. Chadeloid Chem. Co.*, 175 Fed. 995 (C. C. S. D. W. Va. 1909); *Mannington v. Hocking Valley Ry.*, 183 Fed. 133, 140 (C. C. S. D. Ohio, 1910); *Dougherty v. Michigan Bell Telephone Co.*, 235 Mich. 416, 209 N. W. 200 (1926).

A case arises under the laws of the United States not only if a right expressly given by such a law is sought to be vindicated, but also if "the construction or effect" (*Joy v. St. Louis*, 201 U. S. 332, 340 (1906)) of such a law is necessarily involved in the plaintiff's claims as set out in her pleadings. It is quite true, as plaintiff contends, that she is asserting a common law right of the corporation defendant to recover from the individual co-defendants the damages suffered by it through their alleged wrongful, negligent, or unlawful acts and that this right is not based upon any federal statute. Defendants, however, point out that even though the complaint is grounded on the violation of a common law right, that violation consists in damaging the corporation, in part at least, by the alleged wrongful and illegal use of the corporation's funds in purchasing stocks and other property for the purpose of creating a monopoly in interstate and foreign commerce. The determination of whether or not the acts charged fall within the prohibition of the federal anti-trust statutes necessarily involves "the construction or effect" of those laws.

Plaintiff, however, points out that she nowhere mentions directly or indirectly a violation of the federal statutes, differentiating in that respect the second from the first suit between the same parties. This, however, is immaterial, inasmuch as it is unnecessary, in stating a cause of action, to allege that it comes within any specific statute or generally within the purview of federal law. It suffices, as a matter of pleading, to allege facts. If those facts state or apparently are intended to state the basis for a claim to recover, in which the effect or construction of the federal statute is brought into question, a case for removal under the first clause is presented.

Plaintiff urges further that she can maintain her bill on proof of violations of the common law and state statutes without regard to the federal anti-trust laws. This, too, while true, is likewise immaterial. Indeed, at the trial, plaintiff may rely solely upon the other alleged wrongs and not attempt to prove any use of the funds for monopolistic purposes, whether contrary to federal or state laws.

The test, however, is not what plaintiff intends to or does prove but what facts are charged in the bill as part of the ground of complaint. If plaintiff in this bill had limited her complaint to damages caused by defendants' alleged monopolistic activities violative of common law and state statutes and had disclaimed those resulting from a violation of a federal statute, an entirely different situation would be presented. Such, however, is not the case as made out by this bill. Assuming without deciding that she has stated a good cause of action in this respect, she clearly would be entitled, though not compelled, to prove activities in violation of the federal law.

Joy v. St. Louis, supra, and other cases cited by plaintiff are clearly distinguishable. They involve the well settled principle that the case as stated by the plaintiff's pleadings, regardless of any issue which might be raised in defense, determines whether or not the suit arises under the laws of the United States. Cf. also *American Well Works Co. v. Layne*, 241 U. S. 257 (1916). Motion denied.

[¶ 55,015] United States v. Radio Corporation of America et al.

In the District Court of the United States for the District of Delaware. Filed November 21, 1932.

Consent decree ordering divestiture of stock of the Radio Corporation of America by other defendants, enjoining defendants from enforcing the exclusive provisions of their radio patent cross licensing agreements and forbidding agreements for the division of territory.

Consent Decree

This cause coming on to be heard this 21st day of November, 1932, and the several defendants having accepted service of process and having appeared and filed their answers to the Petition and to the Amended and Supplemental Petition herein, which latter has superseded the original Petition and is hereinafter referred to as the Petition, and the cause having heretofore this day been dismissed as to the General Motors Corporation, General Motors Radio Corporation, American Telephone and Telegraph Company and Western Electric Company, Inc.;

And the petitioner and the remaining defendants (hereinafter in this decree referred to as the defendants) having filed a stipulation with the Clerk of the Court wherein and whereby the defendants consent to the making and entering of this decree;

And the petitioner by its counsel having represented to the Court that this decree will provide suitable relief concerning the matters which the petitioner charges in said Petition, and having requested that this decree be made and entered;

And it appearing that by reason of the consents of the defendants to this decree and the acceptance of the same by the petitioner it is unnecessary to proceed with the trial of the cause or to take testimony therein or that any adjudication be made by the Court of the issues presented by the pleadings herein, other than those hereinafter specially reserved in Section VI hereof;

Now, therefore, without taking any testimony or evidence and without making any adjudication, it is, upon and in accordance with such stipulation and consent, hereby ordered and decreed as follows:

I.

The Court has jurisdiction of the subject matter hereof and of all the parties hereto and has full power and authority to enter this decree and the allegations of the Petition state a cause of action against the defendants under the provisions of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" and Acts amendatory thereof and supplemental or additional thereto, known as the Federal Anti-Trust Laws.

II.

General Electric Company and Westinghouse Electric & Manufacturing Company, respectively, shall divest themselves of the holdings of themselves and their respective subsidiaries of shares of stock of the Radio Corporation of America. This shall be done as follows:

General Electric Company shall within three months from the date hereof divest itself of substantially one-half of all of the holdings of itself and its subsidiaries of the shares of common stock of Radio Corporation of America by distributing such shares ratably to its own common stockholders, or causing them to be so distributed.

The balance of such common stock and the shares of preferred stock of Radio Corporation of America held by General Electric Company and its subsidiaries shall be disposed of within three years from the date hereof, by distributing such shares ratably to its own common stockholders, or causing them to be so distributed, or otherwise disposed of.

Westinghouse Electric & Manufacturing Company shall within three months from the date hereof divest itself of substantially one-half of all of the holdings of itself and its subsidiaries of the shares of common stock of Radio Corporation of America, by distributing such shares ratably to its own stockholders, or causing them to be so distributed.

The balance of such common stock and the shares of preferred stock of Radio Corporation of America held by Westinghouse Electric & Manufacturing Company and its subsidiaries shall be disposed of within three years from the date hereof by distributing such shares ratably to the shareholders of Westinghouse Electric & Manufacturing Company, or causing them to be so distributed, or otherwise disposed of.

The distribution of shares of Radio Corporation of America to shareholders of General Electric Company and of Westinghouse Electric & Manufacturing Company, herein provided for, shall be without any restriction on the full rights of ownership of the several distributees, including the right to dispose of the same as they see fit.

In any disposition of shares of common stock hereby required to be made by General Electric Company and Westinghouse Electric & Manufacturing Company, or its or their subsidiaries (other than for the

purpose of distribution to stockholders), they shall not knowingly sell or transfer to any one interest shares of such common stock to an aggregate in excess of 150,000 shares of the present common stock, or stock which at the time may be equivalent to 150,000 shares of the present common stock in respect to the then existing voting rights.

Pending the disposition of such stock, General Electric Company and Westinghouse Electric & Manufacturing Company and their respective subsidiaries (other than G. E. Employees Securities Corporation) shall be enjoined from exercising any voting rights with respect to such stock, except that they shall from time to time, as requested by the executive committee of the board of directors of Radio Corporation of America, as such executive committee may then be constituted, give to it or to such person or persons as such executive committee may designate, proxies with power of substitution, to vote such stock for the election of directors of Radio Corporation of America or for the transaction of ordinary business at any annual or special meeting of stockholders; and as to all other matters as to which the stockholders' action is required, such holders may, at their election, give proxies to such executive committee or, in case any of them fails to do so within ten days before the date set for any such meeting, it shall give such proxies as may be directed by an order of this Court on the application of the defendant, Radio Corporation of America, or the holder of such stock.

General Electric Company and Westinghouse Electric & Manufacturing Company shall report to the Court at the ends of the aforesaid periods of three months and three years, respectively, with regard to their compliance with the foregoing provisions of this Section II.

Except as aforesaid, General Electric Company and Westinghouse Electric & Manufacturing Company, and each of them, are enjoined after the expiration of such period of three months from acquiring or holding, directly or indirectly, any shares of stock of Radio Corporation of America or any of its subsidiaries, present or future; provided, however, that nothing herein contained shall be construed to prevent G. E. Employees Securities Corporation from continuing to hold, and from exercising all rights with respect to, not more than 50,000 shares of A Preferred and 10,000 shares of B Preferred stock of Radio Corporation of America now held by it.

III.

General Electric Company and Westinghouse Electric & Manufacturing Company, respectively, shall cause all of their officers, directors, employees or agents, who are now members of the board of directors, or other boards or committees of Radio Corporation of America, or of any of its subsidiaries, to resign, within ten days from the date hereof, from such boards and committees, and are hereby enjoined and restrained from thereafter permitting any such officer, director, employee or agent to act as a member of any such board or committee; and Radio Corporation of America and its subsidiaries are likewise enjoined and restrained from thereafter permitting any officer, director, employee or agent of General Electric Company or Westinghouse Electric & Manufacturing Company to become or to act as a member of any such board or committee; provided, however, that for a period of not longer than five months from the date hereof, Owen D. Young and Andrew W. Robertson may continue to serve, at the pleasure of the Radio Corporation of America, as members of the boards and committees of Radio Corporation of America and its subsidiaries, and provided, further, that the Advisory Council of National Broadcasting Company, Inc., so long as its functions shall continue to be merely advisory, shall not be deemed to be a board or committee within the meaning of the foregoing provision

IV.

The defendants are hereby enjoined and restrained from recognizing as exclusive or asserting to be exclusive any license for the enjoyment of patents or patent rights in the following agreements, referred to in the Petition:

1. The Agreement between the Radio Corporation of America and the General Electric Company, dated November 20, 1919, and referred to as Agreement A;

2. The Agreement between General Electric Company and American Telephone and Telegraph Company, dated July 1, 1920, and referred to as Agreement B;

3. The Agreement between the Radio Corporation of America and United Fruit Company, dated March 7, 1921;

4. The Agreement between the Westinghouse Electric & Manufacturing Company and The International Radio Telegraph Company, dated June 29, 1921, and referred to as Agreement D;

5. The Agreement between the General Electric Company, Radio Corporation of America and Westinghouse Electric & Manufacturing Company, dated June 30, 1921, and referred to as Agreement E:

6. The Agreement between General Electric Company and American Telephone and Telegraph Company, dated July 1, 1926, and referred to as Modified Agreement B;

7. The Agreement between General Electric Company, Radio Corporation of America and Westinghouse Electric & Manufacturing Company, dated June 11, 1929, and referred to as Agreement L;

8. The Agreement between General Electric Company, Radio Corporation of America and Westinghouse Electric & Manufacturing Company, dated January 1, 1930, and referred to as Agreement M;

and are likewise enjoined and restrained from recognizing or asserting the continued existence or the continued obligation of any provision of any of said agreements restricting or limiting the right of a party thereto freely to engage in such business or activities as it may desire or to make such use of its patents or patent rights as it may desire.

V.

The defendants are and each of them is further enjoined and restrained from making or entering into any combination, agreement, understanding or joint endeavor between them or any two or more of them (except between any one defendant and its subsidiaries, or between subsidiaries of any one defendant) or between them or any one of them and third persons, in restraint of interstate or foreign commerce of the United States in violation of the Anti-Trust Laws of the United States by:

(a) limiting or restricting the freedom of any defendant to grant licenses under its own patents or patent rights in the fields of radio purposes as defined in the Agreement A-1 attached to the stipulation consenting to this decree, or in the application in fields other than of radio purposes, of radio tubes or tubes having the functional characteristics of radio tubes or of other radio devices or circuits;

(b) limiting or restricting the freedom of any defendant or any party to such combination, agreement, understanding or joint endeavor to engage in trade and commerce in said fields of radio purposes and in said applications either by exchange of exclusive licenses under patents, by agreements restricting or burdening the right of an owner of a patent or patent right to enjoy the same or to grant licenses thereunder, by agreements for division of fields or territory, or by other similar means or devices;

provided, however, that nothing herein contained shall be deemed or construed to prevent any defendant from acquiring or assigning or agreeing to acquire or assign patents or other property or granting or agreeing to grant, or continuing to act under exclusive rights thereunder or in connection therewith, or taking any other action, if not done to restrict liberty of action as part of a plan or purpose to restrain interstate or foreign commerce of the United States as prohibited by the Anti-Trust Laws of the United States, it being recognized that patents and patent rights may be bought, sold and transferred as may other kinds of property and subject only to like limitations.

VI.

The issues presented by the Petition and the amendment thereto this day filed, with reference to contracts and arrangements and understandings between the defendants or any of them and foreign companies and governments, are specially reserved for trial and determination if that becomes necessary, for a period of two and one-half years from the date hereof, such period being allowed for the reason stated in the stipulation consenting to this decree. Said contracts, arrangements and understandings now existing are not affected by and do not come within the provisions of the previous Sections of this decree. The defendants affected hereby shall at the end of one year from the date hereof render to the Attorney General a written report as to what has been and what is being done with reference to the matters covered by the foregoing portion of this Section VI, and on the request of the Attorney General shall at any time irrespective of the rendering of said report give to him full information respecting such matters. If prior to the expiration of said period of two and one-half years the defendants have succeeded in securing modifications or changes of said contracts, arrangements and understandings, to meet the objections of the petitioner, the cause shall be dismissed as to the issues so reserved, but otherwise upon the expiration of said period (unless it be shown to the Court at that time that defendants have used due diligence to secure the modification or change of said contracts, arrangements or understandings and that no reason of public interest exists why such trial should not be further continued, in which case the trial may be postponed to such time as the Court deems advisable) the cause shall forthwith be placed upon the trial calendar next following and shall be set for trial on the reserved issues at the earliest convenience of the Court. If said issues are to be tried the defendants may file their answers to the amendment to the Petition on or before the expiration of said period, but a failure to do so shall not prevent the cause from being placed on the calendar and set for trial as hereinbefore

provided. At any time after the said one year from the date hereof the petitioner may, on notice to the defendants affected thereby, apply to the Court to have said period of two and one-half years shortened upon showing to the satisfaction of the Court that the defendants have not been diligent in dealing with said foreign contracts, arrangements and understandings by negotiation or otherwise, or that there appears no likelihood of their being satisfactorily adjusted.

VII.

The term subsidiary as used in this decree means a corporation the majority of the voting stock of which is owned by any of the named defendants.

VIII.

Jurisdiction is hereby expressly reserved for the purpose of enforcing or modifying this decree on application of any of the parties hereto. Jurisdiction is further reserved to permit any of the defendants, after the expiration of three years from the date hereof, to apply to the Court for permission to acquire stock in any other of the defendant corporations, or their subsidiaries, which permission may be granted upon proof to the satisfaction of the Court that such acquisition of stock will not tend to defeat the purpose of this decree or violate the anti-trust laws or operate in any manner otherwise inimical to the public interest.

(Sgd.) John P. Nields,
Judge

[¶ 55,016] The New York Central Securities Corporation v. The United States of America, The Interstate Commerce Commission, The New York Central Railroad Company, et al.

United States Supreme Court, November 7, 1932.

The Interstate Commerce Commission has not exceeded its authority by authorizing one railroad to acquire control, by lease, of other railroad systems, or by permitting the lessee to assume certain obligations of the lessors, under Section 5 (2) and 20a, Interstate Commerce Act.

The fact that the railroads' lines were parallel and competing "cannot be deemed to affect the validity of the authority conferred upon the [Interstate Commerce] Commission. The Congress, which had power to impose prohibition in the regulation of interstate commerce ...., had equal power to foster that commerce by removing prohibitions and by permitting acquisition of control where that was found to be an aid in the accomplishment of the purposes in view in the enactment of Transportation Act, 1920." Carriers affected by orders of the Interstate Commerce Commission are "relieved from the operation of the 'antitrust laws'" and "of all other restraints or prohibitions by law, State or Federal," so far as necessary to comply with orders of the Commission.

Mr. Chief Justice Hughes delivered the opinion of the Court.

On July 2, 1929, the Interstate Commerce Commission made an order authorizing the New York Central Railroad Company to acquire control, by lease, of the railroad systems of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company (known as the "Big Four") and of the Michigan Central Railroad Company. By order of December 2, 1929, the Commission permitted the assumption by the lessee of obligation and liability in respect of certain securities of the lessors. In this suit, a minority stockholder of each of the lessors, and of the lessee, sought to set aside these orders upon the ground that the Commission had exceeded its authority. The District Court, of three judges, upon pleadings and proofs, and having filed findings of fact and conclusions of lap, denied the motion for injunction and dismissed the petition upon the merits. 54 F. (2d) 122. The petitioner appeals. U. S. C., Tit. 28, secs. 47, 345.

The District Court, against objection, sustained its jurisdiction. The court took the view that the petitioner, as a minority stockholder of the lessors, alleged an injury not merely derivative, but independent, being a member of a class created by the leasing agreements. 54 F. (2d) at

p. 126; compare *Pittsburgh & West Virginia Railway Co. v. United States,* 281 U. S. 479, 487. While appellees submit that there are certain contentions which appellant may not properly raise, the correctness of the decision as to jurisdiction is conceded.

The authority of the Commission to make the orders is rested upon section 5, subdivision 2, and section 20a of the Interstate Commerce Act. U. S. C., Tit. 49.[1] After full hearing, and upon consideration of the purpose of the proposals, of the physical, traffic and intercorporate relationships, of investment, income and dividends, of the provisions of the proposed leases, of the benefits deemed to accrue to the public, of the particular situation of certain short lines, and of the objections raised by minority stockholders, the Commission found that the "considerations and terms and conditions" set forth in the proposed leases were "just and reasonable" and that the contemplated acquisition would be "in the public interest." The authorization was upon the express condition that before the leases became effective, the New York Central should offer to acquire specified short lines upon terms and conditions stated. Report, January 14, 1929, 150 I. C. C. 278, 321, 322. Upon proof of compliance with this condition, and upon further conditions, the acquisition was approved. Supplemental Report and Order of July 2, 1929, 154 I. C. C. 489, 494, 495. One of the conditions was that the New York Central and the "Big Four" should not be relieved from compliance with provisions of law applicable to any assumption of obligations and liabilities by virtue of the execution of the leases. On later application for authority in that respect, the Commission found that the proposed assumption by the carriers was "for a lawful object within their corporate purposes, and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by them of service to the public as common carriers, and which will not impair their ability to perform that service" and was "reasonably necessary and appropriate for such purpose." Report and Order of December 2, 1929, 158 I. C. C. 317, 323, 328.

Appellant contends (a) that as the New York Central had already acquired control of the "Big Four" and Michigan Central by stock ownership, the Commission could not authorize acquisition of control by lease; (b) that the proposed acquisition involved a "consolidation" which could not be authorized under section 5 (2); (c) that the main lines of the lessors are parallel and competing with those of the lessee so that competition would be suppressed, and that the attempt to confer authority upon the Commission to approve the acquisition of control was an unconstitutional delegation of power; (d) that the proposed leases transgressed limitations imposed by state authority; and (e) that the action of the Commission was unsupported by evidence and was arbitrary and confiscatory as to the appellant. The questions presented thus relate, in part, to the construction and validity of the statute and, in part, to the present application of the statute in view of the particular terms of the leases.

First. The Commission stated that, while the properties of the New York Central, the "Big Four" and the Michigan Central

[1] The pertinent provisions of these sections are as follows:

"Sec. 5 (2): *Acquisition of control of one carrier by another.*—Whenever the commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this chapter, that the acquisition, to the extent indicated by the commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the commission to be just and reasonable in the premises. "

"Sec. 5 (8): *Carriers affected relieved from operation of antitrust laws, etc.*—The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order are relieved from the operation of the 'antitrust laws,' as designated in section 12 of Title 15, Commerce and Trade, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section. . . "

"Sec. 20a (2): *Issuance of securities; assumption of obligations; authorization.*—It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that, such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose. . . ."

are operated as separate units, the companies are under common control. This control has existed for many years. The Commission found that the New York Central held upwards of 99 per cent. of the stock of the Michigan Central and upwards of 91 per cent. and 84 per cent., respectively, of the common and preferred stocks of the "Big Four." The authority to lease was sought in the view that it would facilitate revision of routes, and physical improvements needed for new routes, and would make possible important economies in operation which the Commission set forth in detail. Section 5 (2) authorizes the acquisition of control "to the extent indicated by the Commission." The question is not of the extent of the control, provided it stops short of "consolidation," but of the public interest in having the control maintained. The public interest is served by economy and efficiency in operation. If the expected advantages are inadequately secured by stock ownership and would be better secured by lease, the statute affords no basis for the contention that the latter may not be authorized although the former exists. The fact that one precedes the other cannot be regarded as determinative if the desired coordination is not otherwise obtainable. The disjunctive phrasing of the statute "either under a lease or by the purchase of stock" must be read in the light of its obvious purpose and cannot be taken to mean that one method must be exclusive of the other.

The statute refers to "control" in contradistinction to "consolidation." Subdivision (2) itself indicates that control by purchase of stock or by lease is not regarded as a "consolidation" as the word is there used. Its use is in the restricted sense of the formation of a "single system for ownership" as well as for "operation." This distinction between control where separate ownership continues, and consolidation where a single ownership is created, is a familiar one in the law. *Railroad Company v. Georgia,* 98 U. S. 359, 363. That the Congress had this distinction in view appears from the other provisions of section 5. Thus, subdivision (6) permits carriers "to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation." This may be effected under stated conditions which contemplate the ownership by one corporation of the consolidated properties and the issue of securities upon that basis. The view that the proposed acquisition does not involve a "consolidation" contrary to the limitation in subdivision (2) is in accord with the long-continued construction of the statute by the Interstate Commerce Commission. *Control of El Paso & S. W. System,* 90 I. C. C. 732; *Control of Alabama & Vicksburg, etc.,* 111 I. C. C. 161, 169; *Lease of Pan Handle,* 72 I. C. C. 128, 133; *New York Central Leases,* 72 I. C. C. 243; *Control of Central Pacific,* 76 I. C. C. 508; *Nickel Plate Unification,* 105 I. C. C. 425. And this administrative construction would be persuasive if the statute could be regarded as ambiguous. *United States v. Jackson,* 280 U. S. 183, 193; *Louisville & Nashville R. R. Co. v. United States,* 282 U. S. 740, 757. Whether the particular authorization, in the light of the situation of these carriers, would interfere with plans of the Commission for consolidation was an administrative question with which the Commission was competent to deal.

Appellant insists that the delegation of authority to the Commission is invalid because the stated criterion is uncertain. That criterion is the "public interest." It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary. Going forward from a policy mainly directed to the prevention of abuses, particularly those arising from excessive or discriminatory rates, Transportation Act, 1920, was designed better to assure adequacy in transportation service. This Court, in *New England Divisions Case,* 261 U. S. 184, 189, 190, adverted to that purpose, which was found to be expressed in unequivocal language: "to attain it, new rights, new obligations, new machinery, were created." The Court directed attention to various provisions having this effect, and to the criteria which the statute had established in referring to "the transportation needs of the public," "the necessity of enlarging transportation facilities," and the measures which would "best promote the service in the interest of the public and the commerce of the people." *Id.* p. 189, *note.* See, also, *Texas & Pacific Rwy. Co. v. Gulf, Colorado & Santa Fe Rwy. Co.,* 270 U. S. 266, 277. The provisions now before us were among the additions made by Transportation Act, 1920, and the term "public interest" as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authortiy conferred. So far as constitutional delegation of authority is concerned, the question is not essentially different from that which is raised by provisions with respect to reason-

ableness of rate, to discrimination, and to the issue of certificates of public convenience and necessity. *Intermountain Rate Cases*, 234 U. S. 476, 486; *Railroad Commission v. Southern Pacific Company*, 264 U. S. 331, 343, 344; *Avent v. United States*, 266 U. S. 127, 130; *Colorado v. United States*, 271 U. S. 153, 163; *Chesapeake & Ohio Rwy. Co. v. United States*, 283 U. S. 35, 42.

The fact that the carriers' lines are parallel and competing cannot be deemed to affect the validity of the authority conferred upon the Commission. The Congress, which had power to impose prohibitions in the regulation of interstate commerce (*Northern Securities Company v. United States*, 193 U. S. 197), had equal power to foster that commerce by removing prohibitions and by permitting acquisition of control where that was found to be an aid in the accomplishment of the purposes in view in the enactment of the Transportation Act, 1920. See *New York v. United States*, 257 U. S. 591, 601; *Colorado v. United States*, 271 U. S. 153, 165. Exercising this paramount power, the Congress expressly, provided in subdivision (8) of section 5, which has direct reference to subdivision (2), that "the carriers affected by any order made under the foregoing provisions of this section" are "relieved from the operation of the 'antitrust laws'," and "of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section." The question whether the acquisition of control in the case of competing carriers will aid in preventing an injurious waste and in securing more efficient transportation service is thus committed to the judgment of the administrative agency upon the facts developed in the particular case.

Appellant contends that the provision of subdivision (8) of section 5, referring to "restraints or prohibitions by law, State or Federal" should be construed as limited to those restrictions which are of the same general character as the "antitrust laws" and not as applying to specific limitations imposed by state laws upon corporate powers with respect to the making of leases. Appellant invokes the laws of the States of incorporation in relation to leases of competing lines, and especially the laws of Ohio upon that subject and with respect to minimum rentals and security for payment and the preservation of property. It is sufficient for the present purpose to say that this contention cannot, in any event, avail the appellant. The question of the right of a State of incorporation, in a direct proceeding, to challenge the leases as *ultra vires* is not before us. See *Cleveland, Cincinnati, Chicago & St. Louis Rwy. Co. v. United States*, 275 U. S. 404, 414. The order of the Commission under section 5 (2) is permissive, not mandatory. There is no warrant for concluding that the Congress intended to fetter the exercise of the Commission's authority by requiring that the Commission before making its order must determine whether the acquisition is within the corporate powers of the carrier under state laws. The Commission has given its approval in the exercise of the authority conferred and the question of corporate powers cannot properly be raised in this suit to set aside the Commission's order. *Cleveland, Cincinnati, Chicago & St. Louis Rwy. Co., supra; Claiborne-Annapolis Ferry Co. v. United States*, 285 U. S. 382, 391.

Nor is there ground for a different conclusion with respect to the Commission's order under section 20a, authorizing the assumption of obligations. Appellant points to the requirement in that section that the Commission shall make such an order only if it finds that the assumption by the carrier is "for some lawful object within its corporate purposes." But that this provision does not refer to state limitations upon corporate powers, but rather to the general field of corporate purposes, sufficiently appears from the context and from the legislative history of the clause. In creating federal supervision of the issue of securities by interstate carriers, the Congress, so far from making it necessary for the Commission to determine whether there had been compliance with state requirements, expressly provided in subdivision (7) of section 20a that the jurisdiction of the Commission should be "exclusive and plenary" and that approval, other than as specified in that section, should not be necessary.[2]

[2] It appears that in the course of the consideration of the measure which ultimately became section 20a (2) the words "corporate purposes" were substituted for "corporate powers." 54 F. (2d) at p. 130, *note*. It should also be noted that, in connection with the provision which became subdivision (7) of section 20a, an amendment was offered in the House of Representatives to strike out that paragraph and to provide that no security should be issued under the Act "except in the manner and form prescribed by the laws of the state which created such common carrier, and that this section is not to be construed as a limitation of state authority, but only as cumulative thereof." The amendment was defeated. Cong. Rec., 66th Cong., 1st sess., vol. 58, pp. 8673, 8676. Mr. Esch, in the report of the measure to the House of Representatives, stated: "Without federal control, the carriers would have to be subjected to the diversified requirements of the several states. . . . The enactment of the pending bill will put the control over stock and bond issues exclusively in the hands of the Federal Government and will result in uniformity and greater promptness of action." Cong. Rec., 1st sess., House Report No. 456, p. 21.

Another objection, urged against the order under section 5 (2), is that the Commission had no power to make the acquisition of certain short lines a condition of its approval of the leases. The condition is asserted to be a burdensome one, opposed by the New York Central when it made its application and involving the building up of an enlarged system. But section 5 (2) expressly authorized the Commission to impose conditions, and its action in so doing was not limited to conditions proposed or favored by the carriers. The Commission stated the facts as to each of the short lines (150 I. C. C., pp. 294-311) and the Commission found that those lines to which the condition relates were complementary to the New York Central System and that their preservation was "required by public convenience and necessity and for the maintenance of an adequate transportation system." *Id.*, p. 322. It cannot be said that the consideration of the situation of these short lines was not appropriate to the determination which the Commission was called upon to make or that the condition was arbitrarily imposed.

Second. Questions as to the alleged breach by the New York Central, as majority stockholder of the Michigan Central, of its fiduciary duty to the appellant as minority stockholder, in the light of the terms of the indenture under which the voted shares had been pledged to secure bonds, are not properly raised in this suit under the Urgent Deficiencies Act (U. S. C., Tit. 28, sec. 47) and hence are not open to review on this appeal. *Pittsburgh & West Virginia Railway Co. v. United States,* 281 U. S. 479, 488.

The remaining questions with respect to the adequacy of the rentals fixed, the other terms of the proposed leases, and the public interests involved, relate to the propriety of the action of the Commission in the exercise of its authority under the statute as construed. As to these matters the parties were fully heard, pertinent evidence was received and considered, and we find no basis for a contention that the order of the Commission was not adequately supported or had any confiscatory effect. *Virginian Railway Co. v. United States,* 272 U. S. 658, 663; *Georgia Commission v. United States,* 283 U. S. 765, 775.

Decree affirmed.

[¶ 55,017] Gibson Canning Co. v. American Can Co.

U. S. District Court, Eastern District of Illinois, September 26, 1932.

Declaration based upon a violation of the Clayton Act does not need to allege that the acts complained of are not within the exceptions contained in such act.

LINDLEY, District Judge. This is a demurrer to plaintiff's declaration upon the statute copied in the footnote,[1] upon the ground that the declaration is insufficient in that it does not negative the proviso of the statute. It is insisted that exceptions and provisos contained in the same section as the enacting provisions must be negatived in the declaration.

It has been asserted by reputable authority that exceptions and provisions do not stand upon the same basis. I shall not attempt to determine whether such is a correct statement of the law, but shall base my decision upon the assumption that they are of the same character, so far as pleading is concerned.

The precise question involved has been before the federal courts at various times. Thus, in an action to recover a penalty under the Safety Appliance Act (45 USCA § 1 et seq.), the United States Circuit Court of Appeals for the Eighth Circuit in *U. S. v. Denver & R. G. R. Co.,* 163 F. 519, said: "The defendant makes several objections to

[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." S. Ann. Code, title 15, § 13.

the complaint. The first of these is that the plaintiff does not negative the matter of the exception created by the proviso to section 6 of the act of March 2, 1893, as amended by the act of April 1, 1896 [45 USCA § 6], which gives the right of action for the penalty. This objection must fail, because it is opposed to the settled rule that an exception created by a proviso or other distinct or substantive clause, whether in the same section or elsewhere, is defensive, and need not be negatived by one suing under the general clause."

In *Jelke v. United States,* 255 F. 264 at page 279, in discussing a similar situation, the Circuit Court of Appeals, Seventh Circuit, used this language: "The failure of the indictment to negative the exception found in section 16 of the Oleomargarine Act [26 USCA § 554], does not subject the indictment to demurrer. The correct rule is laid down in *United States v. Denver & R. G. R. Co.,* 163 F. 519, 520, 90 C. C. A. 329, 330. * * * Indictments charging violation of the Oleomargarine Act but which did not negative any of the exceptions found in the act have been sustained."

The basis for such decisions is to be found in the language of the opinion of Justice Holmes in *Schlemmer v. Buffalo, R & P. R. Co.,* 205 U. S. 1, 8, 27, S. Ct. 407, 408, 51 L. Ed. 681, as follows: "The word 'provided' is used in our legislation for many other purposes beside that of expressing a condition. The only condition expressed by this clause is that four-wheeled cars shall be excepted from the requirements of the act. In substance it merely creates an exception, which has been said to be the general purpose of such clauses. *Interstate Commerce Commission v. Baird,* 194 U. S. 25, 36, 37, 48 L. Ed. 860, 865, 866, 24 S. Ct. 563. 'The general rule of law is, that a proviso carves special exceptions only out of the body of the act; and those who set up any such exception must establish it,' etc. *Ryan v. Carter,* 93 U. S. 78, 83, 23 L. Ed. 807, 809; *United States v. Dickson,* 15 Pet. 141, 165, 10 L. Ed. 689, 698. The rule applied to construction is applied equally to the burden of proof in a case like this. *United States v. Cook,* 17 Wall. 168, 21 L. Ed. 538; *Com. v. Hart,* 11 Cush. [Mass.] 130, 134."

In *U. S. v. Cook,* 17 Wall. 168, 176, 21 L. Ed. 538, the court said: "Both branches of the rule are correctly stated in the case of *Steel v. Smith,* 1 B. & Ald. 93, 99, 106 Reprint 35, which was a suit for a penalty, and may perhaps be regarded as the leading case upon the subject. Separate opinions were given by the judges, but they were unanimous in the conclusion, which is stated as follows by the reported: 'Where an act of Parliament in the enacting clause creates an offense and gives a penalty, and in the same section there follows a proviso containing an exemption which is not incorporated in the enacting clause by any words of reference, it is not necessary for the plaintiff in suing for the penalty to negative such proviso in his declaration.' All of the judges concurred in that view, and Bayley, J., remarked that where there is an exception so incorporated with the enacting clause that the one cannot be read without the other, there the exception must be negatived."

Following this doctrine, and applying it to specific cases are *Grand Trunk Ry. Co. v. U. S.* 229 F. 116 (C. C. A. 7); *N. Y. Cent. & H. R. Co. v. U. S.,* 165 F. 833 (C. C. A. 1); *U. S. v. Great Northern Ry. Co.,* 220 F. 630 (C. C. A. 8); *Wallace v. U. S.,* 243 F. 300 (C. C. A. 7); *Holbrook, Cabot & Rollins Corp. v. N. Y.* (D. C.) 277 F. 840; *Javierre v. Central Altagracia,* 217 U. S. 502, 30 S. Ct. 598, 54 L. Ed. 859; *U. S. v. Trinity, etc., Ry. Co.* (C. C. A.) 211 F. 448, 453; *Ryan v. Carter,* 93 U. S. 78, 23 L. Ed. 807; *U. S. v. Dickson,* 15 Pet. 141, 10 L. Ed. 689; *Basham Co. v. Lucas* (D. C.) 21 F. (2d) 550; *B. & O. R. R. Co. v. U. S.* (C. C. A.) 242 F. 1; *Ledbetter v. U. S.,* 170 U. S. 606, 18 S. Ct. 774, 42 L. Ed. 1162; *Joplin Merc. Co. v. U. S.* (C. C. A.) 213 F. 926, Ann. Cas. 1916C, 470; *U. S. v. Atl. Coast Line* (D. C.) 153 F. 918.

In *Smith et al. v. United States* (C. C. A.) 157 F. 721, 726, the court of which Justice Van Devanter was then a member used this language: "It is further objected that the indictment was insufficient because it did not exclude the accused from the operation of the exception found in the thirteenth amendment. It is said that the failure to aver that John Reed was not to be subjected to involuntary servitude as a punishment for a crime is fatal to the indictment. This also is untenable. The ingredients of the offense were susceptible of accurate and clear description without regard to the exception; and they were so described. We cannot conceiv of an unlawful and felonious conspiracy to deprive a convict sentenced to hard labor in the penitentiary of his constitutional right of freedom from involuntary servitude. The exception in question is defensive in its character, and, if the defendants fell within its protection, it was an easy matter for them to show it, and it was their duty to do so."

In *American Can Co. v. Ladoga Canning Co.,* 44 F. (2d) 763, 768, the Circuit Court of Appeals for the Seventh Circuit, in dealing with a case similar to the one now before the court and discussing the burden of proof, said: "In disposing of this phase of the question, it might be added that the burden was on the defendant to establish its

justification in view of plaintiff's showing that a price discrimination was given to Van Camp."

In view of the fact that the Conformity Act provides that the practice, pleadings, forms, and modes of proceeding in civil cases shall conform as near as may be to those existing in courts of record of the state within which the district court is held (U. S. Code Annotated, title 28, § 724), the assertion is made that, under the forms of pleadings and practice recognized in Illinois, provisos such as those now under consideration must be negatived. It should be observed that the language of the act is that conformity must be "as near as may." In other words, the section left to the federal courts "some degree of discretion in conforming entirely to the state procedure" and to reject, as Congress doubtless expected they would do, "any such subordinate provision in the state procedure, as would unwisely encumber the administration of the law, and tend to defeat the ends of justice in their tribunals." *Manitowoc Malting Co. v. Feuchtwanger* (D. C.) 196 F. 506; *Hills & Co. v. Hoover,* 200 U. S. 329, 31 S. Ct. 402, 55 L. Ed. 485, Ann. Cas. 1912C, 562; *Sligo Furnace Co. v. Dalton* (C. C. A.) 255 F. 532.

The Supreme Court has held that it is not required by this section to follow a rule of practice of the state which directly conflicts with a well-settled rule prevailing in in federal courts. *Mexican Cent. R. Co. v. Pinkney,* 149 U. S. 194, 13 S. Ct. 859, 37 L. Ed. 699. Thus it has been held for many years that whatever may be the rule in the state court as to the necessity of negativing contributory negligence in actions brought for personal injuries the federal courts have established firmly the rule that contributory negligence is a matter of defense. *Central Vermont R. R. Co. v. White,* 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252.

The present action is largely penal in character and is grounded upon an act of Congress creating same. It is thus clearly within the decisions heretofore cited, wherein the federal court determined for itself the essentials of pleading at common law an action based upon a federal statute.

Furthermore, upon careful analysis, I am of the opinion that the law of Illinois upon this subject as announced in the leading case of *Great Western R. R. Co. v. Hanks,* 36 Ill. 281, is not in conflict with the rules of the federal court as stated herein. I conclude therefore that under the law as established in the federal courts generally it is not necessary to negative such a proviso as is contained in the statute sued upon. Therefore the demurrer is overruled.

[¶ 55,018] United States of America v. Fox West Coast Theatres, Fox Film Corporation, Metro-Goldwyn-Mayer Distributing Corporation, Paramount Publix Corporation, United Artists Corporation, Vitagraph Inc. and First National Pictures Distributing Corporation.

U. S. District Court, Southern District of California. Decree dated November 16, 1932.

Decree entered enjoining the defendants from the use of certain alleged unfair discriminations in the method of zoning theatres for exhibition of motion pictures but not prohibiting the use of any reasonable method of classification.

Final Decree

United States of America filed its petition herein on November 16, 1932, and each of the defendants having duly appeared by their respective counsel, the United States of America by Samuel W. McNabb, United States Attorney for the Southern District of California, Central Division, moved the Court for an injunction as prayed in the petition and each of the defendants consented to the entry of this decree without contest and before any testimony whatever had been taken.

Wherefore, it is ordered, adjudged and decreed that:

I. The term "affiliated exhibitors" as used herein shall include persons, firms, partnerships or corporations which are engaged in the exhibition of motion pictures at theatres which are owned, operated or controlled directly or indirectly by any producer or distributor of motion pictures.

II. The term "unaffiliated exhibitors" as used herein shall include persons, firms, partnerships or corporations which are engaged in the exhibition of motion pictures at theatres which are not owned, operated or controlled directly or indirectly by any producer or distributor of motion pictures.

III. The Court has jurisdiction of the subject-matter hereof and of all persons and parties hereto and the petition states a cause of action against the defendants under the Act of Congress of July 2, 1890 commonly known as the Sherman Anti-Trust Act.

IV. The conspiracy to restrain and to monopolize interstate trade and commerce in motion-picture films alleged in the petition herein is hereby declared illegal and in violation of said Act of Congress of July 2, 1890, commonly known as the Sherman Anti-Trust Act.

V. The defendants and each of them, their respective officers, directors, agents, servants, employees and all persons acting or claiming to act on behalf of them or any of them be and they hereby are perpetually enjoined and restrained from carrying out directly or indirectly by any means whatsoever the conspiracy alleged in the petition herein and from entering into or carrying out directly or indirectly any other conspiracy of like character or effect.

VI. The defendants and any two or more of them, their respective officers, directors, agents, servants, employees and all persons acting or claiming to act on behalf of any two or more of them be enjoined from preparing, publishing, adopting, enforcing or attempting to enforce any uniform plan, system or schedule of zoning, clearance or protection:

1. (a) Whereby first-run theatres owned, operated or controlled by defendant theatres company, which under the terms of such plan, system or schedule, receive certain additional periods of protection over competing second-run theatres, over and above the minimum clearance granted to said first-run theatres, as such (the length of which said additional periods of protection were originally determined by the prices charged for admission to said second-run theatres) are thereafter permitted to reduce the said admission prices of said first-run theatres to the point where the difference between the admission prices charged by said first-run theatres and said second-run theatres is less than that upon which said additional periods of protection were computed, without at the same time reasonably shortening the said additional periods of protection received by said first-run theatres as aforesaid; or (b) whereby second-run theatres and/or subsequent run theatres, owned, operated or controlled by unaffiliated exhibitors which are subject to additional periods of protection over and above the minimum clearance granted to said first-run theatres, as such, are unable to decrease the said additional periods of protection by increasing their own admission prices and thereby decreasing the difference between the admission prices charged by said first-run theatres and that charged by said second-run theatres at the time that said additional periods of protection were computed.

2. (a) Whereby suburban first-run theatres owned, operated, or controlled by defendant threatres company receive certain periods of protection over competing second-run theatres, the length of which is determined substantially by the evening admission prices charged by said theatres; and at the same time subsequent run downtown theatres are subjected to periods of protection, the length of which is determined substantially by an average of the matinee and evening prices charged by said theatres; and (b) whereby the periods of protection granted to such of the said downtown subsequent run theatres as are owned, operated, or controlled by defendant theatres company are in fact determined upon a basis of the evening admission prices alone, while at the same time the periods of protection granted to such of the said downtown subsequent run theatres as are owned, operated, or controlled by unaffiliated exhibitors are in fact determined upon a basis of averaging the matinee and evening admission prices charged by said theatres.

3. Whereby the periods of protection applicable to theatres located immediately outside of the city limits of Los Angeles and owned, operated, or controlled by defendant theatres company are determined without regard to any price admission basis applicable to theatres within the city limits of Los Angeles, while at the same time the periods of protection applicable to theatres located immediately outside of the city limits of Los Angeles and owned, operated, or controlled by unaffiliated exhibitors are determined upon a price admission basis applicable to theatres located within the city limits of Los Angeles.

VII. The defendants and any two or more of them when acting as distributors of motion pictures in the Pacific Coast territory in such instance, or the defendants and any two or more of them, when acting as exhibitors of motion pictures in the Pacific Coast territory in such instance, or the defendants and any two or more of them, when one or more is acting both as a distributor and an exhibitor in the Pacific Coast territory in such instance, their respective officers, directors, agents, servants, employees and all persons acting or claiming to act on behalf of them or any of them be enjoined from preparing, publishing, adopting, enforcing or attempting to enforce any uniform plan, system or schedule of zoning, clearance or protection whereby theatres owned, operated or controlled by defendant theatres company receive unreasonably long periods of protection or unreasonable zoning privileges over theatres owned, operated or controlled by competing unaffiliated exhibitors.

VIII. That nothing in this decree contained shall be construed to declare a classi-

fication of theatres as first, second, third or subsequent run or runs threatres, or such other reasonable classification as may hereafter from time to time be in use in the motion-picture industry or zoning of such theatres or clearance and/or protection of motion-picture films for exhibition purposes as between theatres, including clearances and/or protection according to runs or price of admission, to be illegal as such or in violation of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce," commonly known as the "Sherman Anti-Trust Act," or as prohibiting any defendant from selecting its own customers and bargaining with them in accordance with law, or any affiliated exhibitor from exhibiting at any time its own films in theatres owned or controlled by it.

IX. Nothing in this decree contained shall be construed as prohibiting Fox West Coast Theatres from negotiating for or entering into any lawful contract for motion-picture films for exhibition purposes with any distributor separately.

X. Nothing contained herein shall be construed as affecting in any manner the decree of this Court entered on August 21, 1930, in the case of *"United States v. Fox West Coast Theatres, Incorporated et al.* (In Equity, No. S-10-C.)

XI. For the purpose of this decree in case any defendant is owned directly or indirectly by another defendant the two defendants shall, so long as such relationship continues, be deemed one defendant.

XII. The jurisdiction of this cause be and hereby is retained for the purpose of enforcing or modifying the decree.

XIII. The petioner have and recover of the defendant its costs herein.

Dated: November 16, 1932.

HOLLZER, *United States District Judge.*

[¶ 55,019] Pirnie Simons & Company, Inc. v. New York Stock Exchange, Richard Whitney et al.

United States District Court, Southern District of New York. December 19, 1932.

An action under the Sherman and Clayton Acts may be maintained against both an unincorporated association and its members at the same time regardless of the statutes of the State in which the association is domiciled, to the contrary.

Suit may be brought both against the New York Stock Exchange, an unincorporated association, and its individual members for alleged violation of the Anti-Trust Acts in prohibiting the "package" or small lot sale of assorted securities.

KNOX, D. J. This motion asks dismissal of the complaint as against all the individual defendants on the ground that, as against them, the action is unseasonable. This is said to be due to the fact that Richard Whitney, as President of the New York Stock Exchange, an unincorporated association, has been made a party defendant.

Sections 13 and 16 of the New York General Associations Law, L. 1920, Ch. 915, provide, in part, as follows:

"13. *Action or proceeding against unincorporated association.* An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally. Any partnership, or other company of persons, which has a president or treasurer, is deemed an association within the meaning of this section."

"16. Where an action has been brought against an officer, or a counterclaim has been made, in an action brought by an officer, as described in this article, another action, for the same cause, shall not be brought against the members of the association, or any of them until after final judgment in the first action, and the return, wholly or partly unsatisfied or unexecuted, of an execution issued thereupon."

Defendants' argument that as a result of this legislation an action cannot be maintained in the courts of the State of New York against an unincorporated voluntary association and the members thereof at the same time, appears to be sound. *Mandell v. Moses*, 209 A. D. 531; *Institute for Public Service v. Winter et al.*, 233 A. D. 1. The question now presented is whether this rule is binding on this court in an action that is here pending, and which is based upon allegations that, due to violations of the Clayton and Sherman Acts on the part of all defendants, plaintiff is entitled to a recovery of treble damages. Plaintiff resists the motion directed to his complaint, saying that, under authoritative rulings of Federal courts, the members of an unincorporated association are suable along with the association, in such a suit. This is undeniably true when there is no State statute similar to Section 16 of the General Associations Law of this State. *United*

Mine Workers v. Coronado Company, 259 U. S. 344. It appears, therefore, that the point which will here rule the decision, is whether the existence of the local State statute bearing upon the subject matter requires this court to depart from the usual rule that an association and its members may be sued in the same action brought under the Federal Anti-trust laws. Consideration of what would be the result on the motion if the Court's jurisdiction were predicated upon diversity of citizenship, may be laid to one side. The matter turns upon plaintiff's rights under the Federal Anti-Trust Laws.

Section 1 of the Sherman Act, 26 Stat. 209, 28 U. S. CA, Section 1, declares illegal

"every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce,"

and provides that

"*every person* who shall make any such contract or *engage in any such combination or conspiracy,* shall be deemed guilty of a misdemeanor." (italics mine)

Section 2 provides that

"*every person* who shall monopolize, or attempt to monopolize, or *combine or conspire* with any other person or persons, to monopolize any part of the trade or commerce among the several states * * * shall be deemed guilty of a misdemeanor. * * *" (italics mine)

Section 4 of the Clayton Act, 15 U. S. C.A., Section 15, which is substantially similar to Section 7 of the Sherman Act, provides that

"any person who shall be injured * * * by reason of anything forbidden in the Anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent * * * and shall recover three fold the damages by him sustained * * *"

Section 8 of the Sherman Act, 15 U. S. C. A., Section 7, and Section 1 of the Clayton Act, 15 U. S. C. A., Section 12, provide that

"the word 'person' or 'persons' * * * shall be deemed to include corporations and associations * * *"

Plaintiffs' complaint alleges that an unlawful combination and conspiracy entered into between the New York Exchange and its individual members, who are officers and members of the Governing Committee, has damaged his business. The statutes in terms make "*every* person" who violates their provisions criminally and civilly liable.

Any person injured by a violation of these statutes "may sue therefor." Such person, therefore, has a substantive right that may here be vindicated, and which may entitle him to a recovery of treble damages. In the *Coronado* case. it was stated at page 390:—

"As a matter of substantive law, *all the members* of the union engaged in a combination doing unlawful injury are liable to suit and recovery * * *" (italics mine)

The decision also held an unincorporated labor union to be an "association" which was recognized as a distinct entity by numerous acts of Congress, and which, as such, was suable in the Federal Courts upon process served on its principal officers. The court so held despite the fact that the Supreme Court of Arkansas had declared the union to be possessed of the character of a partnership, and to be capable of suit only in the name of its members, with liability to be enforced against each member separately. The Supreme Court declared at page 391, that the ruling of the Arkansas Court.

"cannot under the Conformity Act operate as a limitation on the federal procedure in this regard."

Here, also, the Stock Exchange is a suable entity distinct from its members. As an association, it is a "person" with capacity to violate the federal anti-trust laws. Should it do so, civil liability accompanies the wrong and runs in favor of the injured party.

Plaintiff, in alleging that the Stock Exchange and the members of its Governing Committee

"entered into a combination and conspiracy unreasonably to restrain and prevent competition in interstate commerce."

and to his injury, etc., has set up separate violations of plaintiffs' rights by the association, and some of its individual members. If each of them has been guilty of a statutory wrong, it follows that each has incurred a statutory liability. Plaintiffs' rights in the premises may be asserted against each and/or all who have wronged him. *Brown v. United States,* 276 U. S. 134, 141. As shown by this decision, and by the *Coronado* case, *supra,* the conception of an association as a legal entity is carried further by the Federal Courts than by the Courts of New York under the General Associations Law. Under the State law, the association is not regarded as a legal entity wholly separate and apart from the persons who compose its membership. The statute permits suit to be brought against the president or treasurer of an association for the purpose of obviating the inconvenience of having each individual member named as a party to the action, and requiring process to be served upon him. *Meinhart v. Contresta,* 194 N. Y. S. 593. While the members of the association incur an individual liability for a wrong which it commits, the statute permits alternative methods of redress. One is a suit against the president or treasurer of the association; the other against the individual members. But the remedies are not concurrent.

In the federal courts, and under the statutes involved, the underlying substantive law, as has been seen, is somewhat different. The association is an entity that can be guilty of unlawful acts; and the individuals who participate therein are separately guilty of such acts. When plaintiff, therefore, sues each and all of the "persons" who, in violation of the anti-trust acts, have combined and conspired against him, he is but claiming a remedy for which they, separately and jointly, may be required to respond. See *Brown v. United States, supra.* He is not doing what the New York Statute sought to prevent, i. e., suing the same defendants on the same cause of action in the same or in co-pending suits. The application of Section 16 of the General Associations Law to the present action would hardly be consonant with the theory of liability imposed by the Sherman and Clayton Acts.

The Conformity Acts, 28 U. S. C. A., Section 724, states that

"the forms * * * of proceeding * * * shall conform as near as may be, * * * to the forms * * * in *like causes*" (italics mine)

in the State Courts. The cause of action now before the court is exclusively cognizable in the Federal jurisdiction, and is not a "like cause" within the meaning of the Conformity Act. *Coffey v. United States,* 117 U. S. 233; *United States v. More,* 287 Fed. 879, affirmed 294 Fed. 852, Cert. den. 264 U. S. 581; *United States v. Southern Dredging Company,* 251 Fed. 400.

Furthermore, as pointed out in the case of *Indianapolis and St. Louis R. R. Co. v. Horst,* 93 U. S. 291,

"The conformity is required to be 'as near as may be'—not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose; it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such State statutes, which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice, in their tribunals."

The procedure that is here followed seems to be that heretofore characterising suits of this nature in this circuit, although the point involved does not appear to have been discussed in the opinions. See *Dextone Company v. Building Trades Council,* 60 F. (2d) 47; *Decorative Stone Company v. Building Trades Council,* 18 F. (2d) 333, affirmed 23 F. (2d) 426; *Marienelli v. United Booking Offices,* 227 F. 165.

Motion denied.

[¶ 55,020] Torquay Corporation, suing on behalf of itself and of other stockholders of Radio Corporation of America, v. Radio Corporation of America, General Electric Company, Westinghouse Electric & Manufacturing Company, et al.

United States District Court, Southern District of New York, E. 72-390. Decided December 14, 1932.

Plaintiff seeks to enjoin defendants, General Electric Company and Westinghouse Electric Manufacturing Company, from distributing certain shares of the stock of the Radio Corporation of America, now held by them, to their stockholders or to anyone else, except the Radio Corporation. Action dismissed on the following grounds: (1) To grant relief asked would in effect modify the consent decree previously entered in another District Court against the Radio Corporation and the defendants here involved insofar as it related to the disposition of the Radio stock here involved, although that Court had specifically reserved jurisdiction under the consent decree. (2) In order to modify the decree all parties to the original decree should be parties to the present action, which would include the United States; but this case is on removal from a state court which would have no jurisdiction over the United States as a party, hence the Federal Court could obtain no jurisdiction on removal.

Nathan Burkan, Esq., attorney and counsel for plaintiff, *Cravath, de Gersdorff, Swaine & Wood, Esqs.* attorneys for defendant, Westinghouse Electric & Manufacturing Company, (*Robert T. Swain* and *Wm. D. Whitney, Esqs.,* of counsel), *Cotton Franklin, Wright & Gordon, Esqs.,* attorneys for defendant, General Electric Company; *Fish, Richardson & Neave, Esqs.,* attorneys for defendant, Radio Corporation of America (*Charles Neave, Esq.,* of counsel).

KNOX, D. J. Three motions are here before the Court: (1) defendant corporations ask leave to amend their petition for removal, filed December 1, 1932; (2) plaintiff prays remand of the suit to the State Court; (3) plaintiff seeks to enjoin defendants, General Electric Company and Westinghouse Electric Manufacturing Company, from distributing several million shares of stock of Radio Corporation of America, now held by them, to their stockholders or to anyone else, except the Radio Corporation. In connection with such relief, plaintiff wishes the appointment of a receiver of these shares of stock.

(1) Defendants' motion to amend their removal petition will be granted. This court has power to permit such amendment. *Kinney v. Columbia Savings and Loan Association,* 191 U. S. 78; *Hall v. Payne,* 274 Fed. 237; *Matarazzo v. Hustis,* 256 Fed. 882; *Wooldridge v. M'Kenna,* 8 Fed. 650. The fact that defendants have so promptly docketed the record in this court, and that they have accepted plaintiff's motion to remand on only two days' notice, warrants the exercise of a liberal discretion in allowing them to amend.

(2) Plaintiff's motion to remand to the State court will be denied.

Complainant, a stockholder of Radio Corporation, alleges itself to be a citizen of Delaware, within which State the Radio Corporation, also, was incorporated. General Electric is a resident of New York and Westinghouse is a resident of Pennsylvania. The Bill of Complaint, inter alia, alleges:

General Electric and Westinghouse were large stockholders of Radio Corporation, having representation on its Board of Directors, and largely controlling its policies and actions. General Electric and Radio Corporation entered into an unlawful combination and conspiracy in restraint of interstate commerce, and in violation of the Sherman and Clayton Acts. Westinghouse became a co-conspirator in 1921. About January 1, 1930, a group of contracts was entered into between these corporations, which constituted an unlawful conspiracy in restraint of trade, and which had the effect of giving Radio Corporation a monopoly in the manufacture and sale of radio devices in the United States. Since January 1, 1930, however, Radio Corporation has operated at a loss, and the market value of its common stock has dropped from $40.00 to approximately $5.00 a share.

In May of 1930, the United States instituted suit in the District Court of the United States for the District of Delaware, against General Electric, Westinghouse and Radio, charging that the various contracts and agreements between the parties, and the transfer of blocks of Radio stock in exchange for which Radio had received exclusive rights in patents, plants and equipments of General Electric and Radio, constituted a combination in restraint of trade, and a conspiracy to create a monopoly in violation of the Sherman and Clayton Acts. Upon a stipulation of the parties to the suit of the United States, a consent decree was entered on November 21, 1932, requiring General Electric and Westinghouse to divest themselves of their holdings in Radio stock in certain ways and within specified times. The decree also enjoined the continued existence of various license agreements, and stated in detail various acts that should or should not be done. The Court making the decree retained jurisdiction for the purpose of enforcing or modifying its decree, with leave to any of the defendants after three years, to apply to the Court for permission to acquire stock in any other of the defendant corporations, or their subsidiaries.

The complaint before this court proceeds to allege that, as a result of the decree in the Delaware suit, the Radio Corporation lost rights that it had theretofore obtained without securing a provision for the return of its own stock by the General Electric and Westinghouse companies. The result alleged is that Radio was deprived of fair and adequate consideration for the stock with which it had parted, and, that General Electric and Westinghouse were unjustly enriched. Furthermore, it is charged that General Electric and Westinghouse and Radio deceived the District Court in Delaware as to the true facts and circumstances by failing to make a sufficient disclosure thereof with consequential injury to the Radio Company.

The complaint then sets forth that General Electric and Westinghouse are threatening to dispose of all their holdings of Radio stock by ratably distributing the same as a bonus to their own stockholders; that plaintiff demanded of Radio that it insist that General Electric and Westinghouse return its stock, but that there has been no compliance with such demand; that the stock in question is physically located within the State of New York, and that plaintiff has no adequate remedy at law. The relief asked by the complaint is that General Electric and Westinghouse be enjoined *pendente lite,* and permanently, from distributing the stock; that they be required to re-transfer the stock to the Radio Corporation; that a receiver be appointed to take possession of the stock; that it be declared to be the absolute property of the Radio Corporation; that a trust be impressed upon it for the benefit of the Radio Corporation; and that the individual de-

fendants, the directors of General Electric, Westinghouse and Radio, be compelled to account to Radio for all of their wrongful acts.

From the foregoing it will readily be seen that the relief here sought, if granted, would constitute an interference with the operation of the decree of the United States District Court of Delaware. The effect of the requested relief would be nothing else than a modification of the terms of that decree insofar as it relates to the disposition of the Radio stock held by General Electric and Westinghouse.

The Supreme Court of the United States has held the action of a State Court in enjoining a defendant from doing acts pursuant to the valid decree of a Federal Court, to be error. *Central National Bank v. Stevens*, 169 U. S. 432. It has also been held that a suit in a State Court, attacking the title to property acquired under a decree of a Federal Court on the ground that such decree was void, involves a Federal question and is, therefore, removable. *South Dakota Central Railway Co. v. Continental & Commercial Trust & Savings Bank, et al.*, 255 Fed. 941 (C. C. A. 8th. And in *Cornue v. Ingersoll*, 174 Fed. 666, decision was made that a suit in equity in a State Court, the effect of which as disclosed on the face of the bill, was to delay, obstruct and perhaps defeat, the enforcement of the judgment of a Federal Court was removable, as involving a Federal question.

In addition, it should be remembered that the decree of the Federal Court in Delaware was a consent decree. Such a decree is not only a decree of Court. It is also a contract between the parties to a suit in which it was entered. *Garrett & Co. Inc. v. Sweet Valley Wine Company*, 251 Fed. 371. See *Kelley v. Milan*, 127 U. S. 139; Freeman on Judgments, 5th Edition, § 1350; 21 C. J. 815.

A suit to rescind a contract requires that all the parties to it be made parties to the suit. *Shields v. Barrow*, 17 How. 130; *United States v. Northern Pacific R. R. Co.*, 134 Fed. 715. Similarly, all the parties to a consent decree should be made parties to a suit assailing it. See Freeman on Judgments, supra, § 1352; 21 C. J. 817. Inasmuch as the United States was a party to the consent decree which was entered by the Federal Court in Delaware, it would seem to be not only a necessary but an indispensable party to the present suit, which would affect its right under the decree. As all of us know, a suit against the United States raises a Federal question. For this reason, also, the present suit is removable to this Court. As previously stated, plaintiff's motion to remand to the State Court will be denied.

(3) Plaintiff's motion for an injunction *pendente lite* will also be denied.

Assuming for the moment that this court has jurisdiction of the present suit, it is clear, as a matter of comity and of the orderly administration of justice, that this Court should refuse to exercise its jurisdiction to interfere with the operation of a decree of another Federal Court. Especially is this so where it is clear that the United States District Court in Delaware would have jurisdiction of such a suit as is now before this Court. A bill to modify or restrain the enforcement of a decree of a Federal Court may undoubtedly be brought in the Court which entered such decree. *Pacific Railroad of Missouri v. Missouri Pacific Railway*, 111 U. S. 505; see *Johnson v. Christian*, 125 U. S. 642; *Sherman Naional Bank v. Shubert Theatrical Company*, 247 Fed. 256; see also Foster Federal Practice, 6th Edition, §§ 51, 132. Furthermore, the consent decree stated that—

"Jurisdiction is hereby expressly reserved for the purpose of enforcing or modifying this decree on application of any of the parties hereto."

While the present plaintiff was not a party to the Delaware suit, complainant is suing as a stockholder on behalf of itself and other stockholders of the Radio Corporation. That Company was a party to the decree, and complainant's rights, if any, would seem to be more properly justiciable in the Court that made the decree, out of which complainant's grievance arises, than here.

Finally, the present bill should be dismissed. As stated before the United States is a necessary party to this suit. Since the United States cannot be sued in the State Court, that tribunal was without jurisdiction of the suit. If the State Court had no jurisdiction, this Court acquired none upon its removal here *Lambert Company v. Baltimore and Ohio Railroad Company*, 258 U. S. 377. See *General Investment Company v. Lake Shore Railway Company*, 260 U. S. 261, at page 288. Where it appears to a District Court of the United States that it has no jurisdiction of a suit, it may dismiss it of its own motion. 28 U. S. C. A. § 80.

Plaintiff's motion for an injunction *pendente lite* is denied, and the bill is dismissed without prejudice.

[¶ 55,021] E. Griffiths Hughes, Inc., a Corporation, Appellant, v. Federal Trade Commission, Appellee.

Court of Appeals of the District of Columbia. No. 5636. Argued January 10-11, 1933. Decided January 30, 1933.

Appeal from the Supreme Court of the District of Columbia.

In refusing to restrain the Federal Trade Commission from holding a public hearing under a formal complaint which it had already issued, the Court holds that such a public hearing is proper in the absence of a showing that the hearing is not in the public interest or that it would disclose trade secrets or other data destructive of the business under investigation. (From the opinion:) ". . . but where, as is here alleged, the possibility of loss is founded wholly on the public knowledge that an investigation has been ordered, no good reason exists or can be shown why the public hearing should not continue."

Where the Commission is authorized by the Act to adopt such rules not inconsistent with law as may be necessary in carrying out the act, regulations which have been so adopted may have the force of law, and, the Court adds, "much more is this true where the rule (in question) is one of long standing."

Albert E. Maves, of New York City, and Elwood H. Seal, of Washington, D. C., for appellant.

Robt. E. Healy, Martin A. Morrison, and Harry D. Michael, all of Washington, D. C., for appellee.

Before Martin, Chief Justice, and Robb, Van Orsdel, Hitz, and Groner, Associate Justices.

Groner, Associate Justice: This appeal challenges the right of the Federal Trade Commission to take testimony in an open or public session in a hearing on a complaint directed against the appellant charging it with false and fraudulent advertising and unfair trade methods in interstate commerce.

The act of Congress creating the Federal Trade Commission and defining its powers and duties (Act Sept. 26, 1914; U. S. C. A., Tit. 15, sec. 41, et seq.) provides for the issuance of a "complaint" against any person, partnership, or corporation (except banks and common carriers) using unfair methods of competition in commerce. The test is the public interest. The law provides for a hearing, the taking of testimony, and the filing of the same in the office of the Commission.

In the instant case the complaint issued and was duly served on appellant and an answer thereto was duly filed. On the day set for the hearing appellant applied to the Supreme Court of the District of Columbia for an injunction restraining the Commission from making the complaint public and from taking any testimony in public and from making public the transcript of the testimony. The lower court dismissed the bill and the matter is here on appeal. We think the action of the lower court was in all respects correct.

A copy of the complaint issued by the Commission was filed as an exhibit in the proceedings below, and by recourse to it we ascertain that it recited in the first place that it was issued in the public interest, that it charged appellant was engaged in the sale in interstate commerce of certain proprietary preparations known as "Kruschen Salts" and "Radox Bath Salts"; that the former of these preparations was advertised by appellants as a cure or remedy for obesity and that the latter as a preparation relieving pain and having medicinal and therapeutic value and that it is imported from England and combines the properties of the world famous medical spas. The complaint then went on to state that all of this advertising was untrue because in fact the Kruschen salts is no more than a purgative or laxative and therefore not a cure or remedy for obesity, and that the Radox salts has no material medicinal or therapeutic value and is not imported from England and does not combine the properties of the European medical spas; and it concludes that as a result of these misrepresentations the public is misled and deceived and appellant's competitors prejudiced within the intent and meaning of section 5 of the Act.

The bill filed in the lower court charges as the ground of injunctive relief that, because of the announcements in trade journals of the issuance by the Commission of its complaint, appellant's business has been injured and that the taking of testimony in public will aggravate and in-

crease the injury, for all of which appellant has no adequate or complete remedy at law.

It will be at once noticed that there is no charge in the bill that the Commission is acting unfairly or arbitrarily or that the result of an open hearing will be to disclose trade secrets or the names of appellant's customers, or any other detail of its business which, without regard to the final determination of the controversy, will result in serious injury to it. On the contrary it is confined to the assertion that the Commission has no right to determine to hear evidence in public; that until its final determination its function is wholly inquisitorial and is therefore necessarily secret.

We find nothing in the Act which will warrant this limitation on the Commission's powers, or indeed anything which would indicate that this was the intention of Congress. The Act distinctly provides that *any* person who may be interested in the question may make application and may, upon good cause shown, be allowed by the Commission to intervene and appear in person or by counsel. This provision the Commission has construed to impose upon it the duty of public hearings, and in this we concur.

More than twelve years ago the Commission adopted a rule that all hearings before it, or its examiners, on formal complaint should be public hearings, and another rule of later date that after complaint issued the papers in the case shall be open to the public for inspection under such rules and regulations as the secretary of the Commission may prescribe. Both rules are in line with the theory that a competitor has the right to intervene, and this in itself is inconsistent with the idea of secrecy. But without regard to this, the Commission is authorized by the Act to adopt such rules not inconsistent with law as may be necessary in carrying out the Act, and we have uniformly held that a regulation adopted under these circumstances has the force of law, and much more is this true where the rule is one of long standing. In a number of other acts of Congress creating bodies similar to the Trade Commission, provision is made that all proceedings *shall* be public. This is true in the case of the Interstate Commerce Commission and the Board of Tax Appeals and in proceedings before the deputy commissioner under the Longshoremen's Compensation Act, and it is argued on behalf of appellant that because of these specific provisions and the omission of such in the act creating the Federal Trade Commission, Congress meant that proceedings before the latter body should be secret rather than public, but we think this view cannot be sustained. Doubtless Congress considered that there might be occasions when it would be unjust to a person or corporation proceeded against to require public hearings and left the decision in such cases to the Board. Certainly the omission can be given no greater significance.

Nor is it suggested in the bill for injunction that the proceeding is one not in the public interest, and it could not well be because, except in the case of fraud or arbitrary abuse of power, that question is foreclosed by the finding of the Commission. We have said before that one who engages in interstate commerce does so object to the regulatory power of Congress. The test is whether the restrictive measures which Congress may adopt are reasonably adapted to secure the purposes and objects of regulation. To strike down unfair methods of competition or unfair practices on the public is the duty imposed on the Commission by Congress. The object of the Act is to prevent public deception and to preserve free competition. To accomplish this, of course, Congress may not authorize the spoliation of private right by public authority, but there is no charge of this nature here, and such a charge could be much more readily made and sustained if the Act had provided for secret or star-chamber proceedings. The rule of the Board is therefore wholly consonant with the modern view of functions of government. The purpose underlying the constitutional guaranty of public trial in prosecutions for crime is to prevent abuses arising out of the avarice of unprincipled officials or the sale of justice or a conviction through illegal evidence. The rule requiring public hearings, whether in courts or bureaus, avoids these possibilities, and is to be approved. Doubtless on such a hearing as is here provided the Commission has discretion, on a showing that such a hearing would disclose trade secrets or other data in itself destructive of the business under investigation, to do whatever is proper and necessary to avoid these consequences, but where, as is here alleged, the possibility of loss is founded wholly on the public knowledge that an investigation has been ordered, no good reason exists or can be shown why the public hearing should not continue.

Affirmed.

[¶ 55,022] Federal Trade Commission, Petitioner, v. Royal Milling Company, et al.

Supreme Court of the United States. No. 393. October Term, 1932. February 6, 1933.

Use of the terms "milling company" or "mill" as part of the trade name of concerns which are engaged in the business of producing plain and self-rising flour by a process of mixing and blending, but which do not actually grind grain into flour, held to be improper under the Federal Trade Commission Act. The Commission orders, sustained in effect by the above ruling, are modified in each case, however, to permit continued use of such trade names if qualified by "explicit representation that respondent is not a grinder of the grain from which the flour prepared and put out is made."

Although the use of a trade name may be improper the Commission order "should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public; and this can be done, in the respect under consideration, by requiring proper qualifying words to be used in immediate connection with the names."

Public interest is present where there is evidence that there are a large number of buyers who "believe that the price or quality or both are affected to their advantage by the fact that the article is prepared by the original grinder of the grain," and who may be misled by the use of the terms "milling company" or "mills" in the trade names of those who do not actually grind the flours they use in producing their prepared product.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

This writ brings here for consideration six orders made by the Federal Trade Commission under § 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719, Title 15, U. S. C., § 45, which declares that unfair methods of competition in interstate commerce are unlawful. Proceeding under the act* the commission filed separate complaints against respondents, each of whom operates a business, either as a corporation, partnership or an individual, in the City of Nashville, Tennessee. All are engaged in preparing for the market self-rising flour and plain flour and selling the same in interstate commerce. None of them grind from the wheat the flour which they thus prepare and sell, but only mix and blend different kinds of flour purchased from others engaged in grinding. After being mixed and sifted, the flour, either plain or made self-rising, is packed into bags for the market. Most of the concerns grinding wheat into flour and selling in the same market also make self-rising flour and blended plain flour, ground from different sorts of wheat.

One of the respondents does business under the names, "Royal Milling Company," "Richland Milling Company," and "Empire Milling Company." The others use trade names of similar import, all containing the words "milling company," or "mill," or "manufacturer of flour"—words which are commonly understood by dealers and the purchasing public to indicate concerns which grind wheat into flour.

There are other concerns engaged in the business of producing plain and self-rising flour, by a process of mixing and blending, and selling the product in the same market in competition with respondents and with the grinders; but these do not name themselves millers, mills, or milling companies, or hold themselves out in any way as grinders of grain. The business involved is large and the competition among the several concerns substantial; and the use of the enumerated trade names by the respondents tends to divert and does divert business from both the grinders and those blenders who do not use such trade names or an equivalent therefor. Respondents

* "Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. . . . If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition.

* * * * * * *

"The findings of the commission as to the facts, if supported by testimony, shall be conclusive."

have circulated written and printed circulars among the trade which either directly assert, or are calculated to convey the impression, that their product is composed of flour manufactured by themselves from the wheat. These statements and the use of the trade names under which respondents do business have induced many consumers and dealers to believe that respondents are engaged in grinding from the wheat the product which they put out. The respondents, early in the proceeding before the commission, offered "to place on their letterheads, bags, invoices, etc., in conspicuous lettering the words: 'Not Grinders of Wheat.'" This offer the commission evidently thought it unnecessary to consider, in view of the more comprehensive conclusion which it reached as to the remedy.

The findings of the commission, supported by evidence, in substance embody the foregoing facts, and much else which for present purposes it is unnecessary to repeat. From these findings the commission concluded that the practices of respondents were to the prejudice of their competitors and of the public and constituted unfair methods of competition within the meaning of § 5 of the Federal Trade Commission Act. Thereupon, the commission issued its orders against respondents to cease and desist from carrying on the business of selling flour in interstate commerce under a trade name or any other name which included the words "milling company," or words of like import, and from making representations, designed to affect interstate commerce, that they or either of them manufacture flour or that the flour sold by them comes direct from manufacturer to purchaser, etc.

Upon review the circuit court of appeals set aside all orders of the commission, upon the ground that the proceeding by the commission did not appear to be in the interest of the public. 58 F. (2d) 581.

To sustain the orders of the commission, three requisites must exist: (1) that the methods used are unfair; (2) that they are methods of competition in interstate commerce; and (3) that a proceeding by the commission to prevent the use of the methods appears to be in the interest of the public. *Fed. Trade Comm. v. Raladam Co.,* 283 U. S. 643, 646-647. Upon the first two of these we need take no time, for clearly the methods used were unfair and were methods of competition. *Federal Trade Comm. v. Winsted Co.,* 258 U. S. 483, 492-494; *Fed. Trade Comm. v. Raladam Co., supra,* at pp. 651-652.

We also are of opinion that it sufficiently appears that the proceeding was in the interest of the public. It is true, as this court held in *Federal Trade Comm. v. Klesner,* 280 U. S. 19, that mere misrepresentation and confusion on the part of purchasers or even that they have been deceived is not enough. The public interest must be specific and substantial. In that case (p. 28) various ways in which the public interest may be thus involved were pointed out; but the list is not exclusive. If consumers or dealers prefer to purchase a given article because it was made by a particular manufacturer or class of manufacturers, they have a right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally as good, but having a different origin. Here the findings of the commission, supported by evidence, amply disclose that a large number of buyers, comprising consumers and dealers, believe that the price or quality or both are affected to their advantage by the fact that the article is prepared by the original grinder of the grain. The result of respondents' acts is that such purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed as to its origin. We are of opinion that the purchasing public is entitled to be protected against that species of deception, and that its interest in such protection is specific and substantial. *Federal Trade Commission v. Balme,* 23 F. (2d) 615, 620. Compare *Federal Trade Comm. v. Winsted Co., supra; Ohio Leather Co. v. Federal Trade Commission,* 45 F. (2d) 39, 41. There is nothing in the *Klesner* case to the contrary.

Although we sustain the commission in its findings and conclusions to the effect that the use of the trade names in question and the misstatements referred to constituted unfair methods of competition within the meaning of the act, and that its proceeding was in the interest of the public, we think under the circumstances the commission went too far in ordering what amounts to a suppression of the trade names. These names have been long in use, in one instance beginning as early as 1902. They constitute valuable business assets in the nature of good will, the destruction of which probably would be highly injurious and should not be ordered if less drastic means will accomplish the same result. The orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public; and this can be done, in the respect under consideration by requiring proper qualifying words to be

used in immediate connection with the names. See *N. Fluegelman & Co. v. Federal Trade Commission,* 37 F. (2d) 59, 61; *Federal Trade Commission v. Cassoff,* 38 F. (2d) 790, 791; *Federal Trade Commission v. Good-Grape Co.,* 45 F. (2d) 70, 72. Compare *Herring, &c. Safe Co. v. Hall's Safe Co.,* 208 U. S. 554, 559; *Warner & Co. v. Lilly & Co.,* 265 U. S. 526, 532, *R. Guastavino Co. v. Comerma,* 184 Fed. 549; *Warshawsky & Co. v. A. Warshawsky & Co.,* 257 Ill. App. 571, 584, *et seq.* This is a matter which the commission has not considered but which, as the body having primary jurisdiction, it should, in the first instance, consider and determine. And in doing so it will be enough if each respondent be required by modified order to accompany each use of the name or names with an explicit representation that respondent is not a grinder of the grain from which the flour prepared and put out is made, such representation to be fixed as to form and manner by the commission, upon consideration of the present record and any further evidence which it may conclude to take. In respect of other particulars, the orders of the commission are sustained.

The decree below, therefore, will be reversed, and the proceeding remanded to the commission to be disposed of in conformity with this opinion.

Decree reversed.

Mr. Justice McReynolds and Mr. Justice Roberts are of opinion that the decree below should be affirmed.

[¶ 55,023] The Early & Daniel Co. et al. v. Cities Service Oil Co. et al.*

In the District Court of the United States, Southern District of Ohio, Western Division. No. 844, In Equity. February 2, 1933.

The fact that competitive dealers in the sale of gasoline may see proper, in the exercise of their own judgment, to follow the prices of another, does not establish any suppression of competition or show any unlawful domination. Citing *United States v. International Harvester Co.,* **274 U. S. 693.**

Temporary injunction refused.

Opinion on motion for preliminary injunction.

Nevin, District Judge (Orally, February 2, 1933):

There have been quite a number of questions raised in this case. The first question, and the one which in orderly procedure I take it the court should first pass on, is the question as to the sufficiency of the bill, but in the light of my conclusions at this time I do not think it is necessary for me to determine that question now. For the purposes of this decision we will consider that the bill does state a good cause of action—that is, for the purposes of this decision only.

Now, the bill recites, among other things, the ground of this court's jurisdiction as Sections 13, 14, 22 and 26 of Chapter 1, Title 15, [Sections 2, 3, 12, 16, Clayton Act], and Paragraph 23 of Section 41, Chapter 2, Title 28, of the United States Code; and it is conceded, as I understand it, that the only jurisdiction that the court has depends upon the provisions of the Clayton Act, so-called. Among other things alleged in the bill, without going through all of the allegations, is the following:

"Plaintiffs are informed and believe that the defendants have conspired together to monopolize the wholesale and retail business of the purchase and sale of gasoline in this part of the United States and in furtherance of said purpose and in said County of Hamilton on or about December 15, 1932 and there-

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* The Early & Daniel Company, a corporation under the laws of Ohio; Thomas T. Justis, doing business as Red Elephant Oil Company; B. M. Markstein, doing business as Full Measure Gas Company; Frank A. Renaker and John W. Rhoten, partners doing business as Renaker & Rhoten; Raymond E. Vaughan, doing business as Vaughan's Service Station; Ben. H. Wides, doing business as Powerful Petroleum Products Company; Albert J. Wasser and Ralph L. Wischmeyer, partners doing business as Wasser & Wischmeyer; Plaintiffs, *versus* Cities Service Oil Company, a corporation under the laws of Ohio; Gulf Refining Company, a corporation under the laws of Delaware; Fleetwing Oil Corporation, a corporation under the laws of Ohio; Refiners, Inc., a corporation under the laws of Ohio; The Pure Oil Company, a corporation under the laws of Ohio; Shell Union Oil Company, a corporation under the laws of Delaware; The Consolidated Oil Company, a corporation under the laws of New York; The Standard Oil Company of Ohio, a corporation under the laws of Ohio; The Texas Company, a corporation under the laws of Delaware, Defendants.

after, and notwithstanding that the wholesale market on gasoline had dropped at that time but one cent per gallon, reduced the retail selling price thereof at all of their owned and controlled retail stations to the extent of four cents below that price theretofore prevailing and made the same reductions of four cents on all other grades of gasoline except the lowest on which the reduction was 5¢."

It recites, among other things, that the defendants solicited and entered into annual agreements, known as "marginal contracts," with distributors and retailers having large retail outlets. The bill also recites that:

"Plaintiffs aver that one or more of the defendants, by reason of their size and wealth, have the power to, and do, dictate the maximum retail price of gasoline in this State and County, and have done so, in concert, for many years; those of the defendants who may not dictate said prices immediately, act in concert with that or those who do; said price fixing is secretly arranged and plaintiffs are unable to say which of the defendants are or are not primarily responsible therefor, but plaintiffs are informed and believe that the defendant, The Standard Oil Company, takes the ostensible lead in so doing and the other defendants act in concert with it."

Then it is recited further on:

"In furtherance of the designs of the defendants to monopolize and to substantially lessen competition in the sale of gasoline, said defendants, all being engaged in interstate commerce, habitually discriminate in price between different purchasers of the commodities in which they deal at retail by issuing to retail customers courtesy or preference cards which entitle such customers to buy gasoline at a price from 1¢ to 2¢ under the retail price and without regard to the quantity, grade, or quality of the commodity to be so sold, and without being made in good faith to meet competition and without reference to the cost of selling or transportation of said commodity."

On the bill containing these and of course the other allegations which it is not necessary for the court to read, the court is asked to do the following, as set forth in the prayer:

"* * * permanently enjoin the defendants, and each of them, from acting individually or in concert to arbitrarily fix or retain the retail price of gasoline in the County of Hamilton without regard to the wholesale price and without regard to differences in the grade, quality, or quantity of said gasoline, or for the difference in cost of selling or transportation or for the purpose in good faith of meeting competition and [2] that the defendants likewise be enjoined from issuing and honoring said courtesy cards and [3] for all other relief to which the plaintiffs may be entitled in equity and good conscience."

Then a temporary restraining order is prayed for; and the matter is now before the court on a motion for a temporary restraining order. I do not know whether that is the technical language of the motion or not, but that, at least, is the substance of it.

MR. FREIBERG: May I say to Your Honor that there is an amendment to the petition that I have not had time to prepare as yet?

THE COURT: This amendment I will read into the record:

"Plaintiffs say that in the States bordering Ohio into which the defendants ship and sell gasoline as well as into Ohio, the defendants kept their prices at the same rates as before cutting their prices in Ohio, and that said prices were at the time of filing this Bill from three to four cents higher than those prevailing in Ohio. The difference in said prices is not warranted by the economic factors hereinafter mentioned nor by the necessities of competition in good faith."

Now, the Clayton Act provides in Section 1—I guess it is Section 1 of the act also; Section 1, in any event, as found in 15 U. S. C. A.:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor"—

and so on. Of course, that provides with regard to the criminal procedure. But this case, if the court understands it correctly from the bill, is founded—originally at least—upon the theory that the defendants had joined in a conspiracy of some sort, a conspiracy, as the bill says, "to monopolize the wholesale and retail business of the purchase and sale of gasoline in this part of the United States"—that was the object of the conspiracy, and the bill was founded upon the theory that a conspiracy had been entered into. The court is of the opinion that no proof of a conspiracy, that is, not sufficient proof to warrant the court in finding a conspiracy existed, has been offered, and the view as the court entertained it at the close of the testimony was approved, or at least joined in by counsel for the plaintiffs, who, in his argument to the court, stated that no conspiracy had been proven. Counsel for plaintiffs argued, however, that there was such a concert of action among the defendants as that, to all intents and purposes, it amounted, under one of these subdivisions of the Clayton Act, to a combination, an unlawful combination to do things that the law prohibited, and the case of *Cement Manufacturers Protective Association v. United States*, 268 U. S. 588, was cited to the court by counsel upon both sides. Judge Shohl referred to it first and then Mr. Freiberg quoted from a part of it, as appears on pages 604, 605 and 606. In that case the Supreme Court says:

"Agreements or understanding among competitors for the maintenance of uniform prices are of course unlawful and may be enjoined, but the Government does not rely on any agreement or understanding for price maintenance. It relies rather upon the necessary leveling effect upon prices of knowledge disseminated among sellers as to some of the important factors which enter into price. It is conceded that there is a substantial uniformity of price of cement. Variations of price by one manufacturer are usually promptly followed by like variation throughout the trade. As already indicated, the larger proportion of the product of the defendants is distributed through dealers, and prices to dealers are not reported to or through the Association. It is contended by the Government that the report of prices

on specific job contracts in effect informs the members of the Association of prices to dealers, since the differential allowed to dealers is well known in the trade. However this may be, the fact is that any change in quotation of price to dealers, promptly becomes well-known in the trade through reports of salesmen, agents and dealers of various manufacturers. It appears to be undisputed that there were frequent changes in price, and uniformity has resulted not from maintaining the price at fixed levels, but from the prompt meeting of changes in prices by competing sellers.

It is urged by the defendants that such uniformity of price as existed in the trade was due to competition. They offered much evidence tending to show complete independence of judgment and of action of defendants, by large expenditures in competitive sales efforts and by variations in the volume of their production and shipment, earnings and profits. A great volume of testimony was also given by distinguished economists in support of the thesis that, in the case of a standardized product sold wholesale to fully informed professional buyers, as were the dealers in cement, uniformity of price will inevitably result from active, free and unrestrained competition; and the Government in its brief concedes that 'undoubtedly the price of cement would approach uniformity in a normal market in the absence of all combinations between the manufacturers'."

This is the part that was referred to by Mr. Freiberg, which I am about to quote:

"We realize also that uniformity of price may be the result of agreement or understanding, and that an artificial price level not related to the supply and demand of a given commodity may be evidence from which such agreement or understanding, or some concerted action of sellers operating to restrain commerce, may be inferred. But here the Government does not rely upon agreement or understanding, and this record wholly fails to establish, either directly or by inference, any concerted action other than that involved in the gathering and dissemination of pertinent information with respect to the sale and distribution of cement to which we have referred; and it fails to show any effect on price and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action."

Now, it would seem that, generally speaking, under certain circumstances the matter of uniformity of price may be considered, and from that, certain things, the Supreme Court say, may be inferred; but if we take the case before the court at this time, the only evidence that the court has here in that respect is that in this community very likely The Standard Oil Company—although I do not know that I am warranted by the record to state that as a matter of fact, but we will assume that The Standard Oil Company state what they are going to charge for gasoline. Now, it seems that, so far as the record in this case shows, the other companies may or may not, although they usually do, when they find out about it through the newspapers or by telephone, or what not, follow the same price. That was true also of these independent companies, the plaintiffs. Mr. Vaughan testified—in fact, he testified in response to a question which I put to him myself, that what he did when he got this information from The Standard Oil Company, was that he regulated his price accordingly, or words to that effect. And I think Mr. Markstein—in fact, my notes show that Mr. Markstein testified to the same thing—that upon receiving this information he followed the price established by The Standard Oil Company. Now, I do not think it would be fair for the court to infer necessarily that because each of the other defendants did what the plaintiffs themselves did, that therefore it follows as a matter of course. or as a matter of law, that the defendants did it by reason of some concerted action, that is, that they did it, as the bill says, secretly; the bill says "said price fixing is secretly arranged," and plaintiffs are unable to say how it is done. Now, it would seem that if somebody else had brought this action and had joined Mr. Markstein and Mr. Vaughan in as defendants, and it developed from their testimony that they fixed their prices to follow The Standard Oil Company, although they protested most vigorously that they had nothing to do with this alleged combination, yet the court, by the same token, it seems to me, would be justified in arriving at the inference that because they did follow the prices fixed by the Standard, therefore, perforce, they must be a part of this arrangement or combination along with the other defendants in the case.

So that I do not think that the facts as developed here in the testimony warrant this court in arriving at any such conclusion as the Supreme Court say in the Cement Case just quoted from may, under certain circumstances, be inferred. There is not before the court, at this time in any event, sufficient testimony, in the light of the testimony of some of the plaintiffs themselves, to warrant this court in jumping to the conclusion that merely because one company fixes a price and the others follow along, that therefore it must be that there is a combination or conspiracy.

The proof shows that many of these companies, or a number of these companies, so far as Hamilton County is concerned, or even throughout the State of Ohio, do a relatively very small business. In an affidavit filed by Mr. Rodgers, who is a vice-president of The Texas Company in charge of sales, he says, among other things:

"Affiant states there is no company, person, firm or association or any combination thereof having a monopoly of the oil industry or any of its branches and states, upon information and belief, that in the year 1932, within the United States, there were more than ten thousand companies, firms, persons or associations engaged in the production of crude oil; more than one hundred and fifty engaged in the transportation thereof; more than two hundred and fifty engaged in manufacturing petroleum products and more than twenty-four thousand engaged in marketing such products."

Now, assuming those figures to be approximately correct, of all of the business that goes on in the country that which we have in Ohio is only a small part, comparatively, and that which we have here in Hamilton County, with many of these companies is relatively extremely small—one company did less than 1%, I think it was, if I am not mistaken.

Now, I do not remember that there was any positive proof—I know there wasn't any in detail—with regard to this policy of following prices fixed by major companies in different parts of the country; that is to say, I gathered from what counsel for plaintiffs said this morning that there is some claim on the part of plaintiffs that in this certain territory around here The Standard Oil Company fixes prices and in some other parts of the United States some other company is the major company and that company is followed. If there was any proof to that effect—and I do not say that there was not—it was very meager; I do not recall anything specific to that effect, but it may be so. But, even if it were here, I do not see that under the proof that we have so far as this specific case is concerned, that it would be any evidence tending to show—at least it would be far from conclusive as showing any combination or conspiracy. That is, we may suspect something, or we may think that there is something, but the court cannot decide this case on speculation. I must have some evidence before me that would warrant me in arriving at a conclusion to do such a severe thing as to issue an injunction. That is what I am asked to do; that is, I am asked to issue a temporary order at this time with a view ultimately, of course, of issuing a permanent injunction.

I do not think that the court, except in the most general way, can take into consideration the relative size of these concerns, and in this connection, and in connection generally with the case, I think we should refer to the case also which was called to my attention this morning, *United States v. International Harvester Co.*, 274 U. S. 693. I am quoting from pages 708 and 709, where the Supreme Court say:

"It"—

speaking of the Harvester Company—

"has not, either during those two years or since, attempted to dominate or in fact controlled or dominated the harvesting machinery industry by the compulsory regulation of prices. The most that can be said as to this, is that many of its competitors have been accustomed, independently and as a matter of business expediency, to follow approximately the prices at which it has sold its harvesting machines; but one of its competitors has habitually sold its machines at somewhat higher prices. The law, however, does not make the mere size of a corporation, however impressive, or the existence of unexerted power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its power. *United States v. Steel Corporation*, 251 U. S. 417, 451. And the fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination."

Citing *Cement Association v. United States*, 268 U. S. 588, 608, to which I have heretofore referred.

Now, it would seem from that language that the Supreme Court recognizes that it is not necessarily to be inferred in every case, merely from the fact that competitors have followed the prices of another, that theretofore that has been done because of some unlawful combination, because they recognize that in certain cases these competitors may exercise their own judgment. And that is exactly what they say—"And the fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer," etc.

We come, then, as must be done in each case as it comes before the court, to the question of fact as disclosed by the record. So far as this case is concerned, the record does not show anything more than that, as the defendants claim, each in the exercise of its own independent judgment, does follow in this territory, the Standard Oil Company, which conduct was also indulged in by at least two of the plaintiffs in the case, each exercising their own independent judgment. They did not always, as I understood the testimony, quote the same price that The Standard Oil Company did; not infrequently the price quoted by some of the plaintiffs was even lower than that quoted by the Standard. But they followed the scale, that is to say, they would raise or lower their prices, as the case might be, as prices were raised or lowered by the Standard Oil Company, although at times they undersold—that is, their prices were lower than those of the Standard Oil Company or the so-called major companies, or some of them.

I am unable to find, as a matter of law, that these marginal contracts are illegal or that they are any evidence of illegality of any kind on the part of the defendants. I think they are quite easily distinguished from "tying in" contracts, such as are referred to—and I will not take the time to go over it—by the Supreme Court of the United States in the case of *United Shoe Machinery Co. v. United States*, 258 U. S. 451. To some extent, at least, one of the plaintiffs did not seem to think that they were particularly wrong in any legal or moral sense in so far as he knew, because

Mr. Markstein indicated that at least one of the reasons why he did not care to enter into a marginal contract was because he thought he could make more money by keeping out of it, which is entirely proper and all right. And, as a matter of fact, the proof shows that for almost a year he did make more money by keeping out; it has only been within the last thirty days, or approximately that time, that the market has gone the other way. Now, I do not know, and I do not mean to say that any of these plaintiffs, including Mr. Markstein, would enter into one of these contracts if he thought he could make more money by doing so; but, in any event, one reason he has not done so was because he thought he could make more money by keeping out.

I would not think that this court had any power to fix any price or prices, even if I had taken the view that I should grant the prayer of this bill at this time. That may not be necessary; I do not know exactly what Mr. Freiberg had in mind in regard to the drawing of a decree, but if the matter of price-fixing had anything to do with it I should not think that this court would be in a position where it could do that, or do it intelligently, at any event. I would hate to undertake it, in view of the present economic situation. I would hesitate to say how many businesses I am running now through receivers of this court. If I start to fix prices of commodities I suppose I will take on a great many more, very likely.

I am inclined to concur in the view expressed by Judge Shohl and other counsel in the case, but particularly expressed by Judge Shohl this morning in his argument, that this is more or less of a mandatory injunction that is asked for, which would require the defendants to do something affirmatively.

Mr. Seasongood pointed out that the Sinclair Company do only about 1% of the business in this county, or less, and that it has no courtesy cards. As to them no order could issue as prayed for against them, if that is the case. At this time they have no marginal contracts. There is at least sufficient proof here to warrant the court in coming to the conclusion at this time that there are a great many conditions that surround each one of these companies that make it impossible, or at least impractical for me to issue a blanket order of some kind, even if there had been proof sufficient to my mind to warrant my issuing an order in the first instance. I am not unmindful of the cases that counsel for the plaintiffs referred me to here this morning—*Harriman v. Northern Securities Co.*, 132 Fed. 464, wherein it is said, at page 476:

"But where, in a doubtful case, the denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption, be sustained by the defendant through its allowance, the injunction usually should be granted."

And on page 485:

"* * * It is often of controlling importance where, on such application"—

that is, on an application for preliminary injunction—

"there is room for reasonable doubt as to the ultimate result. Under the circumstances, this court would not be justified in refusing the injunction sought. Such refusal would not be an exercise of sound judicial discretion."

I say now to counsel if I had any reasonable doubt about it I would resolve that doubt in favor of the plaintiffs, but under the testimony as adduced here and the law as I understand it, I have no reasonable doubt in my own mind as to this, that is, that there is not sufficient proof here in this case to warrant at this time my issuing a temporary order.

Now, it may be, if no order is issued by this court or by some other court later on, that it will result in requiring certain economies on the part of the plaintiffs; but the court of course must in this, as in every case, decide the law and the facts upon the facts as he understands them to be and the law as the court understands it; and the court should not be, any more than a jury should be, swayed by sympathy, emotion, passion or prejudice.

There are many other things in this case which should no doubt be touched upon and which, if I had had the time to take the briefs of counsel, I probably could have touched upon and I know the decision could have been better put together. But I determined to decide the matter now out of respect to the position in which the plaintiffs claim to find themselves. I felt that it was only due to them that the court should act promptly, because their counsel from the first has stressed that. I think that is proper. As I understand the law, you have a right to go to the Court of Appeals on an interlocutory order and, that being true, I think you should have that right now, rather than for me to announce the same conclusion, even though it might have been in more choice language, perhaps, at some time later on, leaving the plaintiffs to suffer, if they are going to suffer as they claim they are, in the interim. That is the reason why I felt that it was my duty to dispose of it promptly and let you have the benefit of

the time in going to the higher court if you wish to do so. This, of course, is not a final decision; what might come before the court later on, on the merits, is a matter further along. But at this time the motion for a temporary order will be denied.

[¶ 55,024] V. O. Zahniser and The Midland Oil Company, Plaintiffs, v. The Buckeye Pipe Line Company of Lima, Ohio, The South West Pennsylvania Pipe Lines, Pittsburgh, Pa., Joseph Seep Purchasing Agency, Pittsburgh, Pa., The Pure Oil Company, Pittsburgh, Pa., and The South Penn Oil Company of Pittsburgh, Pa., Defendants.

In the District Court of the United States for the Western District of Pennsylvania. No. 2732. In Equity. Filed January 27, 1933.

Where plaintiff's suit is based on an alleged violation of the Sherman Anti-Trust Act but the averments of the bill are meager and indefinite, the bill should be amended so that facts may be averred "which would clearly disclose the cause of action and the statute, or statutes, depended upon for jurisdiction."

Opinion and Order

McVicar, J.: This is a suit in equity by two producers of oil in the State of Ohio, against five defendants, to recover damages alleged to have been caused by collusion in the grading of plaintiffs' oil marketed through the defendants.

The South West Pennsylvania Pipe Lines, Joseph Seep Purchasing Agency and the South Penn Oil Company, of defendants, filed motions to dismiss the bill on the ground that this court did not have jurisdiction, by virtue of diversity of citizenship.

Plaintiffs argue and contend that this court has jurisdiction under the Interstate Commerce Act (Title 49, sections 9 and 10, U. S. C.), under the Sherman Anti-Trust Act (Title 15, section 22, U. S. C.), and also by diversity of citizenship.

The motions of defendants limit their attack on this court's jurisdiction to one ground, namely: Whether this court has jurisdiction by diversity of citizenship; consequently, whether this court has jurisdiction on the other grounds contended for by plaintiffs is not before us.

The motions to dismiss for want of jurisdiction are dismissed, without prejudice to the defendants to file new motions raising, generally, the question of the jurisdiction of this court.

The averments of the bill are meager and indefinite. If plaintiffs' suit is based on a violation of the above acts, or either of them, the bill should be amended so that facts may be averred which would clearly disclose the cause of action and the statute, or statutes, depended upon for jurisdiction.

[¶ 55,025] Appalachian Coals, Incorporated, et al., Appellants, v. The United States of America.

Supreme Court of the United States. No. 504. October Term, 1932. Decided March 13, 1933.

Appeal from the District Court of the United States for the Western District of Virginia.

The creation of an exclusive sales agency by a group of coal producers held not of itself a violation of the federal anti-trust laws, although such an agency arrangement would be subject to the prohibitions of the anti-trust laws "if in actual operation it should prove to be an undue restraint upon interstate commerce."

The federal anti-trust laws "do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of [interstate] commerce or the

adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis."

"The question of the application of the statute [the Sherman Anti-Trust Act] is one of intent and effect, and is not to be determined by arbitrary assumptions. It is therefore necessary in this instance to consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of defendant's plan of making sales, the reasons which lead to its adoption, and the probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce in bituminous coal."

"With respect to defendant's purposes we find no warrant for determining that they were other than those they declared. Good intentions will not save a plan otherwise objectionable, but knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences."

As to the use of the agency plan as an effort to assist the industry and rid itself of certain abuses the Court said: "The unfortunate state of the industry would not justify any attempt unduly to restrain competition or to monopolize, but the existing situation prompted defendants to make, and the statute did not preclude them from making, an honest effort to remove abuses, to make competition fairer, and thus to promote the essential interests of commerce."

"The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade. The intelligent conduct of commerce through the acquisition of full information of all relevant facts may properly be sought by the cooperation of those engaged in trade, although stabilization of trade and more reasonable prices may result." Cases involving unreasonable restraints of trade are carefully distinguished. "In the instant case there is . . . no intent or power to fix prices, abundant competitive opportunities will exist in all markets where defendants' coal is sold, and nothing has been shown to warrant the conclusion that defendants' plan will have an injurious effect upon competition in these markets."

The argument that the plan for an exclusive sales agency will eliminate competition between the producers agreeing was answered by the argument that if the mere size of a corporate entity is not enough to "bring a combination in corporate form within the statutory inhibition, the mere number and extent of the production of those engaged in a cooperative endeavor to remedy evils which may exist in an industry, and to improve competitive conditions, should not be regarded as producing illegality. The argument that integration may be considered a normal expansion of business, while a combination of independent producers in a common selling agency should be treated as abnormal—that one is a legitimate enterprise and the other is not—makes but an artificial distinction." Citing *United States v. United States Steel Corporation,* 251 U. S. 417; *United States v. International Harvester Co.,* 274 U. S. 693.

Mr. Chief Justice Hughes delivered the opinion of the Court.

This suit was brought to enjoin a combination alleged to be in restraint of interstate commerce in bituminous coal and in attempted monopolization of part of that commerce, in violation of sections 1 and 2 of the Sherman Anti-Trust Act, 26 Stat. 209. The District Court, composed of three Circuit Judges, made detailed findings of fact and entered final decree granting the injunction. 1 F. Supp. 339. The case comes here on appeal. 28 U. S. C., 380.

Defendants, other than Appalachian Coals, Inc., are 137 producers of bituminous coal in eight districts (called for convenience Appalachian territory) lying in Virginia, West Virginia, Kentucky and Tennessee. These districts, described as the Southern High Volatile Field, form part of the coal bearing area stretching from central and western Pennsylvania through eastern Ohio, western Maryland, West Virginia, southwestern Virginia, eastern Kentucky, eastern Tennessee, and northeastern Alabama. In 1929 (the last year for which complete statistics were available) the total production of bituminous coal east of the Mississippi river was 484,786,000 tons, of which defendants mined 58,011,367 tons, or 11.96 per cent. In the so-called Appalachian territory and the immediately surrounding area, the total production was 107,008,209 tons, of which de-

fendants' production was 54.21 per cent, or 64 per cent if the output of "captive" mines (16,455,001 tons) be deducted.[1] With a further deduction of 12,000,000 tons of coal produced in the immediately surrounding territory, which, however, is not essentially different from the particular area described in these proceedings as Appalachian territory, defendants' production in the latter region was found to amount to 74.4 per cent.[2]

The challenged combination lies in the creation by the defendant producers of an exclusive selling agency. This agency is the defendant Appalachian Coals, Inc., which may be designated as the Company. Defendant producers own all its capital stock, their holdings being in proportion to their production. The majority of the common stock, which has exclusive voting right, is held by seventeen defendants. By uniform contracts, separately made, each defendant producer constitutes the Company an exclusive agent for the sale of all coal (with certain exceptions) which the producer mines in Appalachian territory.[3] The Company agrees to establish standard classifications, to sell all the coal of all its principals at the best prices obtainable and, if all cannot be sold, to apportion orders upon a stated basis. The plan contemplates that prices are to be fixed by the officers of the Company at its central office, save that, upon contracts calling for future deliveries after sixty days, the Company must obtain the producer's consent. The Company is to be paid a commission of ten per cent of the gross selling prices f. o. b. at the mines, and guarantees accounts. In order to preserve their existing sales' outlets, the producers may designate subagents, according to an agreed form of contract, who are to sell upon the terms and prices established by the Company and are to be allowed by the Company commissions of eight per cent. The Company has not yet begun to operate as selling agent; the contracts with it run to April 1, 1935, and from year to year thereafter unless terminated by either party on six months' notice.

The Government's contention, which the District Court sustained, is that the plan violates the Sherman Anti-Trust Act,—in the view that it eliminates competition among the defendants themselves and also gives the selling agency power substantially to affect and control the price of bituminous coal in many interstate markets. On the latter point the District Court made the general finding that "this elimination of competition and concerted action will affect market conditions, and have a tendency to stabilize prices and to raise prices to a higher level than would prevail under conditions of free competition." The court added that the selling agency "will not have monopoly control of any market nor the power to fix monopoly prices."

Defendants insist that the primary purpose of the formation of the selling agency was to increase the sale, and thus the production, of Appalachian coal through better methods of distribution, intensive advertising and research, to achieve economies in marketing, and to eliminate abnormal, deceptive and destructive trade practices. They disclaim any intent to restrain or monopolize interstate commerce, and in justification of their design they point to the statement of the District Court that "it is but due to defendants to say that the evidence in the case clearly shows that they have been acting fairly and openly, in an attempt to organize the coal industry and to relieve the deplorable conditions resulting from over-expansion, destructive competition, wasteful trade practices, and the inroads of competing industries." 1 F. Supp., p. 341. Defendants contend that the evidence establishes that the selling agency will not have the power to dominate or fix the price of coal in any consuming market; that the price of coal will continue to be set in an open competitive market; and that their plan by increasing the sale of bituminous coal from Appalachian territory will promote, rather than restrain, interstate commerce.

First. There is no question as to the test to be applied in determining the legality of the defendants' conduct. The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might

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[1] "Captive" mines are thus designated as they produce chiefly for the consumption of the owners.

[2] Defendants contend that, in calculating their position upon a percentage basis, surrounding territory should be included and that their percentage thus lies "somewhere between 54-21 and 64 per cent." The District Court found: "The coal produced in the surrounding territory is the same kind of coal as that produced in the Appalachian territory and is suitable for the same purposes and available to the same markets, generally on the same freight rates, and for all practical purposes might have been included in the territory described as Appalachian territory."

[3] Exception is made of deliveries on contracts then outstanding and of coal used in the operations of defendants' mines or sold to its employees.

either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis. The decisions establish, said this Court in *Nash v. United States,* 229 U. S. 373, 376, "that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade." See *Standard Oil Company v. United States,* 221 U. S. 1; *United States v. American Tobacco Company,* 221 U. S. 106; *Chicago Board of Trade v. United States,* 246 U. S. 231, 238; *Window Glass Manufacturers v. United States,* 263 U. S. 403, 412; *Maple Flooring Association v. United States,* 268 U. S. 563, 583, 584; *Paramount Famous Corporation v. United States,* 282 U. S. 30, 43; *Standard Oil Company v. United States,* 283 U. S. 163. 169.

In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. "The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains." *Chicago Board of Trade v. United States, supra.* The familiar illustrations of partnerships, and enterprises fairly integrated in the interest of the promotion of commerce, at once occur. The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions. It is therefore necessary in this instance to consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of defendant's plan of making sales, the reasons which led to its adoption, and the probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce in bituminous coal.

Second. The findings of the District Court, upon abundant evidence, leave no room for doubt as to the economic condition of the coal industry. That condition, as the District Court states, "for many years has been indeed deplorable." Due largely to the expansion under the stimulus of the Great War, "the bituminous mines of the country have a developed capacity exceeding 700,000,000 tons" to meet a demand "of less than 500.000.000 tons." In connection with this increase in surplus production, the consumption of coal in all the industries which are its largest users has shown a substantial relative decline. The actual decrease is partly due to the industrial condition but the relative decrease is progressing, due entirely to other causes. Coal has been losing markets to oil, natural gas and water power and has also been losing ground due to greater efficiency in the use of coal. The change has been more rapid during the last few years by reason of the developments of both oil and gas fields. The court below found that "Based upon the assumption that bituminous coal would have maintained the upward trend prevailing between 1900 and 1915 in percentage of total energy supply in the United States, the total substitution between 1915 and 1930 has been equal to more than 200,000,000 tons per year." [4] While proper allowance must be made for differences in consumption in different parts of the country,[5] the adverse

[4] The findings show that "The number of domestic oil burners in use has increased more than sixty fold . . . from 1921 to 1931. . . . About fifty per cent of all oil burners, both domestic and commercial, are in the markets in which Appalachian coals are sold. The railroads have improved combustion methods and reduced their fuel consumption from 1916 to 1929 by 32,000,000 tons. In freight service, their consumption of coal per thousand freight ton miles dropped from 164 pounds in 1919 to 125 pounds in 1929. The electric industries decreased consumption of coal per kilowatt hour from approximately 3.2 pounds to 1.6 pounds and thereby reduced their requirements for coal in excess of 47,000,000 tons. Efficiency in the smelting of pig iron decreased the consumption of coal in relation to the pig iron made by 10,000,000 tons. The saving in by-product coke manufactures over the bee hive system amounted to 12,000,000 tons."

[5] The court below points out that "the use of natural gas and fuel oil is limited to certain areas. Gas is not available to all sections of the country and the great centers of fuel oil consumption are California, the southwest, the midcontinent field and the Atlantic seaboard. Moreover, in the States in which Appalachian coal is chiefly marketed, the substitute fuels combined supply only about ten per cent of the total energy consumption. In the year 1929 about fifty per cent of defendants' coal, other than railroad fuel, went into the States of Ohio, Michigan, Indiana and Illinois." In these States the percentage of total energy consumption derived from bituminous coal in 1929 ranged from 88.7 per cent to 92.7 per cent.

influence upon the coal industry, including the branch of it under review, of the use of substitute fuels and of improved methods is apparent.

This unfavorable condition has been aggravated by particular practices. One of these relates to what is called "distress coal." The greater part of the demand is for particular sizes of coal such as nut and slack, stove coal, egg coal, and lump coal. Any one size cannot be prepared without making several sizes. According to the finding of the court below, one of the chief problems of the industry is thus involved in the practice "of producing different sizes of coal even though orders are on hand for only one size, and the necessity of marketing all sizes." Usually there are no storage facilities at the mines and the different sizes produced are placed in cars on the producer's tracks, which may become so congested that either production must be stopped or the cars must be moved regardless of demand. This leads to the practice of shipping unsold coal to billing points or on consignment to the producer or his agent in the consuming territory. If the coal is not sold by the time it reaches its destination, and is not unloaded promptly, it becomes subject to demurrage charges which may exceed the amount obtainable for the coal unless it is sold quickly. The court found that this type of "distress coal" presses on the market at all times, includes all sizes and grades, and the total amount from all causes is of substantial quantity.

"Pyramiding" of coal is another "destructive practice." It occurs when a producer authorizes several persons to sell the same coal, and they may in turn offer it for sale to other dealers. In consequence "the coal competes with itself, thereby resulting in abnormal and destructive competition which depresses the price for all coals in the market." Again, there is misrepresentation by some producers in selling one size of coal and shipping another size which they happen to have on hand. "The lack of standardization of sizes and the misrepresentation as to sizes" are found to have been injurious to the coal industry as a whole. The court added, however, that the evidence did not show the existence of any trade war or widespread fraudulent conduct. The industry also suffers through "credit losses," which are due to the lack of agencies for the collection of comprehensive data with respect to the credits that can safely be extended.

In addition to these factors, the District Court found that organized buying agencies, and large consumers purchasing substantial tonnages, "constitute unfavorable forces." "The highly organized and concentrated buying power which they control and the great abundance of coal available have contributed to make the market for coal a buyers' market for many years past."

It also appears that the "unprofitable condition" of the industry has existed particularly in the Appalachian territory where there is little local consumption, as the region is not industrialized. "The great bulk of the coal there produced is sold in the highly competitive region east of the Mississippi river and north of the Ohio river under an adverse freight rate which imposes an unfavorable differential from 35 cents to 50 cents per ton."[6] And in a graphic summary of the economic situation, the court found that "numerous producing companies have gone into bankruptcy or into the hands of receivers, many mines have been shut down, the number of days of operation per week have been greatly curtailed, wages to labor have been substantially lessened, and the States in which coal producing companies are located have found it increasingly difficult to collect taxes."

Third. The findings also fully disclose the proceedings of the defendants in formulating their plan and the reasons for its adoption. The serious economic conditions had led to discussions among coal operators and state and national officials, seeking improvement of the industry. Governors of States had held meetings with coal producers. The limits of official authority were apparent. A general meeting of producers, sales agents and attorneys was held in New York in October, 1931, a committee was appointed and various suggestions were considered. At a second general meeting in December, 1931, there was further discussion and a report which recommended the organization of regional sales agencies, and was supported by the opinion of counsel as to the legality of proposed forms of contract, was approved. Committees to present the plan to producers were constituted for eighteen producing districts including the eight districts in Appalachian territory. Meetings of the representatives of the latter districts resulted in the organization of defendant Appalachian Coals, Inc. It was agreed that a minimum of 70 per cent and a maximum of 80 per cent of the commercial tonnage of the territory should be secured before the plan should become effective. Approximately 73 per

[6] Defendants insist that "the real spread is from 25 cents to $1.84 per ton."

cent was obtained. A resolution to fix the maximum at 90 per cent was defeated. The maximum of 80 per cent was adopted because a majority of the producers felt that an organization with a greater degree of control might unduly restrict competition in local markets. The minimum of 70 per cent was fixed because it was agreed that the organization would not be effective without this degree of control. The court below also found that it was the expectation that similar agencies would be organized in other producing districts including those which were competitive with Appalachian coal, and that it was "the particular purpose of the defendants in the Appalachian territory to secure such degree of control therein as would eliminate competition among the 73 per cent of the commercial production." But the court added: "However, the formation of Appalachian Coals was not made dependent upon the formation of other regional selling agencies and there is no evidence of a purpose, understanding or agreement among the defendants that in the event of the formation of other similar regional sales agencies there would be any understanding or agreement, direct or indirect, to divide the market territory between them or to limit production or to fix the price of coal in any market or to cooperate in any way." When, in January, 1932, the Department of Justice announced its adverse opinion, the producers outside Appalachian territory decided to hold their plans in abeyance pending the determination of the question by the courts. The District Court found that "the evidence tended to show that other selling agencies with a control of at least 70 per cent of the production in their respective districts will be organized if the petition in this case is dismissed"; that in that event "there will result an organization in most of the districts whose coal is or may be competitive with Appalachian coal; but the testimony tends to show that there will still be substantial, active competition in the sale of coal in all markets in which Appalachian coal is sold."

Defendants refer to the statement of purposes in their published plan of organization,—that it was intended to bring about "a better and more orderly marketing of the coals from the region to be served by this company (the selling agency) and better to enable the producers in this region, through the larger and more economic facilities of such selling agency, more equally to compete in the general markets for a fair share of the available coal business." The District Court found that among their purposes, defendants sought to remedy "the destructive practice of shipping coal on consignment without prior orders for the sale thereof, which results in the dumping of coal on the market irrespective of the demand"; "to eliminate the pyramiding of offers for the sale of coal"; to promote "the systematic study of the marketing and distribution of coal, the demand and the consumption and the kinds and grades of coal made and available for shipment by each producer in order to improve conditions"; to maintain an inspection and engineering department which would keep in constant contact with customers "in order to demonstrate the advantages and suitability of Appalachian coal in comparison with other competitive coals"; to promote an extensive advertising campaign which would show "the advantages of using coal as a fuel and the advantages of Appalachian coal particularly"; to provide a research department employing combustion engineers which would demonstrate "proper and efficient methods of burning coal in factories and in homes" and thus aid producers in their competition with substitute fuels; and to operate a credit department which would build up a record with respect to the "reliability of purchasers." The court also found that "Defendants believe that the result of all these activities would be the more economical sale of coal, and the economies would be more fully realized as the organization of the selling agent is perfected and developed." But in view of the designation of sub-agents, economies in selling expenses would be attained "only after a year or so of operation."

No attempt was made to limit production. The producers decided that it could not legally be limited and, in any event, it could not be limited practically. The finding is that "it was designed that the producer should produce and the selling agent should sell as much coal as possible." The importance of increasing sales is said to lie in the fact that the cost of production is directly related to the actual running time of the mines.

Fourth. Voluminous evidence was received with respect to the effect of defendants' plan upon market prices. As the plan has not gone into operation, there are no actual results upon which to base conclusions. The question is necessarily one of prediction. The court below found that, as between defendants themselves, competition would be eliminated. This was deemed to be the necessary consequence of a common selling agency with power to fix the prices at which it would make sales for its principals. Defendants insist that the finding is too broad and that the differences in grades of coal of the same sizes and the market demands at different times would

induce competition between the coals sold by the agency "depending upon the use and the quality of the coals."

The more serious question relates to the effect of the plan upon competition between defendants and other producers. As already noted, the District Court found that "the great bulk" of the coal produced in Appalachian territory is sold "in the highly competitive region east of the Mississippi river and north of the Ohio river under an adverse freight rate." Elaborate statistics were introduced with respect to the production and distribution of bituminous coal and the transportation rates from the different producing sections to the consuming markets, as bearing upon defendants' competitive position, together with evidence as to the requirements of various sections and consumers and the relative advantages possessed by reason of the different qualities and uses of the coals produced. It would be impossible to make even a condensed statement of this evidence (which has been carefully analyzed by both parties) but an examination of it fails to disclose an adequate basis for the conclusion that the operation of the defendants' plan would produce an injurious effect upon competitive conditions, in view of the vast volume of coal available, the conditions of production, and the network of transportation facilities at immediate command. While strikes and interruptions of transportation may create temporary and abnormal dislocations, the bituminous coal industry under normal conditions affords most exceptional competitive opportunities. Figures as to developed and potential productive capacity are impressive. The court below found upon this point that the capacity of the mines in the Appalachian region operated by others than defendants is 82,660,760 tons, as against the capacity of defendants' mines of 86,628,880 tons, while the present yearly capacity of all mines in southern West Virginia, Virginia, eastern Kentucky and Tennessee is 245,233,560 tons, based upon an eight-hour working day. "This excess capacity over actual production," the court said, "could be brought into production at moderate expense and with reasonable promptness." As to potential, undeveloped capacity in Appalachian territory, the court found that in the eight districts in this region not held by any operating, or by any captive, company, there are approximately 760,000 acres containing more than 4,300,000,000 tons of recoverable coal. In addition, in the same territory "owned by captive companies and not being operated, or owned by operating companies who are using only a very small proportion of their holdings," there is an additional 860,000 acres, containing more than 4,600,000,000 tons of coal. Within the twenty-four counties in which defendants' mines are located, and immediately adjacent to them, on railroads already operating, "with the exception of short, feeder extensions," there are over 1,620,000 acres of coal bearing land, containing approximately 9,000,000,000 net tons of recoverable coal "comparable both in quality and mining conditions with the coal now being mined in that region." "The opening up of this acreage would involve only the extension of short branch lines from the railroads and the building of mining plants. The price of these lands at the present time would be less than half of the value of two or three years ago, and considerably less on a royalty basis. Coal produced from these districts is available for any market in which Appalachian coal is sold. Conditions in the coal industry are such that new companies are free to enter the business of producing and marketing coal in competition with existing companies." In connection with this proof of developed and potential capacity, the "highly organized and concentrated buying power" that can be exerted must also have appropriate consideration.[7]

Consumers testified that defendants' plan will be a benefit to the coal industry and will not restrain competition. Testimony to that effect was given by representatives of the Louisville & Nashville Railroad, the Norfolk & Western Railroad, and the Chesapeake & Ohio Railroad, "the largest railroad users of coal operating in the Appalachian region," and by representatives of large utility companies and manufacturing concerns.[8] There was similar

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[7] J. M. Dewberry, general coal and coke agent of the Louisville & Nashville Railroad, a large consumer of Appalachian coal, testified: "It is a well known fact today that the buying power of these large consumers of coal is more intelligent, more forceful, more far reaching than ever before in the history of the industry. And it just sounds to me like a joke for somebody to talk about Appalachian Coals or somebody else dictating the price that they are going to pay. They dictate their own price. The purchaser makes it. And he makes it because of the tremendous force and influence of his buying power. Why, it is nothing these days for one interest or one concern to buy several million tons of coal."

[8] The District Court in its finding, after referring to the railroads above mentioned, continues: "A representative of a large public utility company" (with extensive power lines in the middle west and on the Atlantic seaboard) "consuming annually approximately 2,485,000 tons of coal has stated that the organization and operation of Appalachian Coals, Inc. will not affect competition in the markets in which his company buys coal, and that it will have a beneficial effect on the coal industry. A representative of a power company operating throughout the State of Georgia . . . using from 30,000 to 125,000 tons of coal annually, has stated that the organization and operation of Appalachian Coals, Inc. will not restrain competition in the markets

testimony by wholesale and retail dealers in coal. There are 130 producers of coal other than defendants in Appalachian territory who sell coal commercially. There are also "a large number of mines that have been shut down and could be opened up by the owners on short notice." Competing producers testified that the operation of the selling agency, as proposed by defendants, would not restrain competition and would not hurt their business. Producers in western Pennsylvania, Alabama, Ohio and Illinois testified to like effect. Referring to this testimony, the court below added, "The small producer can, to some extent, and for the purpose of producing and marketing coal, produce coal more cheaply than many of the larger companies and is not prevented by higher cost of operation from being a competitor in the market."

The Government criticises the "opinion testimony" introduced by defendants as relating to a competitive situation not within the experience of the witnesses, and also animadverts upon their connections and interests, but the Government did not offer testimony of opposing opinions as to the effect upon prices of the operation of the selling agency. Consumers who testified for the Government explained their dependence upon coal from Appalachian territory.

The District Court commented upon the testimony of officers of the selling agency to the effect "that the organization would not be able to fix prices in an arbitrary way but, by the elimination of certain abuses, and by better advertising and sale organization, the producers would get more in the aggregate for their coal." "Other witnesses for the defendants" said the court, "indicated that there would be some tendency to raise the price but that the degree of increase would be affected by other competitors in the coal industry and by producers of coal substitutes."

Fifth. We think that the evidence requires the following conclusions:

(1). With respect to defendants' purposes, we find no warrant for determining that they were other than those they declared. Good intentions will not save a plan otherwise objectionable, but knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences. *Chicago Board of Trade v. United States, supra.* The evidence leaves no doubt of the existence of the evils at which defendants' plan was aimed. The industry was in distress. It suffered from over-expansion and from a serious relative decline through the growing use of substitute fuels. It was afflicted by injurious practices within itself,—practices which demanded correction. If evil conditions could not be entirely cured, they at least might be alleviated. The unfortunate state of the industry would not justify any attempt unduly to restrain competition or to monopolize, but the existing situation prompted defendants to make, and the statute did not preclude them from making, an honest effort to remove abuses, to make competition fairer, and thus to promote the essential interests of commerce. The interests of producers and consumers are interlinked. When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry. So far as actual purposes are concerned, the conclusion of the court below was amply supported that defendants were engaged in a fair and open endeavor to aid the industry in a measurable recovery from its plight. The inquiry then, must be whether despite this objective the inherent nature of their plan was such as to create an undue restraint upon interstate commerce.

(2). The question thus presented chiefly concerns the effect upon prices. The evidence as to the conditions of the production and distribution of bituminous coal, the available facilities for its transportation, the extent of developed mining capacity, and the vast potential undeveloped capacity, makes it impossible to conclude that defendants through the operation of their plan will be able to fix the price of coal in the consuming markets. The ultimate finding of the District Court is that the defendants "will not have monopoly control of any market, nor the power to fix monopoly prices"; and in its opinion the court stated that "the selling agency will not be able, we think, to fix the mar-

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in which his company buys coal. A representative of the Carbide and Carbon Corporation which uses annually about 250,000 tons of bituminous coal, 100,000 tons of coke made from bituminous coal, and 40,000 to 50,000 tons of petroleum coke, and operating plants that consume coal at South Charleston, West Virginia; Niagara Falls, New York; Cleveland, Ohio; Sault Ste Marie, Michigan; Indianapolis, Indiana, and Fremont and Fostoria, Ohio, has stated that the organization of Appalachian Coals, Inc. will have a beneficial effect in the coal industry and will not restrain competition in the markets in which his company buys coal. The largest purchaser of coal in the States of North Carolina, South Carolina, Georgia and eastern Tennessee who purchases approximately 600,000 tons of coal annually under normal conditions for use by textile mills, located in those States, has stated that the organization and operation of Appalachian Coals, Inc. will not control or dominate the price in the markets in which he purchases coal, and that he will be able to purchase coal in an open and competitive market."

ket price of coal." Defendants' coal will continue to be subject to active competition. In addition to the coal actually produced and seeking markets in competition with defendants' coal, enormous additional quantities will be within reach and can readily be turned into the channels of trade if an advance of price invites that course. While conditions are more favorable to the position of defendants' group in some markets than in others, we think that the proof clearly shows that, wherever their selling agency operates, it will find itself confronted by effective competition backed by virtually inexhaustible sources of supply, and will also be compelled to cope with the organized buying power of large consumers. The plan cannot be said either to contemplate or to involve the fixing of market prices.

The contention is, and the court below found, that while defendants could not fix market prices, the concerted action would "affect" them, that is, that it would have a tendency to stabilize market prices and to raise them to a higher level than would otherwise obtain. But the facts found do not establish, and the evidence fails to show, that any effect will be produced which in the circumstances of this industry will be detrimental to fair competition. A cooperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. Voluntary action to rescue and preserve these opportunities, and thus to aid in relieving a depressed industry and in reviving commerce by placing competition upon a sounder basis, may be more efficacious than an attempt to provide remedies through legal processes. The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade. The intelligent conduct of commerce through the acquisition of full information of all relevant facts may properly be sought by the cooperation of those engaged in trade, although stabilization of trade and more reasonable prices may be the result. *Maple Flooring Association v. United States, supra; Cement Manufacturers Association v. United States,* 268 U. S. 588, 604. Putting an end to injurious practices, and the consequent improvement of the competitive position of a group of producers is not a less worthy aim and may be entirely consonant with the public interest, where the group must still meet effective competition in a fair market and neither seeks nor is able to effect a domination of prices.

Decisions cited in support of a contrary view were addressed to very different circumstances from those presented here. They dealt with combinations which on the particular facts were found to impose unreasonable restraints through the suppression of competition, and in actual operation had that effect. *American Column & Lumber Co. v. United States,* 257 U. S. 377; *United States v. American Linseed Oil Co.,* 262 U. S. 371. Compare *Maple Flooring Association v. United States, supra,* at pp. 579-582. In *Addyston Pipe & Steel Company v. United States,* 175 U. S. 211, the combination was effected by those who were in a position to deprive, and who sought to deprive, the public in a large territory of the advantages of fair competition and was for the actual purpose and had the result of enhancing prices,—which in fact had been unreasonably increased. *Id.,* pp. 237, 238. In *United States v. Trenton Potteries Company,* 273 U. S. 392, defendants, who controlled 82 per cent of the business of manufacturing and distributing vitreous pottery in the United States, had combined to fix prices. It was found that they had the power to do this and had exerted it. The defense that the prices were reasonable was overruled, as the court held that the power to fix prices involved "power to control the market and to fix arbitrary and unreasonable prices," and that in such a case the difference between legal and illegal conduct could not "depend upon so uncertain a test" as whether the prices actually fixed were reasonable, a determination which could "be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies." See *United States v. Cohen Grocery Co.,* 255 U. S. 1. In the instant case there is, as we have seen, no intent or power to fix prices, abundant competitive opportunities will exist in all markets where defendants' coal is sold, and nothing has been shown to warrant the conclusion that defendants' plan will have an injurious effect upon competition in these markets.

(3). The question remains whether, despite the foregoing conclusions, the fact that the defendants' plan eliminates competition between themselves is alone sufficient to condemn it. Emphasis is placed upon defendants' control of about 73 per cent of the commercial production in Appalachian territory. But only a small percentage of that production is sold in that territory. The finding of the court below

is that "these coals are mined in a region where there is very little consumption." Defendants must go elsewhere to dispose of their products, and the extent of their production is to be considered in the light of the market conditions already described. Even in Appalachian territory it appears that the developed and potential capacity of other producers will afford effective competition.[9] Defendants insist that on the evidence adduced as to their competitive position in the consuming markets and in the absence of proof of actual operations showing an injurious effect upon competition, either through possession or abuse of power, no valid objection could have been interposed under the Sherman Act if the defendants had eliminated competition between themselves by a complete integration of their mining properties in a single ownership. *United States v. United States Steel Corporation,* 251 U. S. 417; *United States v. International Harvester Company,* 274 U. S. 693. We agree that there is no ground for holding defendants' plan illegal merely because they have not integrated their properties and have chosen to maintain their independent plants, seeking not to limit but rather to facilitate production. We know of no public policy, and none is suggested by the terms of the Sherman Act, that in order to comply with the law those engaged in industry should be driven to unify their properties and businesses in order to correct abuses which may be corrected by less drastic measures. Public policy might indeed be deemed to point in a different direction. If the mere size of a single, embracing entity is not enough to bring a combination in corporate form within the statutory inhibition, the mere number and extent of the production of those engaged in a cooperative endeavor to remedy evils which may exist in an industry, and to improve competitive conditions, should not be regarded as producing illegality. The argument that integration may be considered a normal expansion of business, while a combination of independent producers in a common selling agency should be treated as abnormal—that one is a legitimate enterprise and the other is not—makes but an artificial distinction. The Anti-Trust Act aims at substance. Nothing in theory or experience indicates that the selection of a common selling agency to represent a number of producers should be deemed to be more abnormal than the formation of a huge corporation bringing various independent units into one ownership. Either may be prompted by business exigencies and the statute gives to neither a special privilege. The question in either case is whether there is an unreasonable restraint of trade or an attempt to monopolize. If there is, the combination cannot escape because it has chosen corporate form, and, if there is not, it is not to be condemned because of the absence of corporate integration. As we stated at the outset, the question under the Act is not simply whether the parties have restrained competition between themselves but as to the nature and effect of that restraint. *Chicago Board of Trade v. United States, supra; United States v. Terminal Association,* 224 U. S. 383; *Window Glass Manufacturers v. United States, supra; Standard Oil Company v. United States,* 283 U. S. 163, 169, 179.

The fact that the suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief. There must be "a definite factual showing of illegality." *Standard Oil Company v. United States,* 283 U. S. p. 179. We think that the Government has failed to show adequate grounds for an injunction in this case. We recognize, however, that the case has been tried in advance of the operation of defendants' plan, and that it has been necessary to test that plan with reference to purposes and anticipated consequences without the advantage of the demonstrations of experience. If in actual operation it should prove to be an undue restraint upon interstate commerce, if it should appear that the plan is used to the impairment of fair competitive opportunities, the decision upon the present record should not preclude the Government from seeking the remedy which would be suited to such a state of facts. We think also that in the event of future controversy arising from the actual operation of the plan the results of the labor of both parties in this litigation in presenting the voluminous evidence as to the industry, market conditions and transportation facilities and rates, should continue to be available, without the necessity of reproducing that evidence.

The decree will be reversed and the cause will be remanded to the District Court with instructions to enter a decree dismissing the bill of complaint without prejudice and with the provision that the court shall retain jurisdiction of the cause and may set aside the decree and take further proceedings if future developments justify

[9] *Supra,* pp. 10, 11 [pp. 89, 90].

that course in the appropriate enforcement of the Anti-Trust Act.

It is so ordered.

Mr. Justice McReynolds thinks that the court below reached the proper conclusion and that its decree should be affirmed.

[¶ 55,026] Central Transfer Company, Petitioner, v. Terminal Railroad Association of St. Louis, et al.

Supreme Court of the United States. No. 523, October Term, 1932. Decided March 13, 1933.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

The agreement by a group of railway carriers as to the appointment of a sole agent for the transfer of less than carload lots between their various terminals is a matter within the jurisdiction of the Interstate Commerce Commission.

If an agreement ratified by the Interstate Commerce Commission should violate the federal anti-trust laws, only the Government and not a private individual may bring suit because of such violation under Section 16 of the Clayton Act.

Mr. Justice Stone delivered the opinion of the Court.

Petitioner, a Delaware corporation engaged in the transportation of interstate freight in St. Louis, brought suit in the District Court for Eastern Missouri against respondent, Terminal Railroad Association of St. Louis, and its sixteen constituent members, interstate rail carriers having terminals in St. Louis or East St. Louis, to restrain an alleged violation of the Sherman Anti-Trust Act. The District Court dismissed the suit after a trial on the merits, on the ground that as the acts complained of involved matters within the jurisdiction of the Interstate Commerce Commission a suit to enjoin them was unauthorized under § 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. A., § 26, unless brought by the United States. The Court of Appeals for the Eighth Circuit affirmed. — F. (2d) —. This Court granted certiorari. — U. S. —.

For many years before the present suit the respondent rail carriers had maintained in St. Louis and East St. Louis certain "off track" stations for receipt and delivery of less than carload freight and by the employment of transfer companies, including petitioner, had provided for the transportation of such freight by truck between such stations and their "on track" stations, and between each of the latter in St. Louis and East St. Louis. Tariffs filed with the Interstate Commerce Commission designated all such "off track" stations and fixed line haul rates for the transportation of freight in less than carload lots between such stations and points on their lines. The "off track" stations were generally places of business of local transfer companies, including petitioner, and the Columbia Terminals Company, also named as a defendant.

The several carriers, having proposed, in the interest of economy and efficiency, to reduce the number of "off track" stations and to employ a single transfer company in interchanging freight, the Interstate Commerce Commission, on May 2, 1927, in response to numerous petitions, ordered a general investigation of the lawfulness of this proposal and of the methods and practices of the respondents in handling less than carload freight in St. Louis and East St. Louis. On May 25, 1927, the rail carriers filed with the Interstate Commerce Commission a proposed tariff under which the number of designated "off track" stations was to be reduced from twelve to seven in St. Louis and from two to one in East St. Louis; new schedules of line haul rates, absorbing the allowances paid by the carrier for the inter-station haul, were applied between all stations in St. Louis and East St. Louis and points on the lines of the carriers. The only "off track" stations retained belonged to the Columbia Terminals Company. Those to be abandoned included three operated by petitioner and two operated and one controlled by the Columbia Terminals Company.

Thereupon, the Interstate Commerce Commission instituted a proceeding for an investigation of the lawfulness of the proposed tariffs and consolidated it with the proceeding for a general investigation already pending. In the course of the con-

solidated proceeding the Commission made two reports. The first, of May 13, 1929, 155 I. C. C. 129, upheld as reasonable and lawful the proposed reduction in number of "off track" stations and the employment by the several rail carriers of a single transfer company to do the inter-station hauling. The Commission found that these changes in method of handling freight under the proposed rate schedules would effect large savings in transportation costs and that the arrangement entered into to effect them was not a violation of the anti-trust laws of the United States. The proposed rate schedule was suspended, pending a cost study, at the conclusion of which the Commission, by a second report and order of July 27, 1931, 177 I. C. C. 316, approved the rate schedule as filed.

Pending the proceedings before the Commission, respondent, the Terminal Railroad Association, acting on behalf of the respondent carriers, on June 1, 1931, entered into a contract with Columbia Terminals Company, embodying the arrangement between the carriers and the Columbia Terminals Company, which is the subject of complaint in this suit. By this contract it was agreed that the reduced number of "off track" stations named in the filed tariffs, which were places of business of the Columbia Terminals Company, should be designated and maintained as the only "off track" stations of the carriers; that the Columbia Terminals Company should have the exclusive right to transport less than carload freight between the "on track" stations and between them and the "off track" stations; that the carriers should file the necessary amended tariffs with the Interstate Commerce Commission to carry out the agreement and pay for the services rendered at prescribed rates, which were absorbed in the line haul rates ultimately approved by the Commission. The practical effect of the contract was to give the Columbia Terminals Company the exclusive right to operate the "off track" stations, to haul the interchanged freight, and thus to preclude the employment of petitioner and others in that service.

Petitioner assails the contract and the consequent refusal of the carriers to employ it and to use its places of business as stations, as creating a forbidden monopoly in restraint of interstate commerce. To this the respondents answer that the contract is concerned with matters within the jurisdiction of the Interstate Commerce Commission in respect to which the Clayton Act provides that no one except the United States may maintain a suit for an injunction. The question which we must decide is whether the petitioner is thus precluded from prosecuting the present suit.

By the Sherman Anti-Trust Act, the Government alone was authorized to maintain a suit to restrain violations of its provisions, *Paine Lumber Co. v. Neal,* 244 U. S. 459. Private persons were first authorized to bring suits for that purpose by § 16 of the Clayton Act [15 U. S. C. A., § 26], but with the proviso "that nothing herein contained shall be construed to entitle any person, firm, corporation or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions" of the Interstate Commerce Act "in respect of any matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission."

It is not denied that the respondents are common carriers subject to the provisions of the Interstate Commerce Act. 49 U. S. C. A., c. 1. Nor is it denied that by the applicable provisions of the Act the maintenance by the carriers of the "off track" stations, the transportation service rendered in connection with them and between the "on track" stations, through the exclusive agency of a single transfer company, the restriction of the number of "off track" stations designated by filed tariffs establishing line haul rates to and from those stations, are all within the jurisdiction of the Commission.[1]

The petitioner, conceding that the Commission has jurisdiction of the service of the transfer companies in interchanging freight between the stations, insists that the Commission has no jurisdiction or control over the carrier's discretion in selecting their agents to perform that service, and consequently no jurisdiction over a contract by which that discretion is exercised or of a cause of action arising out of its unlawful exercise; that jurisdiction is therefore in the federal court to grant the relief prayed.

This argument misconceives both the

[1] Section 12 of the Interstate Commerce Act [§ 12, Tit. 49, U. S. C. A.] invests the Commission with broad powers to conduct proceedings to inquire into the management of the business of all carriers subject to the Act and to execute and enforce the provisions of the Act. See *Smith v. Interstate Commerce Commission,* 245 U. S. 33, 43. By paragraph 3 of § 3 of the Act [§ 3, ¶ (3), Tit. 49, U. S. C. A.], rail carriers subject to it are required to afford all "reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers or property to and from their several lines, and those connecting therewith." "Reasonable, proper and equal facilities" include not only trackage, but all other terminal facilities, all of which are brought under jurisdiction of the Commission. See

effect and the purpose of § 16 of the Clayton Act. Under that section jurisdiction of the Commission does not delimit the jurisdiction of the federal courts to restrain violations of the Sherman Anti-Trust Act. Compare *United States v. Trans-Missouri Freight Ass'n,* 166 U. S. 290; *United States v. Joint Traffic Ass'n,* 171 U. S. 505. It affects only the capacity of a private party to maintain a suit to restrain violations. See *General Investment Company v. New York Central R. R.,* 271 U. S. 228. Its obvious purpose is to preclude any interference by injunction with any business or transactions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission, except when the suit is brought by the Government itself. Here the relief prayed is that performance of the contract be enjoined. Performance necessarily involves the continued designation in the filed tariffs of the Columbia Terminal Company's places of business as the "off track" stations specified in the contract, and the continued exclusive employment of that company to render the stipulated service, both matters within the jurisdiction of the Commission. True, a contract may precede and have existence apart from the several acts required to perform it, and conceivably all of those acts might be done if no contract or agreement to perform them had ever existed. But when they are done in performance of an agreement, there is no way by which the agreement itself can be assailed by injunction except by restraining acts done in performance of it. That, in this case, the statute forbids, not because the contract is within the jurisdiction of the Interstate Commerce Commission, but because the acts done in performance of it, which must necessarily be enjoined if any relief is given, are matters subject to the jurisdiction of the Commission. See *Wheeling & Lake Erie Co. v. Pittsburgh & West Virginia Ry.,* 33 F. (2d) 390, 392; *General Investment Co. v. New York Central R. R. Co.,* 23 F. (2d) 822.

Affirmed.

Pennsylvania Company v. United States, 236 U. S. 351. They include privately owned warehouses designated as such by the owner, acting as the carrier's agent, *United States v. Balt. & Ohio R. R. Co.,* 231 U. S. 274; see *Merchants Warehouse Co. v. United States,* 283 U. S. 501, 506, 513; cf. *Interstate Commerce Commission v. Diffenbaugh,* 222 U. S. 42, and motor truck transfer in connection with transportation by rail. In the *Matter of Legality of Tariffs Purporting to Embrace Motor Truck Transfer Service,* 91 I. C. C. 539; *Motor Bus and Motor Truck Operation,* 140 I. C. C. 685, 729; *Discontinuance of Inland or Off-Track Stations in New York City,* 173 I. C. C. 727; *Coordination of Motor Transportation,* 182 I. C. C. 263, 367; *Trucking less than Carload Freight,* 185 I. C. C. 71.

By § 1, par. 6 [§ 1, ¶ (6), Tit. 49, U. S. C. A.] it is made the duty of rail carriers to establish and observe just and reasonable regulations and practices affecting the "facilities for transportation" and "all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation and delivery of property . . . upon just and reasonable terms, and every unjust and unreasonable classification, regulation and practice, is prohibited and declared to be unlawful." See *Director General of Railroads v. Viscose Co.,* 254 U. S. 498.

Section 6 (1) [§ 6 (1), Tit. 49, U. S. C. A.] requires every rail carrier to file schedules of rates applicable between different points on its own route and between points on its own route and on that of any other carrier when a through route has been established. They "shall plainly state the places between which property and passengers will be carried . . . and shall also state separately all terminal charges . . . and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which . . . affect . . . any part . . . of such aforesaid rates . . . or the value of the service rendered to the . . . shipper . . ." Tariffs changing the published rates are also required to be filed (§ 6 (3)), and by § 15 (7), [§ 15 (7), Tit. 49, U. S. C. A.], the Commission is authorized on its own motion to enter upon a hearing concerning the lawfulness of the rate and of any classification, regulation or practice specified in the tariff. See *Director General of Railroads v. Viscose Co., supra; Texas & Pacific R. R. Co. v. Abilene Cotton Oil Co.,* 204 U. S. 426, 437; *Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co.,* 215 U. S. 481, 494.

[¶ 55,027] Baush Machine Tool Co., Plaintiff-Appellee v. Aluminum Company of America, Defendant-Appellant.

U. S. Circuit Court of Appeals, Second Circuit. Decided March 6, 1933.

A bill of discovery may be maintained in an action for damages under the Clayton Act to obtain certain facts concerning costs of production where it is charged that damages have resulted from the alleged ability of defendant-appellant to control prices in the sale of aluminum ingots.

Although neither party was a resident of the district in which the suit was brought, the defendant-appellant was concededly transacting business in that district, hence the Court had jurisdiction of the suit and of the ancillary action for the bill of discovery.

Before MANTON, AUGUSTUS N. HAND and CHASE, Circuit Judges.

Appeal from the District Court for the District of Connecticut. Bill of discovery filed as ancillary to a suit at law to recover treble damages under the Anti-Trust Laws (15 U. S. C. § 15, 22). Decree entered for plaintiff; defendant appeals. Affirmed.

Edward F. McClennen, Esq., Smith, Buchanan, Scott & Gordon, Esqs., Edward Williamson, Esq., for the Appellant. Cummings & Lockwood, Esqs., H. C. Park, Esq., for the Appellee.

MANTON, Circuit Judge. This appeal is from a decree entered for the appellee which granted relief asked in the bill of discovery, filed in aid of an action for treble damages under the Clayton Act (15 U. S. C. §§ 15, 22). Appellant is a Pennsylvania corporation and the appellee a Massachusetts corporation. Appellee claims damages to it because the appellant monopolized commerce in crude aluminum among the several states. The complaint charged that in producing aluminum alloys and in fabricating articles from aluminum and its alloys, the appellant monopolized the industry; that prior to June, 1928, it controlled and operated, through a wholly owned subsidiary corporation, Aluminum Company of Canada, Ltd., the only plants producing aluminum in Canada and that through ownership and financial investment it was the dominant factor in the aluminum industry; that in May, 1928, it caused to be organized under the laws of the Dominion of Canada, Aluminum Ltd., to which it thereafter transferred all of the outstanding stock of its Canadian company and all the stock owned by it in various other companies carrying on operations in Canada and foreign countries; that the stockholders of the appellant received all the shares of Aluminum Ltd., and that the stock ownership rested in the hands of a few individuals; that the relations between the appellant and the foreign producers of the aluminum were not and for many years have not been competitive and that the appellant, in competition with the appellee, in the sale of aluminum alloys and fabricated articles has offered such articles for sale at prices which would yield no profit to the manufacturer who purchased aluminum at the monopoly price fixed and maintained by the appellant and that the appellee has consequently been damaged. It is maintained that the appellant has been able to fix prices at an artificial level in the United States to the appellee's damage.

The bill of discovery seeks a disclosure of appellant's cost of production in support of the allegations of the complaint in the action at law. It sets forth in detail that it is practically impossible for the appellee to obtain proof of the appellant's costs by the processes of law and that such proof cannot be obtained from other sources, and that it requires the aid of a court of equity. Interrogatories are attached to the bill.

A motion to dismiss the bill, made because neither party was a citizen, resident or inhabitant of Connecticut; also because the action in aid of which the bill purports to be brought is for a penalty, and therefore a court of equity has not jurisdiction, or should not exercise it, to order discovery in aid thereof, was denied. A motion to strike out the answer resulted in striking out paragraphs 1, 2, 3, 4, 5, 6 and 8, but the balance of the answer stood, and appellant was ordered to answer some of the interrogatories, namely, those relating to costs of appellant. It is from this decree that the appeal was prosecuted.

Appellee argues that the decree is not appealable and asks for its dismissal. The question is open to us (Judicial Code § 128, U. S. Code Title 28, § 225). The appealability of the order is a question addressed to our jurisdiction. The decree directing the appellant to answer some of the interrogatories is final and appealable within § 128 of the Judicial Code (U. S. Code Title 28, § 225). Although ancillary for jurisdictional purposes, the order obtained was all that was sought or could be obtained in an equity suit. On appeal orders dismissing bills of discovery have been affirmed where appealability has not been raised. *Durant v. Goss*, 12 Fed. (2) 682

(C. C. A. 6); *Bradford v. Indiana Harbor Belt Ry.*, 300 Fed. 78 (C. C. A. 7); *Munger v. Firestone Tire Co.*, 261 Fed. 921 (C. C. A. 2). *Tucker v. Peiler* (297 Fed. 570 [C. C. A. 2]), involved a proceeding to obtain evidence by subpoena and there we pointed out that orders issued denying or granting subpoena duces tecum are not final and therefore not appealable. But in the instant case, there is a decree which is final. *United States v. River Rouge Improvement Co.*, 269 U. S. 411; *Munger v. Firestone, supra.* The decree completely ends the equity suit. It gives to the appellee the relief asked. The decree must be executed by the appellant and, if error has been committed in granting it, the appellant is entitled to have it reviewed as it seeks here.

Neither party is a resident of Connecticut and the suit is not supported under the diversity of citizenship provision of law (U. S. Code Title 28, § 112). But the action at law, in aid of which a bill of discovery was brought, was properly brought in the district of Connecticut where the appellant concededly transacts business (Clayton Act, § 12, U. S. Code Title 15, § 22). Section 12 states that

> "Any suit, action or proceeding under the antitrust Laws against a corporation may be brought * * * in any district wherein it may be found or transacts business; * * *."

The suit is an action at law for treble damages (*Fleitman v. Welsbach Street Lighting Co.*, 240 U. S. 27) and although the language "any suit, action or proceeding" is broad, it is not clear that a bill of discovery may be brought in any district where the corporation is found or does business regardless of the district where the suit at law, which the bill is meant to aid, is pursued. The appellee suggests, and we agree, that we need not decide that § 12 of the Clayton Act offers jurisdiction for the bill of discovery independent of the action at law. It is sufficient for the purpose of this appeal to say that the bill is ancillary or auxiliary to the action at law and is thus supported by the undisputed jurisdiction of the action at law. If the bill is ancillary the question of independent jurisdiction under § 12 of the Clayton Act is not important. *Eichel v. U. S. Fidelity & Guaranty Co.*, 245 U. S. 102. The bill of discovery is ancillary to the law action. Its very purpose is that of aiding the action at law. Such a bill has been called ancillary in the general sense of that term. *Kurtz v. Brown*, 152 Fed. 372 (C. C. A. 3). Counsel has not cited nor has our independent search found any case holding a bill of discovery dependent and ancillary for jurisdictional purposes. However, the bill of discovery is in aid of an action at law in the same district and we think it is dependent and ancillary for jurisdictional purposes and jurisdiction over the bill may be sustained because of the jurisdiction had over the action at law. The suit is between the same parties and is in aid of the claim of damages in the action at law and is brought within the same jurisdiction. These facts are sufficient for jurisdictional purposes. *Root v. Woolworth*, 150 U. S. 401; *Sherman Natl. Bank v. Schubert Co.*, 247 Fed. 256 (C. C. A. 2); *McCabe v. Guaranty Trust Co.*, 243 Fed. 845 (C. C. A. 2); *Campbell v. Golden Cycle Mining Co.*, 141 Fed. 610 (C. C. A. 8). The nature of the suit, its purposes as the decree entered shows, clearly demonstrates it to be an ancillary suit. *Julian v. Central Trust Co.*, 193 U. S. 93, 113; *In re Willams*, 123 Fed. 321; 1 Pomeroy's Equity Jurisprudence, § 191 (4th Ed.). The bill was plainly dependent upon the action at law and the jurisdiction to entertain it was referable to that invoked and existing in the action at law out of which it arose. *Eichel v. U. S. Fidelity & Guaranty Co.*, 245 U. S. 102.

A bill of discovery may be maintained when it is in aid of an action for damages under the Clayton Act. It is urged that equity will not grant a decree of discovery in aid of enforcement of a penalty (*Boyd v. United States*, 116 U. S. 616, 631) and that an action for damages under the Anti-Trust Laws is one for a penalty. The appellant may assert no constitutional privilege against disclosure. *Hale v. Henkel*, 201 U. S. 43. In an action under the Anti-Trust Laws disclosure by one in the position of the appellant may be obtained. *Porto Rican Amer. Tob. Co. v. Amer. Tob. Co.*, 30 Fed. (2) 234, 237 (C. C. A. 2). It has been held that actions under the Anti-Trust Laws are not actions to enforce penalties with respect either to assignment of the chose in action (*United Copper Co. v. Amalgamated Copper Co.*, 232 Fed. 574 [C. C. A. 2]) or the statute of limitations (*Chattanooga Foundry & Pipe Wks. v. Atlanta*, 203 U. S. 390). The *Porto Rica Tobacco* case was a proceeding in equity under the Clayton Act and discovery was allowed by interrogatories sought under equity rule 58. We held it was proper to require such answers. In the action at law, the recovery is for threefold damages but we see no distinction in that which results in lessening the power of the courts to act. Moreover, in actions under the Anti-Trust Laws a corporation may be required to produce its books and papers under the provisions of Rev. Stat. § 724. *Internatl. Coal Mining Co. v. Penn. R. R.*, 152 Fed. 557; *Amer. Banana Co. v. United Fruit Co.*, 153 Fed. 943. An action for damages under the Anti-Trust Laws is not one for a penalty. *Chattanooga Foundry & Pipe Wks. v. Atlanta*, 203 U. S. 390; *Shelton Elec. Co. v. Victor Talking Machine Co.*, 277 Fed. 433

The suit is between private parties and the enlargement of the damages does not convert it into a prosecution for a penalty. *Brady v. Daly,* 175 U. S. 148. While it is true the statute trebles the damages found by a jury, yet to succeed a plaintiff must prove damages and there is no fixed penalty named in the statute.

Lastly, the appellant contends that the plaintiff was not entitled to the relief obtained (a) because the true answers to the interrogatories would not tend to support any allegation of the bill or derogate from any allegation of the appellant; (b) the interrogatories are not for ultimate facts but only for evidence; (c) that the appellee has available a legal remedy to get the same information by deposition of the same officers who would have to answer the discovery interrogatories all of whom reside more than 100 miles from the place of trial; (d) that the collection of information would require burdensome labor, and (e) that the information does not appear on the appellant's books and papers and to obtain it would require the appellant to go out of the district of the court and out of the district of the appellant's residence to consult employees and officers and make compilations and computations.

In order to sustain its cause of action the appellee must prove that the competitive prices of the appellant are unfairly fixed and applied and preclude the possibility of profitable operation by the appellee, and that the appellant has maintained the price of aluminum ingots at an artificial level and above the price yielding a fair and reasonable profit over the cost of production and above the prices which would be fixed in a fair and free market. The interrogatories which have been ordered answered are addressed to matters of costs. They call for information within the appellant's books and records and the knowledge of its employees and officers, important on appellee's theory of its action. They will disclose competent evidence. For the reasons we have stated, the court had jurisdiction to entertain a bill of discovery. The difficulties of the appellee in obtaining proof of the ultimate fact or the true ingot cost is apparent and the immediate success in doing so through a bill of discovery is obvious. It is no answer to say that the task of answering is gigantic and that the appellant should not be obliged to do so. The interest of justice dictates otherwise.

The procedure adopted below is warranted by the authorities. *Pressed Steel Car Co. v. Union Pac. R. Co.,* 241 Fed. 964. A discovery elucidating the facts in the matter of costs from the appellant's own records should be of aid to the course of justice and narrow the issues presented at the trial of the action at law as well as be an aid in the ultimate result.

Decree affirmed.

[¶ 55,028] United States of America, Petitioner, v. Radio Corporation of America, General Electric Company, International General Electric Company, Westinghouse Electric & Manufacturing Company, Westinghouse Electric International Company, National Broadcasting Company, Inc., R. C. A. Communications, Inc., R. C. A. Photophone, Inc., R. C. A. Radiotron Company, Inc., R. C. A. Victor Company, Inc., American Telephone and Telegraph Company, Western Electric Company, Inc., General Motors Corporation and General Motors Radio Corporation, Defendants.

In the District Court of the United States for the District of Delaware. No. 793 in Equity. April 3, 1933.

Petition for leave to intervene in a consent decree proceeding denied where to allow "the intervention here sought and embark upon a determination of the questions raised by petitioner would be to import into this case new issues. This can not be done. *United States v. Northern Securities Co.,* 128 Fed. 808."

Note.—The petition to intervene seems to be directed at that part of the consent decree of November 21, 1932, against the Radio Corporation of America, directing the General Electric Company and the Westinghouse Electric Company to divest themselves of their holdings of common stock of the Radio Corporation by distributing such shares ratably to their own common stockholders. See consent decree at ¶ 55,015, 1932-1939 Trade Cases.

The consent decree in *United States v. Radio Corporation of America et al.,* entered November 21, 1932, appears at ¶ 55,015, 1932-1939 Trade Cases. See also opinion of the U. S. District Court in New York, on similar questions, at ¶ 55,020, 1932-1939 Trade Cases.

In Re Petition of Torquay Corporation for leave to intervene.

Nields, J. Torquay Corporation, holder of 100 shares of common and 100 shares of preferred stock of Radio Corporation of America asks leave to intervene. This suit was brought by the United States against Radio Corporation of America, General

Electric Company, Westinghouse Electric & Manufacturing Company, a number of subsidiaries of those three companies, and certain other defendants. The United States alleged that various contracts and agreements and the transfer of a large block of stock of Radio Corporation of America to General Electric and Westinghouse Companies for which Radio received certain exclusive patent rights and plants and equipment from General Electric and Westinghouse Companies constituted violations of the Sherman and Clayton Acts.

November 21, 1932, a consent decree in the Government suit was entered upon stipulation of the parties. The decree provided:

"General Electric Company shall within three months from the date hereof divest itself of substantially one-half of all of the holdings of itself and its subsidiaries of the shares of common stock of Radio Corporation of America by distributing such shares ratably to its own common stockholders, or causing them to be so distributed."

A like provision applied to the Westinghouse Company.

Shortly after the entry of this consent decree Torquay Corporation commenced an action in the Supreme Court of New York County against Radio Corporation of America, General Electric Company and Westinghouse Electric & Manufacturing Company, and the respective directors of those corporations, seeking an injunction restraining the distribution of the stock of Radio Corporation under the consent decree, and for other relief. The suit was removed to the Federal Court. December 14, 1932, in disposing of a motion to dismiss (2 F. Supp. 841), Judge Knox said:

"Assuming for the moment that this court has jurisdiction of the present suit, it is clear, as a matter of comity and of the orderly administration of justice, that this court should refuse to exercise its jurisdiction to interfere with the operation of a decree of another Federal Court. Especially is this so where it is clear that the United States District Court in Delaware would have jurisdiction of such a suit as is now before this court. A bill to modify or restrain the enforcement of a decree of a Federal Court may undoubtedly be brought in the court which entered such decree. *Pacific Railroad of Missouri v. Missouri-Pacific Railway,* 111 U. S. 505; See *Johnson v. Christian,* 125 U. S. 642; *Sherman National Bank v. Shubert Theatrical Company,* 247 Fed. 236. See also Foster Federal Practice, 6th Edition §§ 51, 132."

January 10, 1933 Torquay Corporation filed its petition in this court for leave to intervene in this cause. It contains many allegations of violations of the anti-trust laws as alleged in the petition of the United States. Petitioner claims no relief based thereon. The petition further alleges that as a result of the consent decree Radio has lost valuable rights which had theretofore been transferred to it by General Electric and Westinghouse and "for which Radio has not received full, fair and adequate consideration, and General Electric and Westinghouse have been and are unjustly enriched by their present ownership of said stock at the expense of Radio," and that General Electric, Westinghouse and Radio "deceived and defrauded" this court in failing to present to the court "all of the facts and circumstances with relation to the acquisition by General Electric and Westinghouse of Radio stock" with consequent injury to the Radio Corporation. Finally, the petition alleges that General Electric and Westinghouse "do not intend to wait the required three-month period given to them by the decree to dispose of one-half of their holdings in the common stock of Radio, but, on the contrary, they have announced, and now threaten to immediately dispose of all of their holdings of Radio stock by distributing the same to the respective stockholders of General Electric and Westinghouse, thereby giving to such stockholders 7,500,000 shares of Radio stock, without consideration, as a bonus or special or stock dividend, all at the expense of Radio and its stockholders, including this petitioner and other stockholders of Radio, similarly situated, and to the unjust enrichment of General Electric and Westinghouse and their respective stockholders."

Upon the filing of the petition an order was entered requiring the parties to this suit (except defendants not included in the consent decree) to show cause why the following order should not be made:

"(a) Permitting the petitioner, Torquay Corporation, as a stockholder of Radio Corporation of America, to intervene in this cause on behalf of itself and other stockholders of Radio Corporation of America, similarly situated; and

"(b) Modifying the consent decree herein filed on or about November 21, 1932, and permitting inquiry to be made regarding the adequacy and fairness of the consideration alleged to have been given to Radio Corporation of America by General Electric Company and Westinghouse Electric & Manufacturing Company for 7,500,000 shares of stock of said Radio Corporation of America."

By supplemental petition Torquay Corporation asks for an order modifying the consent decree of November 21, 1932, to permit it to secure similar relief in other courts.

The order to show cause provided that "until the hearing and final determination of the petition" the General Electric and Westinghouse Companies "be and they hereby are enjoined and restrained from making any distribution of the capital stock of said Radio Corporation of America under the consent decree heretofore entered in this cause."

Three different questions were presented: (1) whether Torquay Corporation may intervene in this suit; (2) whether the consent decree should be modified so as to permit petitioner and other stockholders and creditors of Radio Corporation to bring

proceedings for its further modification in other courts; and (3) whether the injunctive relief in the order to show cause should be continued or dissolved.

The third question has been disposed of. The paragraph of the order to show cause relating to the distribution of the stock has been vacated.

May Torquay Corporation intervene in this suit? Petitioner states in its brief: "There is no attempt here to modify this [consent] decree nor to vary its terms, nor to interfere with the injunctive restraint insofar as it affects monopoly." On what theory can leave to intervene be sustained? Petitioner apparently challenges all the transactions that took place between Radio, General Electric and Westinghouse, commencing with the agreement of January 1, 1930, under which certain property and exclusive patent rights passed from General Electric and Westinghouse to Radio, and for which Radio issued to General Electric and Westinghouse shares of its stock. The basis of this attack seems to be the question whether Radio received fair and adequate consideration from General Electric and Westinghouse for such shares of stock of Radio, and whether dominance and control was exercised by General Electric and Westinghouse over Radio in this transaction. These inquiries have no relation to the relief sought in the Government suit. As stated in Equity Rule 37 intervention shall be "in subordination to and in recognition of the propriety of the main proceeding." To allow the intervention here sought and embark upon a determination of the questions raised by petitioner would be to import into this case new issues. This can not be done. *United States v. Northern Securities Co.*, 128 Fed. 808. The United States and the public can have no interest in any controversy of Radio Corporation, its stockholders and creditors, against the General Electric and Westinghouse companies. The consent decree terminated what promised to be protracted and burdensome litigation. It was entered in the public interest and met the policy of the statutes. Petitioner has failed to present facts justifying the court in taking any action to impair the integrity of the consent decree. The charge that this court in entering that decree was deceived and defrauded is not worthy of any consideration. There is not the slightest evidence that any party to the stipulation on which the decree was entered acted otherwise than in the utmost good faith. Leave to intervene should not be granted.

However, the petitioner and other stockholders of Radio Corporation should not be deprived of their "day in court." The petitioner or any stockholder of Radio Corporation believing himself aggrieved by the action of General Electric or Westinghouse under or pursuant to the provisions of the consent decree may file a bill in this court seeking appropriate relief.

The petition and supplemental petition for leave to intervene must be dismissed.

Application to intervene has been determined upon a consideration of the petition and supplemental petition alone. It is unnecessary to pass upon the propriety of filing affidavits on such an application. However, the affidavits submitted will be marked filed.

[¶ 55,029] Levering & Garrigues Company, Hedden Iron Construction Company, McClintic-Marshall Company, et al., Petitioners, v. Paul J. Morrin, Individually and as President of International Association of Bridge, Structural and Ornamental Iron Workers, et al.

Supreme Court of the United States. No. 423. October Term, 1932. April 10, 1933.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The allegation in plaintiff's bill of complaint that the efforts of the defendants to prevent local building by nonunion labor had the effect of hindering interstate commerce in the materials used, held insufficient to sustain jurisdiction in a federal court on the ground that the acts constituted a violation of the federal anti-trust laws.

(From the opinion): "Accepting the allegations of the bill at their full value, it results that the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce. . . . If thereby the shipment of steel in interstate commerce was curtailed, that result was incidental, indirect and remote, and, therefore, not within the anti-trust acts . . . "

When a bill or complaint fails to set out a substantial claim under a federal statute, the jurisdiction of the federal court is lacking. The federal question averred may be unsubstantial either because without merit or "because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."

Mr. Justice Sutherland delivered the opinion of the Court.

This is a suit brought by petitioners against respondents in the federal district court for the southern district of New York to enjoin respondents from combining or conspiring to compel petitioners to employ, in their work of fabricating and erecting structural iron and steel, only members of a labor union, and to refrain from employing non-members; from conducting, inducing, or advising a boycott of petitioners; and from other enumerated acts. The bill invoked the jurisdiction of the federal court upon the ground of diversity of citizenship, and also upon the ground that acts complained of unlawfully interfered with interstate commerce and constituted a violation of the federal anti-trust acts. The case was sent to a referee, who, after a hearing, made a report and decision sustaining the charge of boycotting, but holding that the interference occasioned thereby was local in character and did not constitute an interference with interstate commerce. The report and decision were confirmed by the district court, and the bill dismissed as to certain of the respondents, and an injunction issued against others, the particulars of which, in the view we take of the case, it is not necessary to state.

The circuit court of appeals reversed the decree of the district court, holding that the allegations of the bill were insufficient to establish jurisdiction on the ground of diversity of citizenship, and that the case having failed on the federal question, the court was without power to consider the nonfederal question because it was asserted in an independent cause of action. While resting its decision upon these considerations, that court expressed the further view that the allegations of the bill in respect of the claim of federal jurisdiction under the anti-trust acts were probably so unsubstantial as to disclose, on the face of the bill, a lack of federal jurisdiction. The district court was directed to dismiss the bill without prejudice for lack of jurisdiction unless amendments could be made to correct the defect in respect of diversity of citizenship. 61 Fed. (2d) 115. This court granted certiorari limited to the question of federal jurisdiction other than questions relating to diversity of citizenship.

The question of jurisdiction as thus limited is to be determined by the allegations of the bill, and not upon the facts as they may turn out, or by a decision of the merits. *Mosher v. Phoenix,* 287 U. S. 29, 30, and cases cited. Whether an objection that a bill or a complaint fails to state a case under a federal statute raises a question of jurisdiction or of merits is to be determined by the application of a well settled rule. If the bill or the complaint sets forth a substantial claim, a case is presented within the federal jurisdiction, however the court, upon consideration, may decide as to the legal sufficiency of the facts alleged to support the claim. But jurisdiction, as distinguished from merits, is wanting where the claim set forth in the pleading is plainly unsubstantial. The cases have stated the rule in a variety of ways, but all to that effect. See for example, *Mosher v. Phoenix, supra; Hull v. Burr,* 234 U. S. 712, 720; *Western Union Tel. Co. v. Ann Arbor R'd Co.,* 178 U. S. 239, 244; *Binderup v. Pathe Exchange,* 263 U. S. 291, 305, *et seq.; South Covington Ry. Co. v. Newport,* 259 U. S. 97, 99; *Niles-Bement Co. v. Iron Moulders Union,* 254 U. S. 77, 82; *Catholic Missions v. Missoula County,* 200 U. S. 118, 130; *Newburyport Water Co. v. Newburyport,* 193 U. S. 561, 576. And the federal question averred may be plainly unsubstantial either because obviously without merit, or "because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Hannis Distilling Co. v. Baltimore,* 216 U. S. 285, 288; *McGilvra v. Ross,* 215 U. S. 70, 76-77, 80; *Norton v. Whiteside,* 239 U. S. 144, 153; *Bianchi v. Morales,* 262 U. S. 170; *State of Kansas v. Bradley,* 26 Fed. 289, 290; *Harris v. Rosenberger,* 145 Fed. 449, 452.

Passing, without inquiry, the first of these tests, a consideration of the decisions of this court rendered prior to the filing of the present bill demonstrates that the question is concluded by an application of the second test.

The prayer for relief primarily is based upon the averments that petitioners are engaged in fabricating and erecting structural iron and steel; that they are, and have been for a long time, operating in such business on the open shop method in relation to their employment of labor; that they have large contracts for the construction of work in the City of New York; that respondents are organizations of labor and officers and agents thereof; that by

means and in ways which are set forth respondents have conspired, and are attempting, to compel petitioners and others to employ, exclusively union labor in their building operations; that in pursuance of the conspiracy respondents have called out on strike petitioners' union employees, and conducted boycotts, and undertaken other injurious interferences particularly set forth in the bill. These allegations conclude with the statement: "The sole purpose of the activities of the said defendants [respondents] is to compel a putting into effect the closed union shop in the industry of erecting structural iron and steel and inasmuch as this branch of the building industry is the only branch of the building industry where a person not a member of the labor union can secure employment if successful the entire building industry in the entire Metropolitan District will be closed union."

Following these allegations the bill contains averments to the effect that all the steel used by petitioners in the City of New York is transported from other states, being either bought or fabricated by petitioners in other states and transported to New York to be erected by petitioners therein; that the purpose and intent of respondents is to prevent the use of said steel therein, and wherever erected by petitioners; that the effect of the success of respondents would be, among other things, to destroy the interstate traffic of petitioners in steel. All this, however, is no more than to say that respondents' interference with the erection of the steel in New York will have the effect of interfering with the bringing of the steel from other states. Accepting the allegations of the bill at their full value, it results that the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce. *Use* of the materials was purely a local matter, and the suppression thereof the result of the pursuit of a purely local aim. Restraint of interstate commerce was not an object of the conspiracy. Prevention of the local use was in no sense a means adopted to effect such a restraint. It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy. Compare *Bedford Co. v. Stone Cutters Assn.,* 274 U. S. 37, 46-47; *Anderson v. Shipowners Assn.,* 272 U. S. 359, 363-364. If thereby the shipment of steel in interstate commerce was curtailed, that result was incidental, indirect and remote, and, therefore, not within the anti-trust acts, as this court, prior to the filing of the present bill, had already held. *United Mine Workers v. Coronado Co.,* 259 U. S. 344, 410-411; *United Leather Workers v. Herkert,* 265 U. S. 457. The controlling application of these cases to the present one is apparent from the review of them in the later case of the *Industrial Ass'n v. United States,* 268 U. S. 64, 77-78, 80-82.

That case involved a combination on the part of building contractors and others to establish the "open shop" plan of employing labor by requiring builders who desired materials of certain kinds to obtain permits from a builders exchange, and by refusing such permits to those who did not support the plan. We held that any resulting interference with the free movement of materials from other states, due to the lack of demand therefor upon the part of builders who were excluded from purchasing such materials by reason of their refusal to support the plan, was incidental, indirect and remote, and, therefore, not an unlawful interference with interstate commerce. After pointing out that the question was thus determined by applying the *Coronado* and *United Leather Workers* cases, we said:

"The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

The pertinent facts of that case and those here alleged are substantially the same, and subject to the same rule. It follows that the federal district court was without jurisdiction because the federal question presented was plainly unsubstantial, since it had, prior to the filing of the bill, been foreclosed by the two previous decisions last named, and was no longer the subject of controversy. See also *Browning v. Waycross,* 233 U. S. 16, 22-23; *General Railway Signal Co. v. Virginia,* 246 U. S. 500, 509-510. The decree must be affirmed for this reason and it becomes unnecessary to consider the other ground discussed by the court below and upon which its decision primarily was predicated.

Decree affirmed.

[¶ 55,030] Pevely Dairy Company, Plaintiff, v. Sanitary Milk Producers, etc., et al., Defendants.

U. S. District Court, Eastern Judicial District of Missouri. No. 9797. Decided April 7, 1933.

In a suit for damages under the Sherman Anti-Trust Act, a motion was made to strike out that part of plaintiff's petition which pleads that in an action between the identical parties in an equity suit in another division of the court it was adjudged and decreed that the defendants in that suit and in the present suit had entered into a conspiracy at common law against the plaintiff and had been permanently enjoined. Held, on the face of the pleadings, the fact of a conspiracy has been adjudged; whether it is in relation to interstate commerce may depend on the record in the former case or upon evidence in the present case. Motion denied.

Although the court may in some instances take judicial notice of an inter-related case in the same court, it would not seem that the court should take judicial notice of the record of a case in a separate division of the court before another judge.

Memorandum of Oral Opinion of the Court.

FARIS, J. This is a motion to strike out that part of plaintiff's petition which pleads, that in an action between the identical parties formerly brought and decided in Division 2 of this Court, it was adjudged and decreed that defendants here, who were, as forecast, defendants there, had entered into a conspiracy at common law against this plaintiff, and had been permanently enjoined.

As intimated, the former suit sounded in equity; it was finally ruled and no appeal was taken from the judgment entered. The action at bar is bottomed upon a federal statute, and sounds in law. Movant, while seemingly conceding the relevancy of the facts and matters, so far as such things are actually found in the record, yet contends that judicial notice may be by me taken of the entire record in the former case, and so, it is not necessary to plead it formally, in order that plaintiff may have the benefit of so much, if anything there be, in the former case and the judgment and decree therein, as is relevant.

Plaintiff's chief contention (as I construe the briefs) seems to be that the question of the existence *vel non* of a conspiracy is foreclosed by the former litigation, in Division 2 of this Court; in other words, that the fact of a conspiracy has now become a legal verity perforce the doctrine of *res adjudicata.* Little is said among plaintiff's contentions. touching judicial notice.

A conspiracy, in its simplest terms, is an agreement between two or more persons to do an unlawful act, or to do a lawful act in an unlawful way. Of course, such a conspiracy, to be actionable, must result in hurt or damage to him against whom it is devised. As said, the conspiracy alleged, proved and adjudged in the former case was a conspiracy at common law. (I make this assumption from the face of the matter attacked, as I may do.) The conspiracy pleaded in the petition before me, is a conspiracy to violate the so-called Sherman Anti-Trust Act. A conspiracy at common law is the identical conspiracy *quo* conspiracy connoted by the Sherman Anti-Trust Act. In other words, the above act simply applies the common law conspiracy to transactions in restraint of interstate commerce, and forbids such conspiracy, and provides (applying to it the case at bar) that those who are guilty of it, and by their guilty acts damage another, shall respond to that other in treble damages.

The doctrine of *res adjudicata* and the scope of its application are tersely set forth in the case of *Oklahoma v. Texas,* 256 U. S., l. c. 70, thus:

"A question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense in a suit or action between parties *sui juris* is conclusively settled by the final judgment or decree therein, so that it can not be further litigated in a subsequent suit between the same parties, or their privies, whether the second suit be for the same or a different cause of action."

This statement of the doctrine suffices for all of the purposes in this discussion, though, in my opinion, the doctrine in many cases goes further afield and may in some phases include matters not directly determined or distinctly put in issue, when such were included among the matters up for judgment, and they could have been, and should have been, put in issue, but were not (268 Fed., 487).

So, I think upon the face of the pleading attacked, the fact of a conspiracy has been adjudged; whether it was in relation to interstate commerce or not may depend upon the whole or some part of the record in the former case, or it may depend upon extrinsic evidence as to the business of plaintiff and the nature of the hindrances thereto done by defendants.

The question of the extent of that judicial notice which a federal court may take of the record of pending cases, or of cases

formerly tried, is one about which there is among the federal decisions much diversity of opinion. The rule in Missouri, as in well-nigh all of the states, is fairly uniform, and is to the effect that the Court may judicially notice only the record in a given case, but that it may not take judicial notice of any other independent and non-related case. The best that may be said of the federal rule, if it can be said to be a rule when no uniformity exists, is that the cases run the gamut from the case of *Paridy v. Tractor Company*, 42 Fed. (2d) 166, wherein the doctrine adhered to closely approximates the Missouri rule, to the case of *United States v. Greater New York etc. Company*, 53 Fed. (2d) 518, and the case of *Freshman v. Atkins*, 294 Fed. 867. It suffices to say that all the cases, all of which I have examined, are nearly equally divided as between the rule in the *Paridy* case and that in the *Atkins* case, wherein it was held that judicial notice may be taken of an inter-related case, in the same court. But here, the matter of which I am urged to take judicial notice did not take place in this Division, but in Division 2 of the District Court of the Eastern Division of the Eastern Judicial District of Missouri. Undoubtedly, the doctrine of judicial notice is bottomed, faintly at least, on judicial memory or recollection (See, Chapter 7, Thayer's Preliminary Treatise on Evidence), and, obviously, of course, I have not, nor have I ever had, recollection of matters which happened before another judge, and not before me. Concededly, of course, in many matters of which judicial notice must be taken, memory or recollection cut no figure. A judge is presumed to be no more ignorant than ordinary mankind, and since the latter are deemed to know many things, even absent proof of them, so also is the judge, even though actually his ignorance of them be such as that he must needs resort to geographies and history to either furnish or furbish memory.

On first blush, I held the view that the motion to strike out should be sustained, but after a most pains-taking examination of many cases (in some phases all) bearing on the points I have mentioned, I am constrained to conclude that the motion to strike should be overruled, and so it is ordered.

[¶ 55,031] Brown Fence and Wire Co. v. Federal Trade Commission.

U. S. Circuit Court of Appeals, Sixth Circuit. May 9, 1933.

The use of such terms as "direct from factory" to describe products not manufactured by the vendor, *held* to be an unfair method of competition.

It is not necessary to produce direct testimony to prove deception of customers, as such matters may be inferred by the Commission.

Before Moorman, Hicks and Simons, Circuit Judges.

Simons, Circuit Judge. Petitioner is engaged in the mail order business, selling farm supplies in interstate commerce through the medium of annual catalogues circulated in the rural districts of the United States. It owns and operates three factories manufacturing wire fencing and allied products, such as gates, tools, posts and stretchers. The remaining articles listed in its catalogue, including fence anchors, barbed wire extension arms, paint, roofing, tires, tubes, baby chicks, brooders, stoves, cream separators, nursery stock, heaters and sprayers, are purchased from other manufacturers or producers, and shipped directly from the production point to the consumer. These general statements of the nature of the petitioner's business are subject to qualifications, which for present purposes it is unnecessary to note. The petitioner's catalogue contains statements that it sells direct from the factory to the consumer; that the prices for the articles advertised are low because the consumer does not have to pay anything for a middleman's profit and expense, and that such prices are lower than others for the reason that customers pay only the actual cost of manufacture, plus one small profit.

The Commission found *inter alia* that with reference to articles sold by the petitioner other than fencing and accessories manufactured in its own factories, and such articles as it purchased from other manufacturers at a loss to them, the petitioner is a middleman, and makes a profit by resale, in consequence of which the statements in its catalogue, insofar as they refer to merchandise purchased rather than produced.

have a tendency to mislead and deceive the public to induce it to purchase such articles from the petitioner in preference to its competitors, and that the methods involved are unfair methods of competition in interstate commerce and constitute a violation of the Federal Trade Commission Act.

In response to its findings of fact and conclusions of law, the Commission issued an order directed to the petitioner, its agents and employees, directing that in connection with the sale in interstate commerce of all articles not manufactured, produced or grown by the petitioner, they cease and desist from representing directly or by implication, that such articles are by it manufactured, fabricated, produced or grown, and from giving as the reason for its alleged ability to sell such articles at quoted prices the fact that they are furnished direct to the consumer from the petitioner's own factories, mills, nurseries, hatcheries or other establishments, without any expense or charge for a middleman, or with but one profit plus the manufacturer's cost, when such is not the case.

We are asked to set aside the Commission's order on the ground that the evidence does not support its findings in respect to the three prerequisites upon which a desist order must be based, (1) the methods complained of must be unfair, (2) they must be methods of competition in commerce, (3) a proceeding by the Commission to prevent the use of the methods must appear to be in the interest of the public. *Federal Trade Commission v. Raladam*, 283 U. S. 643. The petitioner's denial of unfair methods rests mainly upon the assertion that the statements "Direct from factory," "Direct to you," "From factory to you," "Factory prices," and similar phrases used in the catalogue are literally true and so do not tend to mislead. Its contention that the methods are not methods of competition in commerce is based principally upon an offer to prove by the catalogues of other mail order houses that 98% of petitioner's competitors in the mail order business use such terms as "Factory prices" and "From factory to you" with respect to goods which they do not themselves manufacture, and that this is the custom in the mail order business. This evidence was excluded by the Commission, and its ruling is assigned as error.

Aside from a question of substantial competition that may still exist by reason of 2% of mail order houses refraining from employing challenged methods, there still remains the competition, undoubtedly substantial, of those who sell similar products through retail stores, agents or jobbers. The excluded testimony did not reach, nor purport to reach, that sort of competition. The contention that such competition is not competition in commerce is clearly without merit. But without regard to whether the offered testimony substantially covers the competitive field, it was not conclusive for another reason. The petitioner offered to prove that the phrases "Factory prices," "Direct from factory" and "From factory to you" are commonly used in the mail order business, but the petitioner itself goes far beyond this. Assuming for the moment that there is no implication in such phrases that the factory referred to is one owned, operated and controlled by the petitioner, other statements in the catalogue leave no room for doubt as to the meaning conveyed. In its 1931 catalogue the petitioner used this language: "Every page of this book proves that it pays to buy your fencing and other farm and home needs direct from Jim Brown's factories." "Buying direct from my factories saves at least 33⅓% of your purchasing dollar, because you pay no in-between profit to the dealer and jobber, who add no value, but who add their profits to the original factory cost. You save all this needless expense when you buy direct from my factories." This language, without qualification confining it to those articles actually produced by the petitioner's factories, clearly supports the findings of unfair methods, and the offered proof not purporting to show similar methods by competitors, the language also sustains the finding of unfair competition, even upon the assumption that similar methods by competitors remove the petitioner's practices from control of the Commission's orders.

It also sufficiently appears that the proceeding was in the interest of the public. Whatever may have been our previous understanding of the line of demarcation between methods of trade which result at most in a private wrong and those in which there is specific and substantial public interest (which led to our decision in *Royal Milling Company v. Federal Trade Commission*, 58 Fed. [2d] 581), any misapprehension we may have entertained of the exclusive character of the tests to be applied thereto enumerated in *Federal Trade Commission v. Klesner*, 280 U. S. 19, has now been dispelled by the decision in *Federal Trade Commission v. Royal Milling Co., et al.*, — U. S. —, decided February 6, 1933. The language of the Supreme Court in that case is peculiarly applicable here: "If consumers or dealers prefer to purchase a given article because it was made by a particular manufacturer or class of manufacturers, they have a right to do so, and this right

cannot be satisfied by imposing upon them an exactly similar article or one equally as good but having a different origin."

A remaining contention must be noted. In the instant case the Commission produced no direct testimony tending to show that any of the petitioner's customers were imposed upon or deceived by the representations made in its catalogue, and it is claimed that such omission is fatal to the case against it. We know of no reason why reasonable factual inference may not be the basis for the fact findings of the Commission as well as direct evidence. Price is so fundamental a factor in merchandising, and so persuasive in drawing customers to one competitor and from others, that it seems superfluous to demand direct proof of the efficacy of methods, frankly relied upon, to accomplish the results now denied.

The order of the Commission is sustained.

[¶ 55,032] V. O. Zahniser and the Midland Oil Co. v. The Buckeye Pipe Line Co., et al.

U. S. District Court, Western District of Pennsylvania. April 17, 1933.

Complaint, alleging collusion between defendants to market plaintiffs' oil as oil of a certain grade, dismissed because it fails to aver any contract or combination in restraint of interstate commerce.

McVicar, J.: Plaintiff's bill in equity prays—

"That this Honorable Court may find that the defendants by their collusion have jointly and severally caused great damage to the plaintiffs on account of their arbitrarily, and without practical or legal cause, fixed or caused to be fixed a market price for the petroleum produced and being produced and sold by them, also for such further relief as the Court may deem fit and proper in equity."

on the ground that defendants or some of them by agreement or collusion, since April 1, 1926, have caused the oil which plaintiffs produced in Ohio to be graded and marketed in Pennsylvania as "Corning grade" oil instead of "Pennsylvania grade" oil. Plaintiffs invoke the jurisdiction of this Court on the grounds of diversity of citizenship, violation of the Interstate Commerce Act and the Sherman Anti-Trust Act.

The Buckeye Pipe Line Company was not served, nor has it appeared. The South West Pennsylvania Pipe Lines, Joseph Seep Purchasing Agency, and the South Penn Oil Company have appeared only for the purpose of moving this Court to dismiss the bill for want of jurisdiction. Their motions for this purpose are now before the Court.

Federal Courts are Courts of limited jurisdiction. The burden rests upon the plaintiffs in this case to aver facts which clearly disclose that this Court has jurisdiction. Have plaintiffs met this burden?

Jurisdiction does not vest by reason of diversity of citizenship. The bill discloses that one plaintiff and several of the defendants are citizens of Pennsylvania, and that one plaintiff and one defendant are citizens of Ohio. With a plurality of plaintiffs or defendants, the jurisdiction of the District Court attaches only when every plaintiff possesses the requisite diversity to every defendant. *Blake v. McKim,* 103 U. S. 366; *Salem Trust Co. v. Manufacturers Finance Co.,* 264 U. S. 182, and *New Orleans v. Winter,* 1 Wheat. 9. The exception in class suits has no application here.

Jurisdiction does not vest by virtue of the "Interstate Commerce Act" of 1887. Plaintiffs have not pointed out to the Court any specific violation of said Act, nor have we discovered in the original or amended bill any alleged specific violation thereof.

Jurisdiction does not vest under the Sherman Anti-Trust Act of 1890 (15 U. S. C. 1). That Act provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

The original or amended bill does not sufficiently aver any contract, combination or conspiracy in restraint of interstate commerce between the defendants which would bring this case under the provisions of said Act. A substantial cause thereunder must be clearly and positively averred. *Blumenstock Brothers Advertising Agency v. Curtis Publishing Co.,* 252 U. S. 436; *Strout v. United Shoe Machinery Co.,* 195 Fed. 313; *Corey v. Independent Ice Co.,* 207 Fed. 459; *American Steel Co. v. American Steel & Wire Co.,* 244 Fed. 300; *Noyes v. Parsons et al.,*

245 Fed. 689; *Cilley v. United Shoe Machinery Co.*, 152 Fed. 726; *McLatchy et al. v. King*, 250 Fed. 920; *Tilden v. Quaker Oats Co.*, 1 Fed. (2) 160.

Let an order be prepared directing the dismissal of the bill and amended bill for want of jurisdiction.

[¶ 55,033] Associated Press v. Sioux Falls Broadcast Association.

U. S. District Court, Southern Division of South Dakota. April 8, 1933.

The contention that the plaintiff news agency is a monopoly is not sustained by the Court in its findings of fact.

The limitations imposed by the plaintiff upon the dissemination of news by its members do not constitute unreasonable restraint of trade but are merely proper and reasonable measures to protect a property interest in its collected news.

The above entitled action having come on regularly to be heard before the above entitled Court, the Honorable James D. Elliott, Judge of said Court presiding, in the Court Room of the above entitled Court in the United States Post Office Building, in the City of Sioux Falls, Minnehaha County, South Dakota, on Monday, March 13, 1933, at ten o'clock in the forenoon of said day, upon the Application of the Complainant above named, for a preliminary injunction herein, the Complainant appearing by its Attorneys and Solicitors, George J. Danforth and Holton Davenport, and the Defendant above named appearing by its Attorneys and Solicitors, Tom Kirby and O. R. Davis, and the Court having listened to the evidence and to the arguments of counsel, and having verbally announced the decision of the Court that said Preliminary Injunction be granted, and the Court's reasons for such decision, and the Court having at said time and upon the announcement of said Decision found the facts pertinent to said Application and reached the Conclusions of Law on said findings, as hereinafter set forth, and the Court having on March 14, 1933, made and entered herein a Preliminary Injunction, and it appearing to the Court that for the purpose of completing the record herein and for the purpose of showing affirmatively the Findings of Fact and Conclusions of Law upon which said Decision was based, that such Findings and Conclusions should be reduced to writing, the Court does hereby make and order filed as of March 13, 1933, being the date when said Hearing was had and when said Decision was reached, the following Findings of Fact and Conclusions of Law, the same being only such Findings and Conclusions as the Court deems appropriate to said Application for a preliminary Injunction:

Findings of Fact

I.

That the Defendant upon said Hearing on said Application for such Preliminary Injunction did not controvert or dispute the essential and basic allegations of fact contained in the duly verified Bill of Complaint herein, and did not dispute or controvert that Defendant had been appropriating and using news gathered by Complainant, and news to which Complainant was entitled, for purposes of broadcast over that certain radio station commonly known as KSOO, maintained and operated by Defendant in the City of Sioux Falls, Minnehaha County, South Dakota.

II.

That a summary of what the Court regards as the basic and essential allegations of said Bill of Complaint, none of which, except as herein specified, were controverted upon said Hearing, is as follows: That Complainant is a resident and citizen of the State of New York, that Defendant is a resident and citizens of the State of South Dakota, that the amount involved herein and in controversy herein is in excess of the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs; that Complainant is organized under the so-called Membership Corporation Law of the State of New York and has more than twelve hundred members, each of whom owns or represents a daily newspaper published in the United States; that Complainant is engaged in the business of gathering news, intelligence and information throughout the world, for transmission to its members, obtaining and gathering said news through its own representatives in every important capital and city in the world, through reciprocal arrangements with

many important news agencies in foreign countries, and also through news supplied by its members, each of said members being required by Complainant's By-Laws to supply to Complainant the local news gathered by the newspapers represented by said member; that the direct expense to Complainant of gathering news and intelligence which it obtains through its own agents and of transmitting such news to its members, amounts to many millions of dollars each year; that such cost is equitably divided amongst said members in accordance with the provisions of said By-Laws; that said service is of great importance to said members; that said service, or a similar service, is essential to said members in the conduct of their respective newspapers; that the value of said service depends upon the promptness, accuracy and impartiality thereof, and also upon the freshness of the news furnished; that to protect said membership and to safeguard said news from becoming generally known before publication thereof in member newspapers, the By-Laws of Complainant, to which each of its members agrees upon assuming membership, provide that news received through Complainant service is received exclusively for the purpose of publication in the specific newspaper specified in the member's Certificate and that the members shall permit no other use to be made of it; that Defendant operates said radio station KSOO at said Sioux Falls, conducting daily broadcasts of the same kind and nature as are usually conducted by radio stations; that as a feature of said daily broadcasts, Defendant three times daily, being from 8:30 to 8:40 o'clock in the morning, from 12:20 to 12:30 o'clock during the noon hour, and from 4:50 to 5:00 o'clock in the afternoon, conducts what it calls news broadcasts; that the purpose of said news broadcasts is to popularize said radio station through obtaining additional listeners thereto, so as to enhance the value of time sold by said radio station to advertisers; that Complainant's members derive a large portion of their revenue through sale of advertising space in their respective newspapers, and the value of said space is largely determined by the number of readers thereof, this being in turn largely determined by the freshness and interest of the news reports contained in said newspapers; that thereby defendant in conducting said radio station has become and is a competitor of Complainant and the various members of Complainant corporation in the obtaining and distribution of news, which competition necessarily involves rivalry in being the first to obtain and distribute news; that Defendant does not maintain any news organization of its own for the purpose of gathering or obtaining news and does not purchase news from any news agency; that there is published at said Sioux Falls a newspaper called The Daily Argus-Leader, and at Sioux City, Woodbury County, Iowa, said Sioux City being about ninety miles from said Sioux Falls, a newspaper called The Sioux City Tribune; that said The Daily Argus-Leader and said The Sioux City Tribune are both members of Complainant corporation, and under the provisions of Complainant's By-Laws, are entitled to receive, and do receive, Complainant's news reports and are obligated to furnish to Complainant all of the news gathered by said two newspapers in their respective fields, this being commonly known as local news; that for the purpose of said daily broadcast from 8:30 to 8:40 o'clock in the morning, Defendant obtains a copy of the last prior issue of said The Sioux City Tribune; that for the purpose of said daily broadcast from 12:20 to 12:30 o'clock in the noon hour, Defendant regularly obtains a copy of the so-called noon edition of said The Daily Argus-Leader, published at 11:00 to 11:30 o'clock in the forenoon; that for the purpose of said daily broadcast from 4:50 to 5:00 o'clock in the afternoon, the Defendant regularly obtains an issue of the so-called evening edition of said The Daily Argus Leader, which is published and goes to press between 3:45 and 4:15 o'clock in the afternoon; that said respective editions of said newspapers include accounts of all of the most interesting and most important news events in the world up to the respective hours of publication, as aforesaid, and also local news gathered by said newspapers; that at each of said news broadcasts, Defendant proceeds to read verbatim over said radio station from the newspaper used, as aforesaid, the leading news articles, or the opening paragraphs thereof, including the items furnished to said newspaper by Complainant, as aforesaid, and also the said local news from said newspapers; that there was some slight dispute upon said Hearing as to the territory served by said radio station, said Complainant alleging that the same extended for a distance of one hundred miles to several hundred miles from said Sioux Falls, depending upon conditions affecting radio broadcasting; and it satisfactorily appearing to the Court that this is substantially correct, with the qualification that under ordinary conditions said territory does not extend beyond a radius of one hundred miles, but that under favorable broadcasting conditions, it extends for several hundred miles, and under exceptionally favorable conditions, an even greater distance; that several hundred of the newspapers represented or included in Complainant's membership circulate and have

subscribers to a greater or lesser extent in said territory served by said radio station; that not less than four-fifths of the persons residing in said territory either own radios or have access to radios; that said newspapers are dependent upon railroad and motor transportation for distribution in said territory, and that except in the cities where said newspapers are published, a period of from two to twenty-four hours necessarily elapses from publication of said respective newspapers before the same are delivered to and actually reach the subscribers thereof; that Defendant's said practice of appropriating said news makes the same known to the general public throughout said territory several hours before said newspapers can reach actual or potential subscribers thereof and said news is, therefore, to a large extent, rendered old, stale and uninteresting and no longer news and greatly impairs and detracts from the attractiveness of said newspapers and that Defendant has declined and refused to desist from said practice and intends to continue the same unless restrained from so doing.

III.

That defendant, as aforesaid, did not upon said Hearing substantially controvert or deny any of the matters and things set forth in the foregoing paragraph but in substance alleged the following reasons why the Court should not grant said Application: A claim on the part of the Defendant that Complainant is operating in material and unreasonable restraint of inter-state commerce in violation of the Sherman Act, and therefore does not come into Court with clean hands; a further claim on the part of Defendant that Complainant and members of Complainant corporation, have been and are permitting broadcasts by large numbers of other radio stations which cover and serve the same identical territory as that served by Defendant and that thereby Complainant is discriminating against Defendant and in favor of Defendant's competitors and thereby seeking to greatly lessen, if not entirely destroy, the profits of Defendant's broadcast business and is thereby guilty of unfair competition against the Defendant; a further claim that Complainant cannot maintain this action either in its own right or on behalf of the members thereof, and a further claim that as to said news appropriated from said Sioux City Tribune, that the same was with the permission of the proprietor of said Sioux City Tribune.

IV.

That with reference to said claim that Complainant is operating in unreasonable restraint of interstate commerce, the Court finds, upon the proofs offered at said Hearing, that Complainant operates its business in the manner and for the purposes hereinbefore set forth; that under Complainant's By-Laws, the membership of Complainant is limited to owners of newspapers; that new members may be elected by the affirmative vote of not less than four-fifths of the members of the Complainant corporation present in person, or by proxy, at any regular meeting of the members (meetings being held annually) or at a special meeting called for that purpose, no vote to be taken at any regular or special meeting upon any application for membership unless the same shall have been filed with the secretary at least sixty (60) days prior to such meeting; that members may be also elected by Complainant's Board of Directors when no meeting of members of the corporation is in session unless a protest against such election is made by certain members of Complainant, who are given the right by said By-Laws to make such protest; that no evidence was offered of any general agreement or understanding among said members as to voting against the admission of new members at such meetings of such membership; that there is no By-Law, Rule or Regulations against any member purchasing news from any other news agency, and it is a common practice of such members to purchase news from news agencies other than Complainant; that said By-Laws further provide that a member shall publish news of Complainant only in the newspaper, the language and the place specified in such member's Certificate of membership and shall not permit any other use to be made of the news furnished by Complainant, that no member shall furnish to any person who is not a member, the news of Complainant in advance of publication, and that each member shall furnish to Complainant all the news of such member's district, the area of which shall be determined by the Board of Directors, the same referring to what is commonly called and herein referred to as local news; that said By-Laws were before the Court on said Hearing and part of the records and files herein, and are hereby referred to and made a part hereof; that the Court finds that the provisions of said By-Laws are proper and not in unreasonable restraint of interstate commerce; that said provisions with reference to the admission of new members constitute a reasonable and legitimate safeguard, considering the nature of Complainant's organization and business; that said provisions with reference to safeguarding news reports are reasonable and necessary to preserve the value of said reports as news to Complainant's membership; that said provisions with reference to requiring mem-

bers to furnish such local news exclusively to Complainant amount only to requirement of undivided loyalty and service on the part of a news correspondent, and considering the nature and necessities of the business, such requirement is reasonable; that Complainant does not in fact have a monopoly in said business but does operate in competition with other news agencies, and the Court does not find any effort by Complainant to achieve a monopoly; that Complainant does not operate unreasonably in restraint of interstate commerce.

V.

That as to Defendant's contention to the effect that Complainant was discriminating against Defendant, through furnishing and permitting its news to be furnished to competitors of Defendant and declining to furnish the same to Defendant, the Court finds the facts as follows: That so far as concerns the By-Laws of Complainant, the same do not permit any radio broadcasting of such news, but there have been adopted by Complainant's membership, at meetings, certain resolutions which for practical purposes have been treated by Complainant and its members as a modification of said By-Laws; that one of said resolutions permits Complainant itself, through its Board of Directors, to permit the broadcast of such news of Complainant as Complainant shall deem of "Transcendent, national or international importance" and on one or two occasions Complainant has furnished to National Radio Chains such news of national or international importance, such as the returns of the 1932 National Election; that the only resolution which permits members to give out such news for radio broadcasts is a resolution that provides that "public display of news upon bulletin boards, or the broadcasting of such bulletins" does not constitute a violation of said By-Laws, that said resolution refers to bulletins commonly posted in front of newspaper offices on bulletin boards or sheets, being a bare statement in a few words, of the nature of a news article; that as to the practice followed by Defendant of broadcasting entire news articles or the leading paragraphs thereof, Complainant has never by any By-Law or other regulation authorized the same; that no evidence has been offered which would justify the Court in finding any tacit or other understanding between Complainant and its members for ignoring the rule as set forth in said resolution, and the Court finds that any such broadcasts as made by the Defendant, whether made by Defendant or others, have been in violation of said rules and regulations and have not been with the consent, either express or implied, of Complainant and that if in any instance a member of Complainant has consented to such broadcasts as have been made by Defendant, such consent has been unauthorized; that so far as appeared upon said Hearing, there has been no discrimination or unfair competition by Complainant and its members against Defendant; that Defendant has never had permission of Complainant, or any member of Complainant, to broadcast such bulletins, except as hereinafter stated.

VI.

That Defendant also contended upon said Hearing that there was no actual damage to Complainant, or Complainant's members, by said practice followed by Defendant for the reason that the news broadcasted by the Defendant had practically invariably been broadcasted throughout the same territory by other radio stations prior to broadcast by Defendant, and that thereby the news value thereof was entirely destroyed prior to broadcast by the Defendant; that said position is inconsistent with the position also taken by Defendant, in the Affidavit of Joseph Henkin, President and General Manager of Defendant, interposed in opposition to said Application, and in which Affidavit said Henkin alleged in effect that if a temporary Injunction should be granted, the profits of Defendant's broadcast business would be greatly lessened, if not entirely destroyed, thereby in effect taking the position that said news appropriated by Defendant, as aforesaid, is of great value to Defendant; that the Court further finds that such broadcasts of news by radio as have been authorized by Complainant, as aforesaid, would not destroy the value of said news, but that the broadcasts of mere bulletins, as aforesaid, would rather have the effect of whetting the public appetite for the entire and detailed news articles; that the Court also finds that so far as concerns so-called local news which has been broadcasted by Defendant, that the same has not been broadcasted by any other radio stations; that so far as concerns broadcasts of news by other radio stations of news from news agencies other than Complainant, the same have not tended to destroy the news value of Complainant's news, except to the extent where the same is duplicated; that upon all of the proofs and the showing made, the Court finds that news so appropriated and broadcasted by Defendant did have and did retain great and material value to Complainant and to members of Complainant corporation at the time of such appropriation and broadcast.

VII.

That as to Defendant's contention that Complainant cannot maintain this action either in its own right or on behalf of the members thereof, the Court finds that the members of Complainant corporation who are suffering damage in a greater or lesser degree by the acts and practices of the Defendant, are too numerous to make it practical for them to join herein, and that Complainant is a proper party to prosecute this action in its own behalf and in behalf of its membership.

VIII.

That as to Defendant's said contention as to authorization from said Sioux City Tribune for such broadcasts, the Court finds that under the By-Laws, rules and regulations of Complainant, said Sioux City Tribune had no authority to grant such permission to a radio station in said Sioux Falls and that such purported authority by said Sioux City Tribune was in violation of the conditions under which said Sioux City Tribune received Complainant's news reports.

IX.

That under the conditions existing in said territory served by Defendant's radio station, news gathered by Complainant and to which Complainant is entitled, has and continues to retain a value to Complainant and Complainant's members for not less than twenty-four hours after first publication thereof in a newspaper which is a member of Complainant corporation; that under the conditions existing in said territory, it takes approximately twenty-four hours after such first publication to complete the distribution of said newspapers throughout said territory and to enable Complainant and Complainant's members to obtain the full benefit of their industry, expenditure and labor in gathering said news.

X.

That said practice of Defendant in so appropriating said news constitutes unfair competition by Defendant against Complainant and Complainant's members, that the same causes great and irreparable injury to Complainant, that Complainant has no adequate remedy at law, and that Defendant intends to continue said practice unless enjoined and restrained from so doing.

From the foregoing Findings of Fact, the Court makes and derives the following

Conclusions of Law

I.

That the Court has jurisdiction over the parties and the subiect matter herein.

II.

That Complainant and Complainant's members have what a Court of equity will treat as a property right in news gathered and disseminated by Complainant, and also so-called local news gathered by members of Complainant and which members of Complainant are obligated to transmit to Complainant.

III.

That Complainant and said members are equitably entitled to enjoy and reap the benefit of their industry, efforts and expenditure in the gathering and obtaining of said news.

IV.

That the practices on the part of the Defendant in appropriating the said news as set forth in the foregoing Findings of Fact are and constitute unfair competition by the Defendant as against Complainant and Complainant's members.

V.

That equity will protect Complainant and Complainant's members, as against such unfair competition, in the aforesaid right of Complainant and Complainant's members to reap and enjoy the benefit of their efforts, industry and expenditure in obtaining and gathering said news.

VI.

That Complainant is a proper party to prosecute this action in its own behalf and for and in behalf of its members.

VII.

That Complainant is not operating in unreasonable restraint of interstate commerce or in violation of any law concerning illegal combinations or monopolies.

VIII.

That Complainant does not come into Court with unclean hands.

IX.

That on its face, the Bill of Complaint herein states a good cause of action and the relief prayed for therein, and no good cause has been shown why the Court should not grant a preliminary Injunction herein

X.

That for purposes of this application, it satisfactorily appears to the Court that Complainant and Complainant's members are suffering irreparable damage and injury by said practices of Defendant, and that Complainant has no adequate, speedy or complete remedy at law.

XI.

That Complainant is entitled to a preliminary Injunction herein, pending final hearing and determination hereof, enjoining the Defendant, its officers, agents, servants, etc., from pirating, appropriating, using or disseminating to the general public through broadcasts or announcements over said radio station KSOO news gathered and obtained through the labor and expenditure of Complainant, or news which has been gathered and obtained through the labor and expenditure of members of Complainant corporation, being so-called local news as aforesaid, for and during the period of not less than twenty-four hours after first publication of said news in a newspaper which is a member of Complainant corporation.

[¶ 55,034] International Visible Systems Corporation v. Remington-Rand, Inc.

United States Circuit Court of Appeals for the Sixth Circuit. June 6, 1933.

The acts of filing a suit alleging patent infringement and the publication of such fact do not of themselves constitute an attempt to monopolize commerce in violation of the Sherman Act.

Before MOORMAN, HICKS and SIMONS, Circuit Judges

HICKS, Circuit Judge. Appeal by International Visible Systems Corporation (plaintiff below) from an order sustaining the demurrer of Remington-Rand, Inc., appellee, to the petition of appellant.

The action was based upon Sections 2 and 15 of Title 15, U. S. C., portions of the Act commonly called the Sherman Anti-Trust Act. The petition alleged that appellant carried on the business of manufacturing card index systems with containers therefor, bookkeeping systems, and related products; that appellee was a competitor and that both parties were engaged in interstate commerce. It also contained the averment of diversity of citizenship and requisite jurisdictional amount.

The burden of the petition rested in the averment that certain acts of appellee "were done and made with the purpose of attempting to unreasonably monopolize the trade or commerce among the several states in the commodities which the plaintiff" (appellant) "manufactured and in which it dealt." Recovery was sought for the three-fold damages provided in Sec. 15 of the Act. Two particular acts set forth as sufficient to constitute the alleged attempt at monopoly are:

(1) That—"On or about March 25, 1931, the defendant learning of the endeavor of the plaintiff to attract additional capital needed in plaintiff's business, maliciously and without probable cause, and with intent to destroy the business of the plaintiff, and to smother competition with the defendant, filed an action No. 725 on the Equity Docket of this Court pretending an infringement by the plaintiff on two certain patents of the defendant. Said suit was given wide publicity, as the defendant anticipated, and hindered and prevented this plaintiff not alone from obtaining additional capital at that time, but from freely selling its products in the different states of the Union."

And

(2) That—"On or about the 5th day of October, 1931, the plaintiff was about to have the shares of stock of International Visible Systems Corporation, a corporation of Delaware, and the holding company for the plaintiff, listed on the Produce Exchange of the City of New York. The defendant learning of the anticipated plan of the plaintiff to have his stock so listed, caused an article to be published and sent abroad over the Dow-Jones Ticker Service in the City of New York and elsewhere, stating that the defendant had

"'been awarded decision against five competitors in Germany in a series of lawsuits in which the validity of Remington-Rand's patents on cardex visible card systems was upheld. Competing makers are compelled to discontinue their infringements.

"'Remington-Rand has filed a suit against International Visible Systems Corp., alleging infringement of the corresponding patents in the United States.'

"Said publicity was copied, as the defendant knew and anticipated, by the Wall Street Journal in the evening edition of the same day, and in many other financial publications. Said information contained in the last quoted paragraph

of said publication was false and untrue, and said last quoted paragraph in connection with the first quoted paragraph, were calculated to and did prevent the Produce Exchange from listing the securities of said holding company on the Produce Exchange of New York. The plaintiff, as the defendant well knew, was to receive the benefit of the subscriptions to the stock of said holding company, and get the actual money therefrom less expenses in obtaining said subscription, and less the commissions of the brokers who had been employed to obtain them."

The suit brought by appellee for the infringement of its patents cannot of itself be characterized as an attempt to monopolize trade or commerce. It was nothing more than a lawful method of protecting appellee's claimed monopoly under the patent laws. *Virtue v. Creamery Pkg. Co.*, 227 U. S. 8, 38; see also *Bement v. National Harrow Co.*, 186 U. S. 70, 92; *Henry v. Dick Co.*, 224 U. S. 1, 27; *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 Fed. 358, 362 (C. C. A. 7); *United States v. Motion Picture Patents Co.*, 225 Fed. 800, 805 (D. C.). Moreover the declaration in the petition that the suits for infringement were brought against appellant maliciously and without probable cause adds nothing to the weight of the claim that the infringement suit was an attempt to monopolize trade or commerce. Sec. 2 of the Anti-Trust Act does not require that such attempt be made maliciously and without probable cause. See *Virtue v. Creamery Pkg. Co., supra.*

Nor can we regard the second paragraph of the Dow-Jones Ticker Service publication as an attempt to monopolize trade or commerce. The petition avers that this paragraph was false but it does not aver that appellee knew it was false at the time it was published nor that it was wilfully or deliberately caused to be published. It cannot be regarded as false as a whole because the petition itself avers that appellee had filed an infringement suit against appellant. We must assume that if there is any falsity it is to be found in that portion stating that the patents sued on corresponded to the patents of appellee which had been upheld in Germany. We cannot as a matter of law regard this isolated statement (*Virtue v. Creamery Pkg. Co., supra,* at p. 37) published more than six months after the institution of appellee's patent suit as an attempt at monopoly whatever effect it may have had upon appellant's business. The most that can be said is that it was an unwarranted attempt by appellee to protect its own patent rights.

But appellant contends that even if the petition fails to state a cause of action under the Sherman Anti-Trust Act its averments with reference to the Dow-Jones publication do embody a substantial cause of action for slander of title. We cannot accept this view. As indicated above the petition is based upon no such theory. The nature of the action for slander of title is peculiar, being based upon a defamatory attack upon property. It has little in common with the ordinary action for slander. Its gist is the special pecuniary loss sustained by reason of malicious utterances or publications by the slanderer. Three elements are necessary for the maintenance of such a suit. The words must be: (1) false; (2) maliciously published; and (3) result in some special pecuniary loss. These requisites must not only be proved but under the fundamental law of pleading must be averred. Cooley on Torts, 4th ed., Vol. I, Sec. 163; Jaggard on Torts, Vol. I, Sec. 182; *Hardin Oil Co. v. Spencer,* 205 Ky. 842, 845; see also *Ebersole v. Fields,* 181 Ala. 421; *Burkett v. Griffith,* 90 Calif. 532, 537; *Hopkins v. Drowne,* 21 R. I. 20, 22; *Cardon v. McConnell,* 120 N. C. 461; *Hanson v. Hall Mfg. Co.,* 195 Iowa 1213; Odgers on Libel and Slander, 5th ed., p. 77; Newell on Slander and Libel, 3rd ed., p. 249.

The petition contains no direct averment that the publication complained of was maliciously caused, that is, caused with the intention of injuring appellant (Newell, p. 250), nor does the publication itself impliedly carry similar import. As pointed out above the petition not only fails to allege that the matter complained of was knowingly false but it also fails to allege that the publication was made without probable cause.

Appellant contends that it was relieved by Sec. 11341 of the General Code of Ohio from averring that the article was caused maliciously. This section is as follows:

> "Libel and Slander. In an action for libel or slander it shall be sufficient to state generally that the defamatory matter was published or spoken of the plaintiff."

But it is clear to us that this section applies only to the ordinary actions for libel and slander. There is nothing therein to indicate that it has application to the distinctive action of slander of title.

Finally, the requisite averment of special damages or special loss, which is the gist of the action (Newell, p. 248; *Barquin v. Hall Oil Co.,* 28 Wyo. 164, 171; *Ebersole v. Fields, supra,* p. 424) is wholly lacking. In addition to seeking the three-fold damages allowed by Sec. 15 of the Anti-Trust Act appellant contents itself with the general averments that by reason of the acts of appellee it was no longer able to use its patents; that many of its customers would

not purchase its goods and that its creditors had been frightened and induced to press for the payment of their claims. These general averments fall far short of setting forth the special pecuniary loss recoverable in an action on the case for slander of title.

Judgment affirmed.

[¶ 55,035] Pennsylvania Railroad Co. and Pennsylvania Co. v. Interstate Commerce Commission.

Third United States Circuit Court of Appeals. June 16, 1933.

The acquisition of the stock of a competitor does not of itself constitute a violation of the Clayton Act, as it is necessary to prove more than the mere possibility that such control will be used to lessen competition.

Before WOOLLEY, DAVIS and THOMPSON, Circuit Judges.

DAVIS, Circuit Judge.

This case is here on petition to set aside an order of the Interstate Commerce Commission requiring the Pennsylvania Railroad Company and the Pennsylvania Company, which is an investment company, whose stock is held by the Railroad Company, to divest themselves of all the shares of the capital stock of the Lehigh Valley Railroad Company and the Wabash Railway Company which they own.

The par value of the total amount of outstanding capital stock of the Wabash Railway Company is:

Preferred A	$69,333,050
Convertible Preferred B	$ 2,462,132
Common	$66,697,775

The par value of the shares of all classes of the stock is $100 and all classes have equal voting power.

The par value of the amount of the Wabash stock held by the Pennsylvania Company is:

Preferred A	$31,290,000
Common	$36,290,000

The par value of the total amount of outstanding stock of the Lehigh Valley Railroad Company is:

Cumulative Preferred	$ 106,300
Common	$60,501,700

The par value of the shares of both classes of the stock is $50 and both classes have equal voting power.

The par value of the shares of stock of the Lehigh Valley Railroad Company held by the Pennsylvania Company is $18,251,950.

This proceeding was brought under the authority of section 7 of the Clayton Act of October 15, 1914 (38 Stat. 730), the material parts of which provide as follows:

"That no corporation engaged in commerce shall acquire directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition."

The general question is whether or not there is any substantial evidence in the case that brings it within the provisions of the above section of the Act.

Section 11 provides that, "the findings of the Commission or board as to the facts, if supported by testimony, shall be conclusive." The Commission found that the effect of the acquisition may be to substantially lessen competition between the Pennsylvania Railroad Company and the other two companies, and that the purchase was not solely for investment. Accordingly if there is any substantial evidence to sustain these findings, they are binding upon us. *Federal Trade Commission v. Curtis Publishing Company,* 260 U. S. 568.

Whether or not there is any substantial evidence to support the findings of the Commission depends, in this case, somewhat upon the interpretation of the words "may be," in the sentence, "where the effect of such acquisition may be to substantially lessen competition."

The Commission contends that where the effect of the acquisition by one corporation engaged in commerce of the stock of another likewise engaged may *possibly* be "to substantially lessen competition" between them, the acquisition is prohibited by the statute. It says that the mere possibility that it will have such effect, the possession of the power regardless of its use, brings

the acquisition within the inhibition of the statute. This was the trend of the decisions of the Supreme Court under the earlier Sherman Act cases. *Northern Securities Co. v. United States,* 193 U. S. 197; *Harriman v. Northern Securities Co.,* 197 U. S. 244; *United States v. Reading Co.,* 253 U. S. 26; *United States v. Southern Pacific Co.,* 259 U. S. 214. But in the later cases the Supreme Court has brought the element of "probability" into the interpretation of the words "may be." The mere possession of power is not, under all circumstances, sufficient to bring the acquisition of stock by one corporation of another within the inhibition of the Act. The possession of power must be accompanied by the probability that it will be exercised to lessen competition to a substantial degree, before it is prohibited by the Act. The purpose of using the words "may be" was to prevent such acquisition of the stock of a competitor as would under the circumstances *probably* lessen competition to a substantial degree. *Standard Fashion Co. v. Magrane-Houston Co.,* 258 U. S. 346, 357; *International Shoe Co. v. Federal Trade Commission,* 280 U. S. 291. In the last case cited, the Supreme Court said: "Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree." In discussing the word "may" in section 3 in the case of *Standard Fashion Company v. Magrane-Houston Company,* 258 U. S. 346, the Supreme Court used substantially the same language.

The Clayton Act was in the nature of a supplement to the Sherman Act and was intended as a preventive measure which would restrain in their incipiency acts prohibited by the statute. *United States v. United Shoe Machinery Co.,* 264 Fed. 138; *Swift & Co. v. Federal Trade Commission,* 8 Fed. (2d) 595; *Standard Fashion Co. v. Magrane-Houston Co.,* 258 U. S. 346.

The exact question then is, whether or not there is any competent evidence showing such circumstances as would justify the conclusion that the effect of the acquisition of the Wabash and Lehigh Valley stock by the Pennsylvania Company will probably lessen competition to a substantial degree. While the act provides that the findings of fact made by the Commission are conclusive, this does not relieve the court of the duty of determining whether or not there is any evidence which justifies the conclusion that the effect of the acquisition will be to lessen competition between the Pennsylvania and the Wabash and Lehigh Valley Companies to a substantial degree. *Temple Anthracite Coal Company v. Federal Trade Commission,* 51 Fed. (2d) 656, 659.

We cannot assume that this will result from the mere acquisition of the stock. As a matter of fact there has not been any lessening of competition since the stock was acquired. On the contrary, the evidence affirmatively shows increased competition between the Pennsylvania Railroad Company and the other two companies. This was recognized by the Commission which did not even attempt to controvert the facts showing increased competition, but suggested that it might be due to decrease in traffic. This, however, cannot be the explanation, for increased competition was carried on in 1929 when traffic was at its height.

Since the acquisition of the stock by the Pennsylvania Company there has not been any change in the policy of administration of any of the three railroad companies in question and the excellence of the service maintained on the roads has been constantly improved at the same time. The fact that they have not lessened competition during these troublous times would indicate that they will not do so in the future. We do not find any evidence that would justify an inference that a different policy will be inaugurated among the companies in the future from that followed during the past or that competition will be substantially lessened between the companies.

The provisions of section 7 of the Act prohibiting the acquisition of the stock of one corporation engaged in commerce by another so engaged do not apply if the stock is purchased "solely for investment" and the stock has not been used by voting or otherwise to bring about, or in attempting to bring about, the lessening of competition. In other words, a railroad company engaged in commerce, may acquire the stock of another railroad company likewise engaged, if the stock is purchased solely for investment.

The word "investment," as the Commission said, "is one of broad application, including in its various uses purchases of practically every kind and description and for every purpose." One of those purposes is the purchase of property for the sake of the direct return which can be realized from such property. This is the definition to which the Commission restricted the word in this case, but it is not primarily a technical word and has other meanings. It ordinarily signifies the use of money to purchase property, personal or real, for any purpose from which income or profit is expected, presently or in the future, speculatively or permanently. The Standard Dictionary; Webster's New International Dictionary; the Century Dictionary; The

Oxford Dictionary; *La Belle Iron Works v. United States,* 256 U. S. 377; *Person v. Board of Tax Commissioners,* 115 S. E. 336 (N. C. 1922); *Morse v. Equitable Life Assurance Society,* 108 N. Y. Supp. 986. Economists, accountants and bankers use the word in this broad sense. Mr. L. F. Loree, President of the Delaware and Hudson Railroad, a witness for the Commission, testified that he thought the price paid, as an investment for the stock, was cheap. Professor W. M. Daniels of Yale University, a noted economist, and former member of the Interstate Commerce Commission, testified that placing money where an asset is realized worth seven per cent. or more is just as much an investment as if seven per cent. in current money was received.

But if it be used in the restricted sense the current income from the stock acquired in this case has been considerable. On the Lehigh Valley stock, the Pennsylvania Company received $2,920,311.96 from 1928 to April 1930, inclusive, and on the Wabash stock, it received $3,561,000 from 1927 to February 1930.

In fairly construing the Act, the word "investment" should not be restricted to a single one of its many meanings when the actual effect of the acquisition of the stock in question has not in fact been "to substantially lessen competition" between the Pennsylvania Railroad Company and the Wabash and Lehigh Valley Railroads. This statute is partly penal in its nature and an ancient and well established rule of construction requires that we do not bring within its provisions by narrow, technical or forced construction of words, cases which are not clearly embraced by it. *Northern Securities Company v. United States,* 193 U. S. 197.

The use of the word generally by the Commission has not been restricted to this single meaning and in the pleadings in this very case, it has given to the word the broader meaning of the dictionaries, text books, writers and courts.

The evidence shows that railroad companies generally invest a substantial part of their surplus in securities of companies constituting members of the family group which make up the system of the purchasing company. This was the custom both before and after the passage of the Clayton Act and this they may do under the investment provision of section 7 even though the effect of the purchase, in the absence of intent, might incidentally lessen competition, if the stock acquired is not used by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. But if there is an intent on the part of the corporation acquiring the stock to restrain interstate commerce or to bring about the substantial lessening of competition by voting or otherwise using the stock, even though commerce has not actually been restrained, the provisions of the statute apply. But where neither the intent nor the effect of the acquisition of the stock stifles competition, the transaction is not prohibited by either the Sherman Act or the Clayton Act. The evidence seems uncontradicted and rather conclusive that the purchase of the stock of the two railroad companies by the Pennsylvania Company was, within the meaning and fair interpretation of the Act, made "solely for investment."

The remaining question is whether or not the stock has been used by voting or otherwise, to bring about, or in attempting to bring about, a substantial lessening of competition.

There is no testimony whatever to show that the stock has been so used and as we understand the position of the Commission, it does not contend that it has been so used, but it does contend that the possibility that it may be so used and that it might have the effect to substantially lessen competition justify its order requiring the Pennsylvania Company to divest itself of the stock. To this we cannot assent.

We are not primarily concerned with the economic result of our interpretation of the statute. That is a matter for Congress and not the courts, but to force all this stock suddenly upon the market might have such a disastrous effect in these troublous times, that it has caused us to consider most carefully the questions in this case.

Since there is no competent evidence showing that the effect of the acquisition of the stock of the Lehigh Valley and Wabash Railroads by the Pennsylvania Company may be to lessen competition between these companies and the Pennsylvania Railroad Company to a substantial degree, or to restrain commerce or to create a monopoly, and since the stock was purchased solely for investment and has not been used, by voting or otherwise, to bring about or in attempting to bring about, the substantial lessening of competition, it follows that the order of the Commission must be reversed.

[¶ 55,036] **Stanley Company of America v. American Telephone and Telegraph Co., et al.** and two other cases.

United States District Court, Delaware, June 28, 1933.

Agreements requiring the purchase of repairs through the organization of the vendor and also the sale of sound film exclusively to distributors using vendor's machinery are in restraint of trade and therefore illegal.

Motions for preliminary injunctions are made on behalf of plaintiffs in three equity suits brought under section 16 of the Clayton act to restrain defendants from alleged violations of section 3 of that act and of sections 1 and 2 of the Sherman act.

In their main brief plaintiffs state the measure of relief sought by these motions for preliminary injunctions. "It is therefore submitted that an injunction *pendente lite* should issue herein in all three cases enjoining and restraining the defendants from enforcing directly or indirectly the restrictive clauses of the so-called leases of reproducing equipments, whereby the exhibitors are required to obtain exclusively from Products [Electrical Research Products, Inc.] all repair and replacement parts for said equipments and to permit Products to inspect the same, and charge the Exhibitor therefor, under the guise of rendering service thereto. In addition, in the suit of the Duovac Company, an injunction should issue *pendente lite* enjoining and restraining the defendants from directly or indirectly enforcing any of the provisions of the producing license agreements whereby the producing licensees of Products are required to obtain exclusively from Products repair and replacement parts for producing apparatus."

The motions deal with covenants in agreements the effect of which may be to substantially lessen competition in interstate commerce in the talking motion picture business. Roughly, that business is handled by the manufacturers, the producers and the exhibitors. The *manufacturers* make the recording equipment for the producers of films. This equipment records sound and photographs action in timed relation on the films. The manufacturers also make reproducing equipment for the exhibitors. This equipment synchronously reproduces the sound and projects the action on the theatre screens. The *producers* use the recording equipment in producing the films. The *exhibitors* use the reproducing equipment in the theatres.

The plaintiff, Stanley Company of America, Inc., (Delaware) is a subsidiary of Warner Brothers. It is an exhibitor, owning a chain of about 150 theatres. The plaintiff, Duovac Radio Corp., (Delaware) is engaged in the manufacture of electrical devices, including vacuum tube amplifiers and photo electric cells. The plaintiff, General Talking Pictures Corporation (Delaware) is a manufacturer of talking motion picture equipment.

In each case the defendants are the same. Western Electric Company, Inc., is a manufacturer as above defined. American Telephone and Telegraph Company is a defendant holding 95% of the capital stock of Western. Electrical Research Products, Inc., herein called "Products" supplements the business of Western by licensing under patents and leasing producing and reproducing equipment and also furnishing services relating to the upkeep of the equipment.

Section 3 of the Clayton Act provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, machinery, merchandise, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

An examination of the numerous affidavits and voluminous exhibits filed on this motion shows that certain restrictive agreements contained in the licenses or leases made by Products are inherently illegal,—the import of which could not be changed by testimony. These restrictive agreements are: (1) The Tying Agreements in the licenses or leases of Products to exhibitors, whereby exhibitors agree to purchase from Products all repair and replacement parts for the reproducing apparatus and equipment leased by Products. (2) The Exclusive Agreements in the contractual letters accompanying the leases of Products to producers whereby producers agree to distribute films produced on the producing apparatus only to exhibitors supplied with Products' reproducing apparatus and equipment.

The Tying Agreements on the part of exhibitors to purchase repair and replacement parts from Products are found in all the licenses or leases made by Products of reproducing apparatus or equipment to exhibitors. For example, in the license or lease dated July 29, 1931 from Products

to Stanley Company of America (Plaintiffs' Exhibits Vol. III, Exhibit—J) we find the following agreements. Section 2 (b):

"* * * it is agreed that all additional and renewal parts and assembled parts for the Equipment shall be obtained from Products and that all repairs to the Equipment shall be made as specified by Products. Products may from time to time at the expense of the Exhibitor, supply and install such spare and renewal parts as may, in its opinion, be necessary to the satisfactory operation and maintenance of the Equipment."

These tying agreements found in the licenses or leases of reproducing apparatus and equipment made by Products to exhibitors are rendered more effective and burdensome by additional sections of the licenses:

Section 7—"The Exhibitor agrees to pay to Products upon rendition of invoices therefor its standard charge as from time to time established for any repairs to the equipment and for any additional equipment or spare or renewal parts, furnished or supplied by Products and to pay the transportation charges thereon. * * *"

Section 11—"The Exhibitor shall provide access for Products' representatives, engineers and mechanics to the Theatre and to all parts thereof where any of the Equipment may be, at all reasonable hours, for the purpose of supervising the installation and from time to time for the purpose of examining and inspecting the Equipment, and shall grant to Products full opportunity to make such adjustments therein and repairs thereto as, in the opinion of Products, are necessary or desirable."

Section 13—"This agreement and/or the rights of the Exhibitor hereunder and/or the license hereby granted shall, at the option of Products, terminate and come to an end in the event of any breach or default on the part of the Exhibitor with respect to any of the covenants and conditions herein contained on its part to be performed, * * *".

Section 14—"Upon termination or expiration of this license by lapse of time or otherwise, the Exhibitor shall surrender the Equipment to Products in good order and condition, * * *."

Section 18—"This license shall be for a term of ten (10) years from September 23, 1928."

Section 22—"* * * Exhibitor agrees to pay to Products the charges provided for in the payment plan hereinafter set forth; said payments to be made at the time and in the manner provided herein, which time and manner shall be of the essence of this agreement."

"(1) $17,192.43 (2) A 'weekly rental charge' of $40.00 per week."

The exclusive agreements in the contractual letters accompanying licenses from Products to producers is illustrated in the contractual letter of Products to Paramount Famous Lasky Corporation dated May 11, 1928 (Plaintiffs' Exhibit—18). Paragraph 5 of this contractual letter provides as follows:

"5. In order to promote the use of sound records in connection with motion pictures, and to make an adequate market for your productions and for our [Products'] reproducing equipments, you agree that all theatres operated by you or by your associated companies shall install our reproducing equipments (which you agree are hereby adopted as the standard equipment for such purposes), wherever and as rapidly as in your judgment conditions permit and we will supply such equipments as rapidly as we are able to after receipt of orders therefor * * *."

Similar exclusive agreements are in the contractual letter of Products to other producers and are indorsed "Accepted" by the producers. These letters accompany the licenses (Recording License Agreements) of producing apparatus and equipment of Products to the producers. The licenses are for 16 years.

The exclusive agreements in the contractual letters require producers to refrain from distributing the talking motion pictures to theatres and exhibitors who have not acquired reproducing equipment from Products. As the result of these exclusive agreements the supply of talking motion pictures would be substantially closed to exhibitors who did not install reproducing apparatus and equipment purchased from Products. These exclusive agreements are bound to restrain exhibitors from using or dealing in goods, wares, merchandise, machinery, supplies or other commodities, of a competitor or competitors of Products.

I find from the proof submitted in support of the motions for preliminary injunctions that the tying agreements contained in the license of reproducing equipments by Products to exhibitors and the exclusive agreements in the contractual letters of Products to producers, in fact, have substantially lessened competition in interstate commerce and will so continue unless defendants are restrained.

"Today," says Dean Pound, "we seek once more, by limiting freedom of contract, to protect those who are subjected to economic pressure against unfair advantage on the part of those who have greater economic freedom." The Clayton Act expresses this modern trend in legislation Section 3 of the act prohibits tying agreements and exclusive agreements whose effect may be to substantially lessen competition. Such agreements are contained in the licenses of reproducing equipments by Products to exhibitors and in the contractual letters of Products to producers. I hold those agreements illegal and void *United Shoe Mach. Co. v. United States,* 258 U. S. 451. *Lord v. Radio Corporation of America,* 24 F. (2d) 565; affirmed 28 F. (2d) 257 (C. C. A. 3). I have not listed the particular licenses and contractual letters of Products containing the illegal agreements dealt with in this opinion because they are numerous and substantially alike. The decrees for preliminary injunctions may be so drawn as to cover them.

JOHN P. NIELDS, J

[¶ 55,037] United States v. Tanners Products Co.

United States District Court, Northern District of Illinois. August 22, 1933.

Defendant's petition for modification of a consent decree under the anti-trust laws dismissed without prejudice until the adoption of a code for its industry shall render such modification necessary, however, the defendants are permitted to associate themselves in formulating a code.

[In the case of the *United States v. Tanners Products Company,* a consent decree was entered in the District Court of the United States on October 3, 1927, enjoining the defendants against certain acts held to be in violation of the anti-trust laws. On July 24, 1933, the defendants filed a petition to suspend the decree of October 3, 1927, in order to enable the defendants to comply with the National Industrial Recovery Act. The order entered by Judge Lindley on August 22, 1933, dismissing the petition without prejudice appears below. —C. C. H.]

This cause having come to be heard on motion by the United States to dismiss the petition of the defendants for suspension of the decree entered herein by consent on October 3, 1927, and for an order of this court authorizing the said defendants to enter into a code of fair competition as provided in the National Industrial Recovery Act, and counsel having been heard, the court being duly advised in the premises, it is hereby ordered, adjudged and decreed:

1. That the said petition of the defendants be and it is hereby dismissed, without prejudice to the right of the defendants to apply to the court for modification of the decree entered herein on October 3, 1927, if and when, and to the extent to which, such modification shall become necessary in order to permit the defendants to obtain the full benefit of, and to abide by, the provisions of a code for their industry approved as provided in the National Industrial Recovery Act.

2. Nothing contained in the decree herein shall be construed to prohibit the defendants from associating amongst themselves and with others to formulate a proposed code of fair competition for the purpose of submitting the same for approval to the President, or such agency as he may designate, as provided in the National Industrial Recovery Act, approved June 16, 1933.

3. Pending such approval of a code and the renewal and granting of an application to this court for suspension of the decree to the extent necessary, as aforesaid, said decree shall remain in full force and effect.

[¶ 55,038] United States of America, v. Standard Oil Company of California, Richfield Oil Company, General Petroleum Corporation of California, Shell Company of California, Union Oil Company of California, The Texas Company, Associated Oil Company, Marine Refining Corporation, Hancock Oil Company, Macmillan Petroleum Company, Rio Grande Oil Company, Edington-Witz Refining Company, Hercules Gasoline Company, Seaside Oil Company, Shanley Gasoline Company, Sunland Refining Company, United States Refining Company, Vernon Oil Refining Company, Western Oil and Refining Company, and F. R. Long.

In the District Court of the United States for the Northern District of California, Southern Division. In Equity. No. 2542-S.

Consent decree entered under the Federal Anti-Trust Laws modified to provide that "nothing in this decree shall be construed to enjoin defendants, individually and collectively, from carrying on any and all activities authorized by or conducted pursuant to and in accordance with the Code of Fair Competition for the Petroleum Industry" as approved by the President "and any and all modifications thereof duly approved by the President or his designated government representative."

Order Modifying Final Decree

The motions of the defendants, Union Oil Company of California, and Associated Oil Company herein, for modification of the Final Decree made and entered herein on the 15th day of September, 1930, coming on to be heard this day, on notice to all of the parties hereto and upon consideration thereof;

And Paul M. Gregg, Esq., by Jerry H.

Powell, Esq., appearing on behalf of defendant Union Oil Company of California, and Robert M. Searls, Esq., appearing on behalf of defendant Associated Oil Company, and James Lawrence Fly, Esq., Special Assistant to the Attorney General, appearing on behalf of Petitioner, all having consented in open court to the entry of this Order and no objection being made on behalf of any party hereto:

It is Hereby Ordered, Adjudged and Decreed as follows:

I.

The Final Decree made and entered herein on the 15th day of September, 1930, is hereby modified so as to incorporate therein the following additional provisions, to-wit:

Nothing in this Decree shall be construed to enjoin defendants, individually or collectively, from carrying on any and all activities authorized by or conducted pursuant to and in accordance with the Code of Fair Competition for the Petroleum Industry as approved by the National Recovery Administration, and signed by the President on August 19, 1933, under the act of Congress of June 16, 1933, known as the National Industrial Recovery Act (a copy of which said Code of Fair Competition has been filed herein in support of the said motions), and any and all modifications thereof duly approved by the President or his designated government representative, as provided in the National Industrial Recovery Act, and any agreements entered into with or approved by the President or his designated government representative pursuant to Section 4 (a) of Title I of the National Industrial Recovery Act or any order or license issued by the President or his designated government representative, pursuant to the National Industrial Recovery Act, provided, however, that no such modification or amendment or agreement or order or license shall be effective for purposes of this decree until after such approval, execution or issuance by the President or his designated government representative and thereafter until ten days after notice thereof shall have been filed herein and served upon the Petitioner through the United States Attorney for this District and shall have been given by mail or telegram delivered to the Attorney General, nor then if the Petitioner shall have filed herein and given to the defendants a notice of objection thereto, without prejudice to the right of the defendants and each of them to make such motions herein as they may be advised.

Nothing in this decree shall be construed to prohibit the defendants from associating amongst themselves and with others to formulate any proposed Code of Fair Competition or any modification or amendment to the said Code of Fair Competition as signed by the President on August 19, 1933, or any agreement contemplated by the National Industrial Recovery Act, for the purpose of submitting the same for approval to the President or his designated government representative, pursuant to the National Industrial Recovery Act.

II.

This Order shall become null and void at such time as and to the extent that the National Industrial Recovery Act or amendments thereto become inoperative or inapplicable, whether by Presidential proclamation, or by the terms of the statute itself, or by other act of Congress, or otherwise, allowance being made for the period allowable under Section 5 of Title I of the National Industrial Recovery Act.

III.

Except as provided by this Order herein, said Final Decree of September 15, 1930, shall remain in full force and effect, and Clause VII thereof, wherein the Court retains certain jurisdiction, is hereby construed to include the same jurisdiction with reference to the Final Decree as modified hereby.

Done in open court this 25th day of September, 1933.

A. F. St. Sure,
United States District Judge.

[¶ 55,039] **Federal Trade Commission v. Hoboken White Lead & Color Works, Inc.**

United States Circuit Court of Appeals for the Second Circuit. Filed November 20, 1933.

Sale of paint from a New Jersey manufacturing corporation to a New York corporation, which places labels on the containers and sells paint to customers, constitutes interstate commerce; and the New Jersey corporation is guilty of contempt when the New York corporation, having the same stockholders and officers, sells paint under labels which the New Jersey corporation has been ordered to cease using.

MANTON, J.—The Federal Trade Commission, acting under the authority of § 5 of the Act of Congress approved September 26, 1914, 38 Stat. 717, 719, on June 10, 1929, served upon the respondent its order to cease and desist in a proceeding before the Commission entitled *"In the Matter of Hoboken White Lead & Color Works, Inc.*, Docket No. 1565." This proceeding was based upon a complaint, issued February 19, 1929, pursuant to the statute, which charged the respondent with the practice of misbranding and misrepresenting its paint materials and paint pigments, sold and transported in interstate commerce in violation of the Act declaring unfair methods of competition to be unlawful. In the same proceeding, on January 19, 1931, this court upon consent of the parties, entered the following order:

"It Is Now Further Ordered, Adjudged and Decreed that the respondent, Hoboken White Lead and Color Works, Inc., its officers, agents, representatives, servants, and employees, cease and desist in the course or conduct of the sale of paint material or paint pigment in interstate commerce—

"(1) From using the words 'White Lead,' or word or words of like import, upon the containers of, or with which to brand, label, represent, advertise, or describe, any such paint material or paint pigment which contains less than 50% white lead, lead carbonate, or lead sulphate; and, if and when said paint material or paint pigment is not composed wholly of white lead or of lead carbonate or lead sulphate or of the two in combination, but contains white lead, lead carbonate, or lead sulphate as its principal and predominant ingredient to the extent of not less than 50% by weight of the product, from similarly using said words 'White Lead,' or word or words of like import, unless immediately preceded in equally conspicuous form and color by a word or words clearly indicating that said paint material or paint pigment is not composed wholly of white lead.

"(2) From using the words 'Zinc Lead,' or word or words of like import, upon the containers of, or with which to advertise, brand, label, represent, or describe any such paint material or paint pigment when said product is not in fact zinc lead or is not in fact wholly composed of zinc in combination with lead carbonate or lead sulphate."

Service of a copy of this order was made January 21, 1931.

Since that time, it is charged, the respondent has directly and indirectly caused its paint materials and paint pigments to be sold and transported in interstate commerce, to wit, from the State of New Jersey to the State of New York, under brands and labels in violation of this order. It is established by affidavit that on March 26, May 7, July 3, September 28 and October 15, 1931, it sold and transported in interstate commerce, from New Jersey to New York, to retail paint dealers, in sealed containers, paint materials under various brands and labels affixed by respondent to such cans containing the paint and materials as follows:

"One Gallon

E L Y S I A N

Master Painters

NEW PROCESS

Contains Zinc White White Lead Pure Linseed Oil

Z I N C L E A D

Ground in Pure Linseed Oil

Used for Priming & Finishing Coats On Interior & Exterior Work

The Paint With No Complaint

WHITE

Manufactured by

HoBoKEN WHITE LeAD & CoLoR WoRKS, Inc.
HoBoKEN, N. J.

. . . . .

HOBOKEN WHITE LEAD

12 1/2 lbs.

N e w P r o c e s s

ZINC LEAD

Combination

Ground in Pure Linseed Oil

& COLOR WORKS INC.

. . . . .

N e w P r o c e s s

Z I N C L E A D

Combination

Ground in Pure Linseed Oil."

. . . . .

It also established that the zinc lead

product manufactured by the respondent in New Jersey, and which respondent caused to be marketed to and by the dealers in the State of New York was a paint material or paint pigment which was not in fact zinc lead nor was it in any way wholly composed of zinc in combination with lead carbonate or lead sulphate but consisted principally of barium sulphate, to wit, approximately 80% of pigment and contained only about 20% of zinc with a trace of lead.

On the labeled containers in which white lead was sold the words "White Leader" were used as a brand and were printed in large and conspicuous letters. These are words of like import as the words "White Lead." They appear upon such brands and labels in the corresponding space occupied by the words "White Lead" in substantially similar labels and brands used on the containers of paint material which respondent marketed and distributed in commerce prior to the entry of the order of this court. The term "White Leader" was developed by the respondent merely by adding the letters "er" to "White Lead." The words "White Lead" used in the corporate name on the labels were printed in a conspicuous manner in much larger and heavier type than the balance of the words used in the corporate name.

In truth, the paint pigment and paint material as described upon these containers did not contain white lead, lead carbonate or lead sulphate to the extent of 50% of the pigment or of the product nor did it contain white lead, lead carbonate or lead sulphate as its principal and predominant ingredient to the extent of not less than 50% of the weight of the product, but contained principally barium sulphate, to wit, approximately 61% of the pigment, and lithopone, to wit, approximately 27% of the pigment, with only a trace of lead and the content of zinc to the extent of approximately 10% of the pigment. Such product is of substantially the same composition as the paint pigment and paint material marketed and distributed by the respondent in interstate commerce under the term "White Lead" prior to the entry and service of the order to cease and desist. The lithopone is a compound ingredient consisting of approximately 30% zinc sulphide and approximately 70% barium sulphate.

After the entry of the order to cease and desist, the respondent organized the Hoboken White Lead & Color Works, Inc., a corporation under the laws of the State of New York, while the respondent was a corporation organized under the laws of New Jersey. The paint was manufactured by the New Jersey corporation, sent to the New York corporation, which did not manufacture, but it placed the labels upon the containers and the paint material was sent forward to the customers in the same sealed container. The stockholders and officers of the New York corporation were the same as those of the New Jersey corporation. Its sole function was to deliver to retail merchants, under these false and fraudulent labels prohibited by the court's decree, the kind of paint referred to in that decree.

To violate the order of this court, it is essential that it be established that the sale of the paint material be found to be in interstate commerce. Soliciting agents, in the name of the New York corporation, took orders from retail dealers in New York for respondent's products which it delivered to the New York corporation by interstate transportation from its manufacturing plant in New Jersey, and the New York corporation delivered the product to the several retail dealers from whom orders had been procured. The respondent's agents, officers and employees, who organized the New York corporation and attempted to carry on the business in the manner described, are expressly enjoined by this court along with the respondent corporation. The respondent may act only through its officers, agents and employees. Their acts are its acts when done in furtherance of respondent's business.

The answer filed expressly admits that the New York corporation was created by respondent's officers to deliver respondent's product, which respondent could not itself deliver in New York under the label "Zinc Lead," without violating the order of the court. It is apparent that the respondent transports its containers and false labels separately to the office of its subsidiary in New York there to be attached and by this means they furnish to retailers a quality of merchandise which deceives the purchasing public. It is no defense that the interstate sale and delivery of respondent's produce under these unlawful labels is accomplished by means of a new corporation which the respondent created for that purpose. *Prang Co. v. Amer. Crayon Co.*, 58 Fed. (2) 715 (C. C. A. 3).

It is likewise clear that the respondent sells and delivers its product to the New York corporation in interstate commerce. The New York corporation is used merely as an instrumentality of the respondent and makes delivery for it. The sales and the delivery of the product by the respondent to the dealers constituted interstate commerce. The paint thus sold and transported is in a continuous process of interstate shipment from the time it leaves the respondent's factory until it reaches the

several purchasers. An intervening sale would not terminate the interstate character of the transaction. *Greater N. Y. Live Poultry Chamber of Commerce v. United States,* 47 Fed. (2) 156 (C. C. A. 2); *Binderup v. Pathe Exchange,* 263 U. S. 291, 309. Nor did a temporary stoppage in the New York corporation's place of business, and the subsequent transfer to other trucks for transportation, change the character of that interstate commerce. *Hughes Bros. Timber Co. v. Minn.,* 272 U. S. 469; *Wagner v. Covington,* 251 U. S. 95.

Moreover, a device created for the purpose of changing transportation from interstate to intrastate commerce, between the factory of the respondent and the place of business of its several purchasers in an effort to evade the terms of the decree of this court, is legally ineffectual for that purpose. *B. & O. S. W. Ry. v. Settle,* 260 U. S. 166.

The disobedience of the decree of this court thus entered constitutes a contempt with the inherent power of the court to administer punishment. The decree of this court bound the respondent perpetually in relation to the prohibited conduct not only within this circuit, but throughout the United States. *Leman adm. v. Krentler-Arnold Hinge Last Co.,* 284 U. S. 451. It is guilty of contempt by its wilful conduct. A fine of Five hundred dollars ($500) is accordingly imposed.

[¶ 55,040] United States v. Southern Hardware Jobbers Association, et al.

United States District Court, Eastern District of Virginia. November 24, 1933.

Consent decree entered under the anti-trust laws, modified to permit respondents to operate under the Iron and Steel Code adopted pursuant to the National Industrial Recovery Act.

ORDER MODIFYING FINAL DECREE

The motion of the defendants for modification of the Final Decree made and entered herein on the 12th day of August, 1926, having come on to be heard this day, after due notice thereof to the Attorney General,

And *Nelson B. Caskill, Esq.,* counsel for the defendants, appearing in behalf of said motion, and *George P. Alt, Esq.,* Special Assistant to the Attorney General, appearing on behalf of the United States, and counsel having consented in open court to the entry of this order.

It Is Hereby Ordered, Adjudged and Decreed as Follows:

1. Nothing contained in the Final Decree herein shall be construed to enjoin, prohibit or prevent, during the time for which the Code of Fair Competition for the Iron and Steel Industry, approved by the President August 19, 1933, under the National Industrial Recovery Act of June 16, 1933, and Section 4, of Schedule E attached to and forming part of said Code, shall be in effect, any defendant, acting individually and not in combination or agreement with any other defendant, person or corporation, including two or more members of said Code, from entering into an agreement in writing with any manufacturer who is a member of the industry, pursuant to Section 4, of Schedule E thereof, providing as follows:

"Before any member of the Code shall allow any such deduction to any jobber or sell for resale to any purchaser who shall not be a jobber any product pursuant to any permission so granted to such member, such member shall secure from such jobber or such other purchaser an agreement substantially in a form theretofore approved by the Board of Directors and filed with the Secretary whereby such jobber or other purchaser shall agree with such member (a) that such jobber or other purchaser will not, without the approval of the Board of Directors, sell such product to any third party at a price which at the time of the sale thereof shall be less than the price at which such member might at that time sell such product to such third party, and (b) that, if such jobber or such other purchaser shall violate any such agreement, he shall pay to the Treasurer as an individual and not as treasurer of the Institute, in trust, as and for liquidated damages the sum of $10 per ton of any product sold by such jobber or such other purchaser in violation thereof."

2. Except as provided in this order, the Final Decree herein shall remain in full force and effect.

Luther B. Way
United States District Judge.

[¶ 55,041] Federal Trade Commission v. Algoma Lumber Co. et al.

Supreme Court of the United States. No. 240. January 8, 1934.

The simplified practice recommendations of the Bureau of Standards are wholly advisory and dealers may conform or diverge as they prefer.

The fact that the name "California White Pine" had been used by the respondent as to "pinus ponderosa" for over thirty years does not bar a proceeding to correct the deception when the pines are not white either botanically or commercially.

The fact that public interest will be promoted by increasing the demand for pinus ponderosa and thus abating the destruction of the pine forests of the east will not deter the court from enjoining the sale of pinus ponderosa under a misleading label.

Mr. Justice CARDOZO delivered the opinion of the Court.

In May, 1929, the Federal Trade Commission filed and served complaints against a group of fifty manufacturers on the Pacific Coast charging "unfair competition in interstate commerce" in violation of § 5 of the Federal Trade Commission Act. 38 Stat. 717, 719, c. 311, § 5; 15 U. S. C. § 45.

After the service of answers the proceedings were consolidated and many witnesses examined. The outcome was a series of reports sustaining the complaints as to thirty-nine manufacturers, with orders to "cease and desist" from the practice challenged as unfair. Twelve companies thus enjoined petitioned the Circuit Court of Appeals for the Ninth Circuit to review the orders of the Commission. Such review being had, the orders were annulled. 64 F. (2d) 618. A writ of certiorari brings the case here.

The practice complained of as unfair and enjoined by the Commission is the use by the respondents of the words "California white pine" to describe lumber, logs or other forest products made from the pine species known as *pinus ponderosa.* The findings as to this use and its effect upon the public are full and circumstantial. They are too long to be paraphrased conveniently within the limits of an opinion. We must be content with an imperfect summary.

The respondents are engaged in the manufacture and sale of lumber and timber products which they ship from California and Oregon to customers in other states and foreign lands. Much of what they sell comes from the species of tree that is known among botanists as *pinus ponderosa.* The respondents sell it under the name of "California white pine," and under that name, or at times "white pine" simply, it goes to the consumer. In truth it is not a white pine, whether the tests to be applied are those of botanical science or of commercial practice and understanding.

Pine trees, the genus "pinus," have for a long time been divided by botanists, foresters and the public generally into two groups, the white pine and the yellow. The white pine group includes by common consent, the northern white pine (*pinus strobus*), the sugar pine and the Idaho white pine. It is much sought after by reason of its durability under exposure to weather and moisture, the proportion of its heartwood as contrasted with its sapwood content as well as other qualities. For these reasons it commands a high price as compared with pines of other species. The yellow pine group is less durable, harder, heavier, more subject to shrinkage and warping, darker in color, more resinous, and more difficult to work. It includes the long leaf yellow pine (*pinus palustris*), grown in the southern states, and the *pinus ponderosa,* a far softer wood, which is grown in the Pacific coast states, and in Arizona and New Mexico as well as in the "inland empire" (eastern Washington, Oregon, Idaho, and western Montana).

Of the varieties of white pine, the northern or *pinus strobus* has been known better and longer than the others. It is described sometimes as northern white pine, sometimes as white pine simply, sometimes with the addition of its local origin, as Maine white pine, Michigan, Wisconsin, Minnesota, Canadian, New Brunswick. It is native to the northeastern states and to the Great Lakes region, as far west as Minnesota. It is found also in Canada and along the Appalachian highlands. It was almost the only building material for the settlers of New England, and so great is its durability that many ancient buildings made from it in the seventeenth and eighteenth centuries survive in good condition. The sugar pine is native to the upland regions of California, southern Oregon and parts of Nevada. The Idaho white pine grows in the mountainous sections of Idaho, Washington and Oregon and in parts of British Columbia. The white pine species "still holds an exalted reputation among the consuming public" and "in general esteem is the highest type of lumber as respects the excellencies desired in soft wood material." "It is coming more and more to be a specialty wood, largely devoted to special

purposes, as it becomes scarcer and higher in price. It is in great demand."

About 1880 the *pinus ponderosa*, though botanically a yellow pine, began to be described as a white pine when sold in the local markets of California, New Mexico, and Arizona, the description being generally accompanied by a reference to the state of origin, as "California white pine," etc. By 1886, sales under this description had spread to Nevada and Utah with occasional shipments farther east. About 1900, they entered the middle western states, and about 1915 had made their way into New England, though only to a small extent. The pines from the inland empire traveled east more slowly, and when they did were described as western white pine, a term now generally abandoned. The progress of the newcomers both from the coast and from the inland empire was not wholly a march of triumph. In their movement to the central and eastern markets they came into competition more and more with the genuine white pine with which those markets had been long familiar. Mutterings of discontent were heard. In 1924, partly as a result of complaints and official investigations, many of the producers, notably those of the "inland empire," as well as some producers in California and Arizona, voluntarily gave up the use of the adjective "white" in connection with their product, and adopted the description "pondosa pines," pondosa being a corruption or abbreviation of the ponderosa of the botanists. "Pondose pine is the term employed for ponderosa by the representatives of producers of slightly more than half of the ponderosa marketed." The respondents and others, however, declined to make a change. During the next five years California white pine and its equivalents became an even more important factor in the lumber markets of the country. Accumulating complaints led to an inquiry by the Commission, which had its fruit in this proceeding.

The confusion and abuses growing out of these interlocking names have been developed in the findings. Many retail dealers receiving orders for white pine deliver California white pine, not knowing that it differs from the lumber ordered. Many knowing the difference deliver the inferior product because they can buy it cheaper. Still others, well informed and honest, deliver the genuine article, thus placing themselves at a disadvantage in the race of competition with the unscrupulous and the ignorant. Trade has thus been diverted from dealers in white pine to dealers in *pinus ponderosa* masquerading as white pine. Trade has also been diverted from dealers in pinus ponderosa under the name pinus pondosa to dealers in pinus ponderosa under the more attractive label. The diversion of trade from dealers of one class to dealers of another is not the only mischief. Consumers, architects and retailers have also been misled. They have given orders for the respondents' product, supposing it to be white pine and to have the qualities associated with lumber of that species. They have accepted deliveries under the empire of that belief. True indeed it is that the woods sold by the respondents, though not a genuine white pine, are nearer to that species in mechanical properties than they are to the kinds of yellow pine indigenous to the south. The fact that for many purposes they are half way between the white species and the yellow makes the practice of substitution easier than it would be if the difference were plain. Misrepresentation and confusion flourish in such a soil. From these findings and others the Commission was brought to the conclusion that the respondents compete unfairly in transacting business as they do, and that in the interest of the public their methods should be changed.

"The findings of the Commission as to facts, if supported by testimony, shall be conclusive." 15 U. S. C. § 45. The Court of Appeals, though professing adherence to this mandate, honored it, we think, with lip service only. In form the court determined that the finding of unfair competition had no support whatever. In fact what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision (*Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U. S. 52, 61, 63) forbid that exercise of power.

First. The argument is made that unfair competition is disproved by the "simplified practice recommendations" of the Bureau of Standards when read in conjunction with the testimony as to the comparative utility of the genuine white pine and *pinus ponderosa*.

The Court of Appeals concedes that the recommendations of the Bureau will not avail without more to control the action of the Commission. Cf. *Brougham v. Blanton Mfg. Co.*, 249 U. S. 495, 499; *Piedmont & Northern Ry. Co. v. Interstate Commerce Commission*, 286 U. S. 299, 312. The view was expressed, however, that alone they are in a high degree persuasive, and that in conjunction with other evidence they are even controlling. In particular that result was thought to follow in this case because the substituted wood, in the judg-

ment of the court, is so nearly equal in utility that buyers are not injured, even though misled.[1]

Such a holding misconceives the significance of the Government's endeavor to simplify commercial practice. It misconceives even more essentially the significance of the substitution of one article for another without notice to the buyer.

(a) The Bureau of Standards is a branch of the Department of Commerce. At its instance representatives of manufacturers, sellers, and users of lumber, as well as, architects, engineers and others, met in conference at various times between 1922 and 1928 in an endeavor to simplify methods of business in the lumber industry. Following these conferences the Bureau in 1929 issued a report entitled "Lumber, Simplified Practice Recommendations." Many subjects that were considered are without relation to this case. The report dealt with standards of size, of inspection, of structural material, and other cognate themes. One of its subdivisions, however, enumerates the standard commercial names for lumber of many types. Sixteen names of pines are stated in the list, and among them is the name "California white pine" with its botanical equivalent, *pinus ponderosa.*

The recommendations of the Bureau of Standards for the simplification of commercial practice are wholly advisory Dealers may conform or diverge as they prefer. The Bureau has defined its own function in one of its reports. The Purpose and Application of Simplified Practice, National Bureau of Standards, Department of Commerce, July 1, 1931, pp. 2, 7, 10, 17. "Simplified practice is a method of eliminating superfluous variety through the voluntary action of industrial groups." "The Department of Commerce has no regulatory powers" with reference to the subject, and hence "it is highly desirable that this recommendation be kept distinct from any plan or method of governmental regulation or control." There is nothing to show that in making up the list of names the Bureau made any investigation of the relation between *pinus ponderosa* and the white pines of the east. Certainly it had no such wealth of information on the subject as was gathered by the Commission in the course of this elaborate inquiry. There is nothing to show to what extent its advice has been accepted by the industry. The record does show that the recommendation does not accord with the practice of other governmental agencies. For example, the United States Forest Service in its publications and forest signs describes the ponderosa species as western yellow pine. In such circumstances the action of the Bureau was at most a bit of evidence to be weighed by the Commission along with much besides. It had no such significance as to discredit in any appreciable degree a conclusion founded upon evidence otherwise sufficient. The powers and function of the two agencies of government are essentially diverse. The aim of the one is to simplify business by substituting uniformity of methods for wasteful diversity, and in the achievement of these ends to rely upon cooperative action. The aim of the other is to make the process of competition fair. There are times when a description is deceptive from the very fact of its simplicity.

(b) The wood dealt in by the respondents is not substantially as good as the genuine white pine, nor would sales under the wrong name be fitting if it were.

The ruling of the court below as to this is infected by a twofold error. The first is one of fact. The supposed equivalence is unreal. The second is one of law. If the equivalence existed, the practice would still be wrong.

The Commission found as a fact that the genuine white pine is superior for many reasons to *pinus ponderosa,* and notably because of its greater durability. The court held the view that the difference in durability had not been proved so clearly as to lay a basis for the orders, and this, it seems, upon the ground that though the superiority exists, the evidence fails to disclose its precise degree. "What the testimony appears to establish is that Northern white pine has relatively a greater durability for exterior use without establishing any comparative degree of such durability." 64 F. (2d) 618 at p. 622.

Court and counsel for the respondents lean heavily at this point upon the testimony of the Director of the United States Forest Products Laboratory at Madison, Wisconsin, and his assistant Mr. Hunt. The Director testified that he did not know the comparative durability of the pines, and would refer any inquirer to specialists, of whom Mr. Hunt was one. The testimony of Mr. Hunt is that there have been no tests in a strict sense, but that the comparison between the white pines and *pinus ponderosa* has been based upon observation and opinion. He continues: "The

[1] "It would not necessarily follow . . . that a yellow pine might be sold as a white pine if such sales were unfair to the trade and injurious to the public, notwithstanding the Bureau of Standards had specified a name such as 'California white pine' in a list of 'Standard commercial names' for pine lumber. It would be different, however, if the particular lumber sold under such name possessed substantially the same qualities possessed by the white pines of commerce as distinguished from certain well known commercial yellow pines." 64 F. (2d) 618 at p. 620.

general experience with the use of the white pines, during the two hundred years since they began to be used, indicated that those pines had moderately high durability. The general experience with *pinus ponderosa* indicated that that wood had low durability in contact with the ground or any place favoring the growth of decay. That is a matter of common knowledge." Inquirers at the Laboratory were accordingly advised that "the heartwood of the white pine has more decay resistence, will give longer service under conditions favoring decay than the heartwood of pinus ponderosa," and "the mill run of the white pine probably would average higher in durability under decay producing conditions."

This testimony, even if it stood alone, would tend to sustain rather than to discredit the findings by the Commission that the genuine white pines are materially superior to the woods that the respondents are selling as a substitute. It is fortified, however, by evidence from many other sources. To be sure there is contradiction which we have no thought to disparage. For present purposes we assume the credibility of those who spoke for the complainants. Wholesalers, retailers, manufacturers, lumber graders, laboratory experts and others bore witness to the comparative merits of the woods, stating their own experience as well as common opinion among their fellows in the industry. If all this may be ignored in the face of the findings of the Commission, it can only be by turning the court into an administrative body which is to try the case anew.

What has been written has been aimed at the position that *pinus ponderosa* is as good or almost as good as the white pines of the east. We have yet to make it plain that the substitution would be unfair though equivalence were shown. This can best be done in considering another argument which challenges the finding of the Commission that there has been misunderstanding on the part of buyers. To this we now turn.

Second. The argument is made that retailers and consumers are not shown to have been confused as to the character of the lumber supplied by the respondents, and that even if there was confusion there is no evidence of prejudice.

Both as to the fact of confusion and its consequences the evidence is ample. Retailers order "white pine" from manufacturers and take what is sent to them, passing it on to their customers. At times they do this knowing or suspecting that they are supplying California white pine instead of the genuine article, and supplying a wood that is inferior, at least for the outer parts of buildings. Its comparative cheapness creates the motive for the preference. At times they act in good faith without knowledge of the difference between the California pines and others. Architects are thus misled, and so are builders and consumers. There is a suggestion by the court that for all that appears the retailers, buying the wood cheaper, may have lowered their own price, and thus passed on to the consumer the benefit of the saving. The inference is a fair one that this is not always done, and perhaps not even generally. If they lower the price at all, there is no reason to believe that they do so to an amount equivalent to the saving to themselves.

But saving to the consumer, though it be made out, does not obliterate the prejudice. Fair competition is not attained by balancing a gain in money against a misrepresentation of the thing supplied. The courts must set their faces against a conception of business standards so corrupting in its tendency. The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212, 216; *City of Carlsbad v. W. T. Thackeray & Co.*, 57 Fed. 18. In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance. Nor is the prejudice only to the consumer. Dealers and manufacturers are prejudiced when orders that would have come to them if the lumber had been rightly named, are diverted to others whose methods are less scrupulous. "A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice." *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483, 494.[2] The careless and the unscrupulous must rise to the standards of the scrupulous and diligent. The Commission was not organized to drag the standards down.

Third. The argument is made that the name for the respondents' lumber was adopted more than thirty years ago without fraudulent design, and that a continuation of the use is not unfair competition, though confusion may have developed when the business, spreading eastward, attained national dimensions.

The Commission made no finding as to the motives animating the respondents in the choice of the contested name. The

[2] The many cases in which the Federal Trade Commission has acted to prevent misbranding or like misrepresentation will be found collected in Henderson, The Federal Trade Commission, p. 182, *et seq.*

respondents say it was chosen to distinguish their variety of yellow pine from the harder yellow pines native to the southern states. We may assume that this is so. The fact remains, however, that the pines were not white either botanically or commercially, though the opportunity for confusion may have been comparatively slight when the sales were restricted to customers in local markets, buying for home consumption. Complaints, if there were any, must have been few and inarticulate at a time when there was no supervisory body to hold business to its duty. According to the law as then adjudged, many competitive practices that today may be suppressed (*Federal Trade Commission v. Winsted Hosiery Co., supra*), were not actionable wrongs, the damage to the complainants being classified often as collateral and remote. *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. 286.[3] The Federal Trade Commission was not organized till 1914, its jurisdiction then as now confined to interstate and foreign commerce. Silence up to that time is not even a faint token that the misapplied name had the approval of the industry. It may well have meant no more than this, that the evil was not great, or that there was no champion at hand to put an end to the abuse. Even silence thereafter will not operate as an estoppel against the community at large, whatever its effect upon individuals asserting the infringement of proprietary interests. *French Republic v. Saratoga Victor Co.*, 191 U. S. 427. There is no bar through lapse of time to a proceeding in the public interest to set an industry in order by removing the occasion for deception or mistake, unless submission has gone so far that the occasion for misunderstanding, or for any so widespread as to be worthy of correction, is already at an end. Competition may then be fair irrespective of its origin. This will happen, for illustration, when by common acceptation the description, once misused, has acquired a secondary meaning as firmly anchored as the first one. Till then, with every new transaction, there is a repetition of the wrong.

The evidence here falls short of establishing two meanings with equal titles to legitimacy by force of common acceptation. On the contrary, revolt against the pretender, far from diminishing, has become increasingly acute. With the spread of business eastward, the lumber dealers who sold pines from the states of the Pacific coast were involved in keen competition with dealers in lumber from the pines of the east and middle west. In the wake of competition came confusion and deception, the volume mounting to its peak in the four or five years before the Commission resolved to act. Then, if not before, misbranding of the pines was something more than a venial wrong. The respondents, though at fault from the beginning, had been allowed to go their way without obstruction while the mischief was not a crying one. They were not at liberty to enlarge the area of their business without adjusting their methods to the needs of new conditions. An analogy may be found in the decisions on the law of trade marks where the principle is applied that a name legitimate in one territory may generate confusion when carried into another, and must then be given up. *Hanover Milling Co. v. Metcalf*, 240 U. S. 403, 416; *United Drug Co. v. Rectanus Co.*, 248 U. S. 90, 100. More than half the members of the industry have disowned the misleading name by voluntary action and are trading under a new one. The respondents who hold out are not relieved by innocence of motive from a duty to conform. Competition may be unfair within the meaning of this statute and within the scope of the discretionary powers conferred on the Commission, though the practice condemned does not amount to fraud as understood in courts of law. Indeed there is a kind of fraud, as courts of equity have long perceived, in clinging to a benefit which is the product of misrepresentation, however innocently made. *Redgrave v. Hurd*, L. R. 20 Ch. D. 1, 12, 13; *Rawlins v. Wickham*, 3 De G. & I. 304, 317; *Hammond v. Pennock*, 61 N. Y. 145, 152. That is the respondents' plight today, no matter what their motives may have been when they began. They must extricate themselves from it by purging their business methods of a capacity to deceive.

Fourth. Finally, the argument is made that the restraining orders are not necessary to protect the public interest (see *Federal Trade Commission v. Royal Milling Co., supra*), but to the contrary that the public interest will be promoted by increasing the demand for *pinus ponderosa*, though it be sold with a misleading label, and thus abating the destruction of the pine forests of the east.

The conservation of our forests is a good of large importance, but the end will have to be attained by methods other than a license to do business unfairly.

The finding of unfair competition being supported by the testimony, the Commis-

[3] The cases are reviewed by Henderson, The Federal Trade Commission, p. 179, *et seq.*

sion did not abuse its discretion in reaching the conclusion that no change of the name short of the excision of the word "white" would give adequate protection.

The judgment is

Reversed

[¶ 55,042] Federal Trade Commission v. R. F. Keppel & Brother, Inc.

Supreme Court of the United States. No. 194. February 5, 1934.

The order of the Federal Trade Commission that a candy manufacturer and distributor cease selling assortments of penny candies, some of which contain pennies, some of which contain inside the wrapper the price to be paid, ranging from one to four cents, and some of which have colored centers which entitle the purchaser to prizes, is upheld on the ground that it encourages gambling among children and is an unfair practice which forces competitors to choose between its adoption against their moral judgment or the loss of their trade.

On writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Justice Stone: This case comes here on certiorari, 290 U. S. —, to review a decree of the Court of Appeals for the Third Circuit, which set aside an order of the Federal Trade Commission forbidding certain trade practices of respondent as an unfair method of competition. 63 F. (2d) 81; § 5, Federal Trade Commission Act, 28 Stat. 717, 719.

The Commission found that respondent, one of numerous candy manufacturers similarly engaged, manufactures, sells and distributes, in interstate commerce, package assortments of candies known to the trade as "break and take" packages, in competition with manufacturers of assortments known as "straight goods" packages. Both types are assortments of candies in packages in convenient arrangement for sale by the piece at a small price in retail stores in what is known as the penny candy trade. The break and take assortments are so arranged and offered for sale to consumers as to avail of the element of chance as an inducement to the retail purchasers. One assortment, consisting of 120 pieces retailing at 1 cent each, includes four pieces, each having concealed within its wrapper a single cent, so that the purchasers of those particular pieces of candy receive back the amount of the purchase price and thus obtain the candy without cost. Another contains 60 pieces of candy, each having its retail price marked on a slip of paper concealed within its wrapper; 10 pieces retail at 1 cent each, 10 at 2 cents, and 40 at 3 cents. The price paid for each piece is that named on the price ticket, ascertained only after the purchaser has selected the candy and the wrapper has been removed. A third assortment consists of 200 pieces of candy, a few of which have concealed centers of different colors, the remainder having white centers. The purchasers of the candy found to have colored centers are given prizes, packed with the candy, consisting of other pieces of candy or a package containing lead pencils, penholder and ruler. Each assortment is accompanied by a display card, attractive to children, prepared by respondent for exhibition and use by the dealer in selling the candy, explaining the plan by which either the price or the amount of candy or other merchandise which the purchaser receives is affected by chance. The pieces of candy in the break and take packages are either smaller than those of the competing straight goods packages, which are sold at a comparable price without the aid of any chance feature, or they are of inferior quality. Much of the candy assembled in the break and take packages is sold by retailers, located in the vicinity of schools, to school children.

The Commission found that the use of the break and take package in the retail trade involves the sale or distribution of the candy by lot or chance; that it is a lottery or gambling device which encourages gambling among children; that children, enticed by the element of chance, purchase candy so sold in preference to straight goods candy; and that the competition between the two types of package results in a substantial diversion of trade

from the manufacturers of the straight goods package to those distributing the break and take type. It found further that in some states lotteries and gaming devices are penal offenses; that the sale or distribution of candy by lot or chance is against public policy; that many manufacturers of competing candies refuse to engage in the distribution of the break and take type of package because they regard it as a reprehensible encouragement of gambling among children; and that such manufacturers are placed at a disadvantage in competition. The evidence shows that others have reluctantly yielded to the practice in order to avoid loss of trade to their competitors

The court below held, as the respondent argues here, that respondent's practice does not hinder competition or injure its competitors, since they are free to resort to the same sales method; that the practice does not tend to create a monopoly or involve any deception to consumers or the public, and hence is not an unfair method of competition within the meaning of the statute.

Upon the record it is not open to question that the practice complained of is a method of competition in interstate commerce and that it is successful in diverting trade from competitors who do not employ it. If the practice is unfair within the meaning of the Act, it is equally clear that the present proceeding, aimed at suppressing it, is brought, as § 5 of the Act requires, "in the interest of the public." The practice is carried on by forty or more manufacturers. The disposition of a large number of complaints pending before the Commission, similar to that in the present case, awaits the outcome of this suit. Sales of the break and take package by respondent aggregate about $234,000 per year. The proceeding involves more than a mere private controversy. A practice so generally adopted by manufacturers necessarily affects not only competing manufacturers but the far greater number of retailers to whom they sell, and the consumers to whom the retailers sell. Thus the effects of the device are felt throughout the penny candy industry. A practice so widespread and so far reaching in its consequences is of public concern if in other respects within the purview of the statute. *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212, 216. Compare *Federal Trade Commission v. Klesner*, 280 U. S. 19, 28. Hence we pass without further discussion to the decisive question whether the practice itself is one over which the Commission is given jurisdiction because it is unfair.

Although the method of competition adopted by respondent induces children, too young to be capable of exercising an intelligent judgment of the transaction, to purchase an article less desirable in point of quality or quantity than that offered at a comparable price in the straight goods package, we may take it that it does not involve any fraud or deception. It would seem also that competing manufacturers can adopt the break and take device at any time and thus maintain their competitive position. From these premises respondent argues that the practice is beyond the reach of the Commission because it does not fall within any of the classes which this Court has held subject to the Commission's prohibition. See *Federal Trade Commission v. Gratz*, 253 U. S. 421, 427; *Federal Trade Commission v. Beechnut Packing Co.*, 257 U. S. 441, 453; *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 652; *Federal Trade Commission v. Royal Milling Co., supra*, at 217. But we cannot say that the Commission's jurisdiction extends only to those types of practices which happen to have been litigated before this Court.

Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories. The common law afforded a definition of unfair competition and, before the enactment of the Federal Trade Commission Act, the Sherman Act had laid its inhibition upon combinations to restrain or monopolize interstate commerce which the courts had construed to include restraints upon competition in interstate commerce. It would not have been a difficult feat of draftsmanship to have restricted the operation of the Trade Commission Act to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act, if that had been the purpose of the legislation.

The Act undoubtedly was aimed at all the familiar methods of law violation which prosecutions under the Sherman Act had disclosed. See *Federal Trade Commission v. Raladan, supra*, 649, 650. But as this Court has pointed out it also had a broader purpose, *Federal Trade Commission v. Winsted Hosiery Company*, 258 U. S. 483, 493; *Federal Trade Commission v. Raladam Company, supra*, 648. As proposed by the Senate Committee on Interstate Commerce and as introduced in the Senate, the bill which ultimately became the Federal Trade Commission Act declared "unfair competition"

to be unlawful.[1] But it was because the meaning which the common law had given to those words was deemed too narrow that the broader and more flexible phrase "unfair methods of competition" was substituted.[2] Congress, in defining the powers of the Commission, thus advisedly adopted a phrase which, as this Court has said, does not "admit of precise definition but the meaning and application of which must be arrived at by what this Court elsewhere has called 'the gradual process of judicial inclusion and exclusion'". *Federal Trade Commission v. Raladam Company, supra,* 648; compare *Davidson v. New Orleans,* 96 U. S. 97, 104.[3]

The argument that a method used by one competitor is not unfair if others may adopt it without any restriction of competition between them was rejected by this Court in *Federal Trade Commission v. Winsted Hosiery Co., supra;* compare *Federal Trade Commission v. Algoma Lumber Company,* 290 U. S. 67. There it was specifically held that a trader may not, by pursuing a dishonest practice, force his competitors to choose between its adoption or the loss of their trade. A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought to involve the kind of unfairness at which the statute was aimed.

The practice in this case presents the same dilemma to competitors, and we can perceive no reason for distinguishing between the element of chance as employed here and the element of deception involved in labelling cotton goods "Natural Wool," as in the *Winsted* case. It is true that the statute does not authorize regulation which has no purpose other than that of relieving merchants from troublesome competition or of censoring the morals of business men. But here the competitive method is shown to exploit consumers, children, who are unable to protect themselves. It employs a device whereby the amount of the return they receive from the expenditure of money is made to depend upon chance. Such devices have met with condemnation throughout the community. Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of

[1] The Senate Committee on Interstate Commerce, in recommending the bill in its original form, seems to have adopted the phrase "unfair competition" with the deliberate purpose of giving to the Commission some latitude for dealing with new and varied forms of unfair trade practices. The Committee said in its report of June 13, 1914, Senate Report No. 597, 63rd Cong., Second Session, page 13:

"The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.

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"It is believed that the term 'unfair competition' has a legal significance which can be enforced by the commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition."

Senator Newlands, in introducing the bill for the Committee, emphasized this feature. In answering the criticism that the phrase "unfair competition" lacked definition he said, 51 Cong. Record, 11084:

"Our answer to this is that it would be utterly impossible for Congress to define the numerous practices which constitute unfair competition and which are against good morals in trade, for we are beginning to realize that there is a standard of morals in trade or that there ought to be. Germany does not hesitate by law to condemn practices in business that are *contra bonos mores.* It leaves their tribunals to determine what practices are against good morals.

* * * * * * * * * *

"It is the illusive character of the trade practice that makes it though condemned today appear in some other form tomorrow. If we should attempt to define all the trade practices that can be devised, that would create dishonest advantage in competition, we would undertake a hopeless task."

[2] The phrase "unfair methods of competition" was substituted for "unfair competition" in the Conference Committee. This change seems first to have been suggested by Senator Hollis in debate on the floor of the Senate in response to the suggestion that the words "unfair competition" might be construed as restricted to those forms of unfair competition condemned by the common law. 51 Cong. Record 12145. The House Managers of the conference committee, in reporting this change said, House Report No. 1142, 63rd Congress, 2nd Sess., September 4, 1914, at page 19:

"It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances."

[3] References showing the details of the legislative history of the Act may be found in Handler, The Jurisdiction of the Federal Trade Commission over False Advertising, 31 Columbia Law Review 527; Montague, "Unfair Methods of Competition", 25 Yale Law Journal 20; Henderson, The Federal Trade Commission, c. I.

the states, it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy. For these reasons a large share of the industry holds out against the device, despite ensuing loss in trade, or bows reluctantly to what it brands unscrupulous. It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the method is not "unfair." See *Federal Trade Commission v. Royal Milling Co., supra,* at 217; *Federal Trade Commission v. Algoma Lumber Co., supra.*

While this Court has declared that it is for the courts to determine what practices or methods of competition are to be deemed unfair, *Federal Trade Commission v. Gratz, supra,* in passing on that question the determination of the Commission is of weight. It was created with the avowed purpose of lodging the administrative functions committed to it in "a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected," and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would "give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience." Report of Senate Committee on Interstate Commerce, No. 597, June 13, 1914, 63rd Cong., 2d Sess., pp. 9, 11. See *Federal Trade Commission v. Beechnut Packing Co., supra,* at 453; compare *Illinois Central R. R. v. Interstate Commerce Commission,* 206 U. S. 441, 454. If the point were more doubtful than we think it, we should hesitate to reject the conclusion of the Commission, based as it is upon clear, specific and comprehensive findings supported by evidence.

We hold that the Commission correctly concluded that the practice was an unfair method of competition within the meaning of the statute. It is unnecessary to attempt a comprehensive definition of the unfair methods which are banned, even if it were possible to do so. We do not intimate either that the statute does not authorize the prohibition of other and hitherto unknown methods of competition or, on the other hand, that the Commission may prohibit every unethical competitive practice regardless of its particular character or consequences. New or different practices must be considered as they arise in the light of the circumstances in which they are employed.

Reversed.

[¶ 55,043] Local 167 of the International Brotherhood of Teamsters, Chauffeurs Stablemen & Helpers of America, et al. v. United States.

United States Supreme Court, No. 6—October Term, 1933. Decided February 5, 1934.

The interference with the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted operates substantially and directly to restrain and burden the shipment and movement of poultry while it is unquestionably in interstate commerce, and an injunction will lie to prevent such acts. Moreover, intrastate acts will be enjoined whenever necessary or appropriate for the protection of interstate commerce and the injunction need not be narrowed to prevent acts which restrain only the interstate shipment.

Appeal from the U. S. District Court, Southern District of New York.

Mr. Justice Butler delivered the opinion of the Court.

The decree appealed from is an injunction against a conspiracy commenced in May, 1927, by the appellants and others to restrain and monopolize interstate commerce in live and freshly dressed poultry in violation of §§ 1 and 2 of the Sherman Anti-Trust Act, 15 U. S. C., §§ 1, 2. Most of the issues were litigated before the same court in a criminal prosecution commenced August 28, 1928. Sixty-five of the defendants in this case were there convicted November 21, 1929. The Circuit Court of Appeals affirmed.*

This suit was commenced February 7,

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* 47 F. (2d) 156. Certiorari denied, 283 U. S. 827.

1930. The defendants are the Greater New York Live Poultry Chamber of Commerce, Local 167 of the International Brotherhood of Teamsters, Chauffeurs, Jobbers and Stablemen of America, the Official Orthodox Poultry Slaughterers of America, Inc., called the shochtim union, and 100 individuals, 75 of whom are wholesalers, hereafter called marketmen. The Chamber is an association of marketmen. The members of Local 167 haul live poultry. Shochtim are the only persons qualified to slaughter poultry in accordance with Jewish dietary laws; they are employed by the marketmen.

Live poultry for sale and consumption in the New York metropolitan area continuously moves in great volume from points in distant States to commission men, called receivers, at railroad terminals in Manhattan and Jersey City. The receivers sell to marketmen. The larger part of the poultry is delivered directly from the cars; the remainder from stands maintained by the receivers. The purchasers have the coops loaded on trucks and hauled to their places of business where, without avoidable delay, they sell, slaughter and deliver to retailers. Marketmen organized the Chamber of Commerce and allocated retailers among themselves and agreed to and did increase prices. The Chamber, through a levy of a cent a pound upon poultry sold by the marketmen, raised money — more than $1,000,000 in the first year—to pay for enforcement activities. To accomplish various purposes of the conspiracy, the conspirators hired men to obstruct the business of dealers who resisted. They spied on wholesalers and retailers and by violence and other forms of intimidation prevented them from freely purchasing live poultry. And, for like purpose and to extort money for themselves and their associates, members of Local 167 refused to handle poultry for recalcitrant marketmen, and members of the shochtim union refused to slaughter.

The petition contains allegations identical with those of the indictment as to the conspiracy and the means used to carry it into effect. The convicted defendants denied all the material allegations. On the Government's motion the court struck out as sham their denials of the conspiracy prior to the commencement of the criminal prosecution but let stand their denials of its continuance after that date. Decree was entered against 52 defendants by consent. Among the 49 resisting were the Chamber of Commerce, Local 167, the shochtim union and 29 individuals who had been convicted. At the conclusion of the evidence the trial judge in an oral opinion stated that, except as to two individual defendants, every material allegation had been proved. In accordance with that ruling the court later made findings of fact, stated its conclusions of law and entered a comprehensive decree. Only Local 167, the shochtim union and 14 individuals, members of the one or the other union, have appealed.

In their brief and oral argument appellants contend: (1) there is no proof that they intended to restrain or did interfere with interstate commerce; (2) if ever concerned in the conspiracy, they voluntarily abandoned it before this suit was commenced, and there is no probability of resumption; (3) there is no credible evidence against Weiner, Rosenman and Markman; (4) the court erred in striking out as sham the denials of convicted defendants; (5) the decree should be modified by eliminating a paragraph that enjoins them in respect of both interstate and intrastate commerce and by limiting the injunction to interstate commerce.

The assignment of errors includes more than 250 specifications and occupies more than 35 pages of the record. While it is possible to find among them bases for the five points indicated, they contain so much that is irrelevant that they tend to confuse rather than to define the issues to be presented. They do not appropriately serve the convenience of the appellee or of the court. *Phillips, etc. Const. Co. v. Seymour,* 91 U. S. 946, 648. *Central Vermont Ry. v. White,* 238 U. S. 507, 508. *Ches. & Del. Canal Co. v. United States,* 250 U. S. 123, 124. *Seaboard Air Line Ry. v. Watson,* 287 U. S. 86, 91. In view of the omission of appellee to object and the lack of precedent definitely in point we refrain from dismissing the appeal for failure substantially to comply with the statute and our rule in respect of the assignment of errors. 28 U. S. C., § 862. Rule 9. But what is here said is to be understood as an announcement that in the future a failure of that sort may be taken as sufficient ground for dismissal.

Appellants' contention that there is no proof that they intended to restrain or did interfere with interstate commerce has no merit.

The evidence shows that they and other defendants conspired to burden the free movement of live poultry into the metropolitan area. It may be assumed that some time after delivery of carload lots by interstate carriers to the receivers the movement of the poultry ceases to be interstate commerce. *Public Utilities Comm. v. Landon,* 249 U. S. 236, 245. *Missouri v. Kansas Gas Co.,* 265 U. S. 298, 309. *East Ohio Gas Co. v. Tax Comm.,* 283 U. S. 465, 470-471. But we need not decide when interstate commerce ends and that which is intrastate begins. The control of the handling, the

sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce. *United States v. Brims,* 272 U. S. 549. *Coronado Co. v. U. M. Workers,* 268 U. S. 295, 310. *United States v. Swift & Co.,* 122 Fed. 529, 532-533. Cf. *Swift & Company v. United States,* 196 U. S. 375, 398. The Sherman Act denounces every conspiracy in restraint of trade including those that are to be carried on by acts constituting intrastate transactions. *Bedford Co. v. Stone Cutters Assn.,* 274 U. S. 37, 46. *Loewe v. Lawlor,* 208 U. S. 274, 301. The interference by appellants and others with the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted operates substantially and directly to restrain and burden the untrammelled shipment and movement of the poultry while unquestionably it is in interstate commerce.

Appellants' contention that the proof shows that they abandoned the conspiracy before the commencement of this suit cannot be sustained.

The conspiracy was not for a temporary purpose but to dominate a great and permanent business. It was highly organized and maintained by the levy, collection and expenditure of enormous sums. In the absence of definite proof to that effect, abandonment will not be presumed. *Hyde v. United States,* 225 U. S. 347, 369. *Nyquist v. United States,* 2 F. (2d) 504, 505. The Government introduced substantial evidence which uncontradicted and unexplained tends to show that the conspiracy and appellants' participation continued until the filing of the amended complaint. They were present in court but failed to testify in their own defense. It justly may be inferred that they were unable to show that they had abandoned the conspiracy and did not intend further to participate in it. Under the circumstances of this case their silence rightly is to be deemed strong confirmation of the charges brought against them. *Mammoth Oil Co. v. United States,* 275 U. S. 13, 52. *Bilokumsky v. Tod,* 263 U. S. 103, 111.

There was evidence tending to show that Weiner, Rosenman and Markman were connected with the conspiracy. All were present but none testified. As on cross-examination full disclosure would have been called for, failure to take the witness stand strongly suggests that they could not give an account of their conduct that would be consistent with the denial interposed by answer or tend to repel what had been shown against them. The district court rightly held them to be parties to the conspiracy.

The judgment in the criminal case conclusively established in favor of the United States and against those who were found guilty that within the period covered by the indictment the latter were parties to the conspiracy charged. The complaint in this suit includes the allegations on which that prosecution was based. The defendants in this suit who had been there convicted could not require proof of what had been duly adjudged between the parties. And, to the extent that the answers attempted to deny participation of convicted defendants in the conspiracy of which they had been found guilty, they are false and sham and the district court rightly so treated them. *Oklahoma v. Texas,* 265 U. S. 70, 85. Cf. *Coffey v. United States,* 116 U. S. 436, 442. *Stone v. United States,* 167 U. S. 178, 184.

Appellants seek elimination of the provision of the decree that enjoins them from using any of the offices or positions in Local 167 or the shochtim union "for the purpose of coercing marketmen to buy poultry, poultry feed, or other commodities necessary to the poultry business from particular sellers thereof." The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort that are shown by the evidence to have been done or threatened in furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing its provisions doubts should be resolved in favor of the Government and against the conspirators. *Warner & Co. v. Lilly & Co.,* 265 U. S. 526, 532. The evidence shows that delegates of the unions coerced marketmen to use coops of a company that had or sought to secure a monopoly of such facilities and charged excessive rentals for them. The lack of specific evidence that coercion has been practiced or is threatened in respect of every detail or commodity is no adequate ground for striking out the clause or for limiting it to a mere specification of the coops. Having been shown guilty of coercion in respect of the coops in which poultry is kept and fed, appellants may not complain if the injunction binds generally as to related commodities including feed and the like. When regard is had to the evidence disclosing the numerous purposes of the conspiracy and the acts of coercion customarily employed by defendants, it is plain that the clause referred to cannot be condemned as unnecessary or without warrant.

And, maintaining that interstate commerce ended with the sales by receivers to

marketmen, appellants insist that the injunction should only prevent acts that restrain commerce up to that point. But intrastate acts will be enjoined whenever necessary or appropriate for the protection of interstate commerce against any restraint denounced by the Act. *Bedford Co. v. Stone Cutters Assn., ubi supra. Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 438. In this case the evidence fully sustains the decree.

Affirmed.

[¶ 55,044] American Equipment Company, a corporation, v. Tuthill Building Material Company, a corporation.

United States Circuit Court of Appeals for the Seventh Circuit. No. 4948. February 1, 1934.

The judgment of the District Court of the United States for the defendant in a suit for royalties alleged to have accrued to plaintiff under a license agreement executed by plaintiff as owner of certain patents, is affirmed where it appears that the plaintiff was the owner of patents for brick setting machines and brick loading forks, and in a license agreement with the manufacturers of ninety per cent of the bricks used in Chicago, fixed the number of brick which each licensee could manufacture, and fixed the price at which brick should be sold by means of a graduated royalty, in violation of the anti-trust laws.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

EVANS, Circuit Judge. Appellant brought suit for an accounting of royalties alleged to have accrued to it under a license agreement executed by it, as the owner of certain patents, to appellee. The latter defended on the ground that the contract violated the antimonopoly law of the State of Illinois and the Sherman Antitrust Law. The cause was referred to a master, whose findings of fact favored appellee. The substance of such findings are herewith set forth.

Appellant, the owner of certain patents described as brick setting machines and brick loading forks, entered into a license contract with appellee which recited that licenses to use such machines had been issued to five other companies engaged in brick manufacturing in the vicinity of Chicago. Appellee could, under its license, use the machine only at its brick yard at 138th Street and Racine Avenue, and it was further limited to the manufacture during each month of five per cent. of the total number of brick manufactured and delivered during said month by the five mentioned licensees. Appellee agreed to pay, as rental for said brick setting machine and as royalty for the license granted, on the fifteenth day of each calendar month, the sum of thirty cents for each thousand brick manufactured and delivered by appellee from its yard. In case appellee sold a greater quantity of brick than the output of its yard, it agreed to procure such excess from another licensee, and, in the event that it delivered a quantity of brick in excess of its quota, it agreed to pay appellant, in addition to the thirty cents per thousand brick, an additional sum of $1.50 per thousand upon the excess brick so delivered. If it continued to deliver brick in excess of its quota from month to month, the sum to be paid was $3 per thousand; and in the event appellee could not deliver brick to the limit of its quota, appellant agreed to use its best efforts to procure sufficient additional orders to make up the deficiency and, in the event of its failure so to do, to pay to appellee the sum of $1.50 per thousand on the difference between the quantity of brick manufactured and delivered and the full quantity for which appellee was licensed to use said machines.

During 1929, appellee manufactured and delivered from its yard 36,000,000 common brick. During the same year the five other licensees manufactured and delivered 498,000,000 brick. In 1930 and 1931, appellee sold more than its quota by several million brick.

The use of the patented machinery in no way affected the shape, size, hardness, or color of the finished brick. The machines performed no function which could not be done by hand. All brick was fully shaped and dried in a separate building before any of the patented machines were used. The sole function of said machinery was to help move and lift as a unit a small load of fully formed and dried brick a few feet from a small car into the burning kiln and also to remove the brick in stacked units from the kiln to the cars after the burning operation was completed. In other words,

appellant's patented machines dealt only with the mechanical handling of the brick.

On October 31, 1930, appellant elected to exercise its right to increase the additional sums of royalties payable from appellee from $1.50 per thousand brick to $3 per thousand brick.

From the execution of the contract down to the time the suit was begun, appellee paid the royalty of thirty cents per thousand on all brick by it made and delivered.

The handling of brick by machinery manufactured under the patents above mentioned was limited to the metropolitan area around New York, Chicago, and a single brick company in Milwaukee. Because of the low value of brick in proportion to its bulk and the correspondingly high freight or motor trucking rates, brick is not customarily shipped more than fifty or sixty miles from the point of origin, and practically all brick used in the Chicago area is manufactured within sixty miles of the Cook County Courthouse. During the last fifteen years the licensees of appellant have manufactured and delivered ninety per cent. of all the common brick used in the Chicago territory.

The brick manufacturing industry in the Chicago area from 1900 to 1909 at times experienced keen competition and at other times was controlled by pools or combines with the result that the prices varied from $3.75 to $10 per thousand. Various efforts were made to eliminate competition and stabilize the price, and on one occasion these efforts resulted in successful criminal prosecutions instituted against the Chicago brick manufacturers on the charge that they were violating the antitrust laws.

In 1909, one Penfield, president of appellant, negotiated with the various brick manufacturers and represented to them that through the use of the patented brick setting machines both the output and the price of brick in the Chicago area could be legally controlled. The license agreements provided a price of $6 per thousand in the Chicago area for wagon deliveries, but in 1925 the provision fixing the price at which the brick was to be sold was eliminated.

Before fixing the various manufacturing quotas, appellant sent to the yards of the various Chicago brick companies investigators who went over the books and, as the result thereof, determined the quotas, which varied from 52% to 2.6%. The 1914 contract modified the quotas somewhat. In 1916, appellee company was organized. Its promoter was offered $50,000 if he would stay out of the field. Appellee, however, proceeded and, upon representation that the output of competing companies could be regulated, took a license, and its quota of the brick manufactured in the area was fixed at 5%. Appellant advanced $14,000 for the alteration of appellee's brick yard as an inducement to appellee to sign the license agreement. The debt was canceled when the royalty payments reached said sum.

A market price of $12 per thousand was maintained from September, 1921, to May, 1931, all licensees maintaining this price for the entire period. During this period the prices of material from which brick was made varied widely and fluctuated continually in the Chicago market.

Each brick company entering into a license agreement rendered a monthly report to appellant showing the number of bricks delivered, and each contracting party was permitted to examine the report on file with appellant to see whether the licensees lived up to their agreements. From 1909 to 1930, the license agreements were enforced by the various licensees' complying with the quota or paying penalty for the deviation. The use of appellant's patented machines resulted in savings and economies to the user thereof. No attack on the validity of the patents was made.

The trial court filed a carefully prepared opinion, the substance of which is embodied in the following:

"The conclusion is inescapable that the plaintiff and its licensees, including the defendant, were engaged in a conspiracy to violate the criminal laws of the United States as well as the State of Illinois. Its plans are 'liveried in legal form,' but its history and its practice sheds a light which shows the parties naked before the law, and they may be seen as they actually exist working in a conspiracy in restraint of trade and to control prices. Plaintiff cannot have the aid of this Court to enforce the penalties provided for in its contract, and designed to make effective the conspiracy the licensor and licensees were engaged in.

"The Illinois statute makes this contract void, and since the record shows that shipments were made out of the state the Sherman Anti-Trust Law was violated. A court of equity will refuse its aid to the parties involved for a much higher moral reason in that it will not undertake to adjudicate the rights of parties who have been engaged in an enterprise outside of the law, and will leave the parties where it found them.

"There are no equities in favor of the defendant. By its own position it stands convicted before the law, and for that reason it will not be awarded costs."

The determination of soundness of the District Court's conclusion turns upon the effect to be given to the so-called license agreement.

To narrow the issue it may be well to state those propositions over which there can be no dispute. The owner of a valid patent is the possessor of a seventeen year legal monopoly granted to him by the United States Government. Such a patentee or his assignee has for said seventeen years the exclusive right to make, sell, and use the patented article or the patent-

ed process. He may exclude the entire population of the United States from making, selling, or using the article covered by the patent. He may assign the patent in whole or in part. The right to exclude all carriers with it the lesser right to exclude a part of said population and to permit another or others to make, sell, or use the patent for a limited period or in a limited territory. Appellant's right to license one, or as many as it chooses, to make, sell or use the patented machine in the Chicago area was clear. It could prefer large manufacturers or small producers. The licensees, thus selected, might through their combined production make and sell (as here) all, or nearly all, the products covered by the patent. The size of output or percentage of total output produced by licensees has no bearing on patentee's right to license. In short, the patentee may exclude all from making, selling, or using his patent in the United States, and this carries with it the right to exclude some and license others. As far as the contract in question deals with the exercise of the patentee's recognized legal monopoly, it is not subject to the prohibitive provisions of the antitrust laws.

In selecting his licensees, the patentee may, as he doubtless would ordinarily, look to the possible royalty returns. He may require minimum royalty payments. He may limit the number or amount of patented articles the licensee may make. Likewise, to secure the maximum royalty return he may require the licensee to use the patented process exclusively or make only the patented articles, if it manufactures such articles.

There are, however, agreements which, though they deal with patent grants and patent rights, yet in other respects transcend the field covered by the lawful monopoly and are void if they violate the antitrust laws.

In so far as such agreements are license agreements, they are unobjectionable; to the extent that they are not license agreements, they are subject to the inhibitions of the Sherman Antitrust Law.

Appellant relies largely upon *Rubber Tire Wheel Company v. Milwaukee Rubber Works*, 154 Fed. 358, decided by this court in 1907. This decision, however, must be read in the light of, and as modified by, later decisions of the Supreme Court. *Standard Oil Company v. United States*, 283 U. S. 163; *Carbice Corp. v. American Patents Development Corporation*, 283 U. S. 27; *Motion Picture Patents Company v. Universal Film Manufacturing Co.*, 243 U. S. 502; *United States v. General Electric Co.*, 272 U. S. 476.

A patentee in licensing another as its agent to sell *the patented article* may lawfully impose the condition that sales by the licensee shall be at a price fixed by the licensor. *United States v. General Electric Company*, 272 U. S. 476.

The owner of a patent which covers a process or a machine for making an *unpatented* article, however, may not fix the price at which the article shall be sold. *Motion Picture Patents Company v. Universal Film Manufacturing Co.*, 243 U. S. 502. Nor can license agreements, which contain selling price provisions for non-patented articles, avoid the penalties of the Sherman Antitrust Law because valid patent license provisions also appear in the agreements.

If an unreasonable restraint upon interstate commerce be the result of the provisions which fix the price of an unpatented article in agreements made by a patentee and licensees who make a large part of said unpatented articles in a certain section of or throughout the United States, the agreements are within the condemnation of the Act and are void.

Such is the situation of the parties to the contract in this case. The brick manufacturers who signed the agreement made ninety per cent. of the bricks used in Chicago. Brick was an *unpatented* article; that is to say, no patent in the license agreement or any other patent covered the article—ordinary brick. The agreement, so far as it licensed the use of the patented machine or device used to make brick, was unobjectionable. It was an exercise of a right given the patentee by his patent grant. In so far as it fixed, curtailed, and allotted the number of brick which each licensee could make, however, the agreement was subject to the antitrust laws of the State of Illinois and the United States. The imposition of the so-called penalty royalties, in case more bricks than were allotted to one licensee were manufactured, was not a license provision, but was a price fixing, quantity production limitation, the inevitable result of which was the unreasonable restraint of commerce and the creation of a monopoly. Even though no price at which the unpatented brick might be sold was fixed in the agreement, the purpose, object, and inevitable result of said royalty provision were to control the production and therefore the price of the unpatented article. The royalty provision to the effect that the amount of the royalty should be determined by the quantity of the unpatented article produced, and would be multiplied if more than a certain percentage of the entire production were manufactured, is obviously a price fixing, quantity production agreement. The contention of counsel that it was nothing more than an exercise of the right of a patentee to select his licensees and limit the use which each might make of the patented article, we cannot accept.

The oral testimony of different witnesses, who spoke for different licensees, leaves no doubt as to the intent of the contracting parties. They entered into the agreement to control prices and regulate the number of brick each should manufacture, not to secure the advantages which flowed from the use of the patented machines or article. It is possible that both results were desired, but the dominant thought, purpose, and plan were to control brick production and brick prices in the Chicago area.

The following facts are determinative of the invalidity of the contract. The finished product, viz., brick, was an unpatented article. The manufacturers who took license contracts produced ninety per cent. of the brick used in the Chicago vicinity. Shipments of brick from outside areas to Chicago were impossible because of the bulk and weight of the article and the high cost of transportation. In addition to the permissible license agreement, the parties contracted to control the output of manufactured brick and the prices at which it was to be sold. The combination of these facts brings the case within the condemnation of the antitrust acts of the state and Federal government. *Standard Sanitary Manufacturing Co. v. United States*, 226 U. S. 20.

The illegal provisions so permeate the contract that a court cannot separate and uphold the legal provisions appearing therein. The entire contract is therefore void.

The judgment is

AFFIRMED.

[¶ 55,045] Federal Trade Commission v. Artloom Corporation, trading as Artloom Rug Mills.

United States Circuit Court of Appeals for the Third Circuit. No. 5072. January 30, 1934.

The order of the Federal Trade Commission that respondent cease using the word "Wilton" in describing a rug fabric on the surface of which is displayed a design in two or more colors, in which the warp pile yarns, when not required at the surface for the said design, are not continued in the subsurface structure of the fabric, is affirmed.

THOMPSON, C. J. This case comes before us upon an application for the enforcement of an order of the Federal Trade Commission. The Commission filed a complaint in which it charged that the respondent, the Artloom Corporation, manufactured and sold in interstate commerce certain rugs, and misbranded them as Wilton rugs under the trade name "Bagdad Seamless Jacquard Wilton." The Commission found that the respondent had been selling its Bagdad rugs as and for genuine Wiltons; that the term "Wilton rug," as applied to a rug fabric on the surface of which is displayed a design of two or more colors, implied a fabric having a weave construction in which the warp pile yarns, when not required upon the surface for the design or pattern, are continued in the subsurface structure of the fabric; that the respondent's Bagdad rugs were made under a process essentially unlike that used in making Wilton rugs; that, when made, the Bagdad rugs consist of a weave construction differing materially from that of Wilton rugs; that the sale of the respondent's Bagdad rugs, as and for genuine Wiltons, constituted an unfair method of competition in commerce, having a capacity and tendency to deceive the public into the belief that, in purchasing the respondent's Bagdad rugs, they were purchasing genuine Wilton rugs; and that trade was thereby diverted from competitors to the respondent. The application for the enforcement order set forth that the Commission had made a cease and desist order which the respondent failed and neglected to obey. This order reads:

"IT IS NOW ORDERED that the respondent Artloom Corporation, a corporation doing business under the name and style of Artloom Rug Mills, its agents, representatives, servants, and employees, in connection with the sale and distribution in interstate commerce of rug and carpet fabrics, do cease and desist from directly or indirectly,

"1. Using the word 'Wilton' in describing, designating, or labeling any rug fabric on the surface of which is displayed a design or pattern in two or more colors, which is of the same weave construction as the 'Bagdad Seamless Jacquard Wilton' rug fabric now manufactured by respondent, or which is of a weave construction in which the warp pile yarns, when not required at the surface for the said design or pattern, are not continued in the subsurface structure of the fabric."

The statute, by virtue of which this application was made by the Commission reads as follows:

"Unfair methods of competition in commerce are declared unlawful.

"The commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

* * * * * *

"If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on

business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to facts, if supported by testimony, shall be conclusive." 15 U. S. C. A. 45.

As the statute directly provides that the fact findings of the Commission, if supported by testimony, shall be conclusive, this court is limited to the determination of two questions: first, whether such findings are supported by any evidence and, second, if they are so supported, whether these facts, as found, justify the conclusion that the sale of the respondent's Bagdad rugs as Wilton rugs constituted unfair competition in commerce. *Federal Trade Commission v. Curtis Publishing Co.*, 260 U. S. 568. *James S. Kirk & Co. v. Federal Trade Commission*, 59 F. (2d) 179, certiorari denied 287 U. S. 663.

No rug manufacturer today makes and sells Wilton rugs which are similar in all respects to those originally named Wiltons more than one hundred years ago. The definition of a genuine Wilton rug approved by the Commission was formulated in 1925 by a voluntary association of rug manufacturers and dealers. Had the Commission relied solely on this definition, we could not but acknowledge the justice of the contention that the respondent is not bound thereby. The Commission, however, did not rely solely on the definition so formulated, but heard considerable testimony on the question as to what characteristics were essential to a genuine Wilton rug. The voluminous record contains testimony of many witnesses called on behalf of the Commission, corroborated by technical works on the art of rug weaving, to the effect that no rug is a genuine Wilton which fails to have the dyed warp yarn, when not used in the actual making of the pattern, dormant in the body of the rug. While, on the other hand, there was testimony defining and describing the method of manufacture and the characteristics of a genuine Wilton rug which would have justified the labeling of the respondent's Bagdad rugs as Wilton rugs if the Commission had based its findings upon the testimony of the respondent's witnesses, nevertheless the Commission had before it ample evidence upon which to find that the respondent's Bagdad rugs did not contain the essentials of genuine Wilton rugs.

Under the ruling of the Supreme Court in *Federal Trade Commission v. Algoma Lumber Co.*, opinion filed January 8, 1934, the fact findings of the Commission are not to be regarded as merely persuasive. Justice Cardozo there said:

"'The findings of the Commission as to facts, if supported by testimony, shall be conclusive.' 15 U. S. C. sec. 45. The Court of Appeals, though professing adherence to this mandate, honored it, we think, with lip service only. In form the court determined that the finding of unfair competition had no support whatever. In fact what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision (*Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U. S. 52, 61, 63) forbid that exercise of power."

Since the statute and decisions expressly confer upon the Commission and not upon the court the duty of determining the facts, it is of no consequence that, if the Congress had conferred fact finding power upon the court, it might have reached a conclusion other than that of the Commission.

The premise of misbranding being supported by the Commission's findings, the conclusion follows that, when the respondent sold its misbranded rugs in commerce, it thereby harmed its competitors and deluded the ultimate consumers. *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212.

The order of the Federal Trade Commission is affirmed. An enforcement order may be entered in accordance with the prayer of the petition.

[¶ 55,046] Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission.

Supreme Court of the United States. No. 363. March 12, 1934.

When a holding company which had previously held all of the common shares of two competing companies divested itself of said shares and dissolved, and thereafter the owners of these common shares united with the holders of the preferred shares to bring about a merger under state laws of Connecticut, the Federal Trade Commission is without power under the Clayton Anti-Trust Act to order the distribution of the physical property brought into a single ownership by the merger.

MR. JUSTICE ROBERTS delivered the opinion of the Court: The Circuit Court of Appeals[1] affirmed an order of the Federal Trade Commission issued pursuant to Section 7 of the Clayton Act.[2] A writ of certiorari was granted upon the claim of petitioner that the formation of a holding company which acquired all the voting shares of two manufacturing corporations was not in violation of the section, or, if it was, the merger of the two manufacturing corporations and dissolution of the holding company after complaint by the Federal Trade Commission deprived the latter of jurisdiction to make any order against the company formed by the merger. A proper understanding of these contentions requires a somewhat detailed statement of events prior and subsequent to the issuance of the complaint.

The Arrow Electric Company, hereafter called Arrow, and the Hart & Hegeman Manufacturing Company, hereafter called Hart & Hegeman, were Connecticut corporations engaged in the manufacture and sale in interstate commerce of electric wiring devices. Both were solvent and successful. There was no community of ownership of the stock of the two concerns. Each had valuable trade names by which its goods were known to consumers. Shortly after the death of the principal stockholder, who was also the president, of Hart & Hegeman, the major interests in that company got into touch with those controlling Arrow, and after some negotiation it was agreed that economies could be effected if the business of both were brought under common control. In view, however, of the competition between the goods known by the names of the two manufacturing companies, it was thought that the trade names and the identity of the goods could best be preserved by retaining the separate corporate entities and the sales forces of the two organizations. The plan evolved was, therefore, that of a holding company which should own all of the common shares of both corporations, under the control of which the manufacturing and sales organization should be kept separate and distinct and in competition with each other as theretofore. In order to bring about an equitable division of the stock of the proposed holding corporation, Arrow issued to its common stockholders a dividend in preferred stock. The recipients sold the preferred shares to a syndicate, which in turn sold them to the public. Hart & Hegeman increased its common stock and issued the new stock as a stock dividend. It also created an issue of preferred stock, which was sold to the public. Prior to the acquisition of the common stock by the holding company the capitalization was as follows:

Arrow—Common stock, $750,000, par $25 Preferred stock, $2,000,000, par $100.

Hart & Hegeman — Common Stock, $500,000, par $25. Preferred Stock, $1,333,300, par $100.

The holders of preferred stock in each company were without the right to vote for directors except upon default in the payment of six successive dividends, in which case the preferred stockholders were entitled to elect the board. In October, 1927, Arrow-Hart & Hegeman, Incorporated, hereafter called the holding company, was organized under the laws of Connecticut. It had only common stock. The owners of all of the common shares of Arrow exchanged them for 120,000 shares of the stock of the holding company and the owners of all the common shares of Hart & Hegeman exchanged them for 80,000 shares of the same stock.

On March 3, 1928, the Federal Trade Commission issued a complaint in which it charged the effect of the holding and voting of all of the common shares of the two operating companies might be to substantially lessen competition between the companies in electrical wiring devices, to restrain commerce in those devices, and to create a monopoly. The holding company filed an answer traversing these allegations. Shortly thereafter counsel advised that the company be dissolved and its assets, consisting of the stock of Arrow and of Hart & Hegeman, be distributed amongst its stockholders, and that thereupon the two latter companies merge into a single corporation under the laws of Connecticut, thus transferring to the new corporation to be formed by merger all of the assets of Arrow and of Hart & Hegeman.

It was discovered that such a program might cast heavy taxes upon the stockholders, and a modification was suggested to work out the plan in accordance with the reorganization sections of the Rev-

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[1] 65 F. (2d) 336.

[2] Act of October 15, 1914, c. 323, Sec. 7; 38 Stat. 731; U. S. C. Title 15, § 18. The relevant paragraph is as follows:

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

enue Act of 1928. The stockholders of the holding company and the preferred stockholders of both the operating companies were notified of the original plan and of its modification, and proxies were asked so that their votes might be recorded at corporate meetings intended to be held to carry out the proposal. A two-thirds vote of both preferred and common stock is required by the law of Connecticut to authorize a merger.

In lieu of the original program of distribution of the shares owned by the holding company to its stockholders, the shares of Arrow were transferred to a new company, called the Arrow Manufacturing Company, and those of Hart & Hegeman to another new company, known as the H. & H. Electric Company, against the issue of all of the shares of these companies respectively. The stock so to be issued by these two new holding companies was, by the direction of the original holding company, issued directly to its stockholders. As soon as this transfer of all its assets had been made to the two new holding companies by the old one, the latter by corporate action dissolved. Thereafter, pursuant to directors' action, the stockholders, preferred and common, of the four companies having an interest in the assets (Arrow, Hart & Hegeman, Arrow Manufacturing Company, and the H. & H. Electric Company) approved a merger agreement whereby the petitioner, The Arrow-Hart & Hegeman Electric Company, was formed, which directly owned in its own right all of the assets formerly belonging to Arrow and to Hart & Hegeman. These transactions were consummated on or prior to December 31, 1928, except that the dissolution of the first holding company did not become final until April 11, 1929, the law of Connecticut providing that a final certificate of dissolution should not issue until four months after the filing of the resolution for dissolution.

January 11, 1929, counsel notified the Commission of the dissolution of the holding company and the formation of the petitioner. June 29, 1929, the Commission issued a supplemental complaint, entitled jointly against the holding company (the original respondent) and the petitioner (the corporation formed by the merger). After reciting in greater detail than above set forth the action taken, this complaint asserted that the formation of the petitioner was brought about by the contrivance and at the instigation of the holding company; that the conveyance of the stocks of Arrow and Hart & Hegeman to the two new holding companies failed to restore the assets to the ownership and control of separate groups in the manner the shares were held and controlled before the formation of the original holding company; that the result of the whole plan was not a restoration of competition as required by the act of Congress, and that the Commission's jurisdiction having timely attached could not be ousted by the steps subsequently taken.

Petitioner answered the supplemental complaint, the matter was heard, and the Commission made its findings. In addition to the facts above recited, the Commission found that at the time of the acquisition of the stocks of Arrow and Hart & Hegeman by the holding company, those corporations were in direct and substantial competition in interstate commerce, and after the formation of the holding company competition between them had been substantially curtailed. The Commission concluded: the acquisition by the holding company of the shares of the two manufacturing companies might substantially lessen competition between them, restrain interstate commerce, and create a monopoly; the divestment by the holding company was not a compliance with the Clayton Act; the petitioner was organized by the holding company, and its creation was an artifice to evade the provisions of Sections 7 and 11 of the Clayton Act, and the effect of the organization of the petitioner and "the acquisition by it of the common or voting stocks of" Arrow and Hart & Hegeman has been, is, and may be to suppress competition between the two manufacturing companies, to restrain interstate commerce, and to create a monopoly.

The Commission entered an order commanding the petitioner to cease and desist from violation of the provisions of Section 7 of the Clayton Act, and to divest itself "of all the common stock of" Hart & Hegeman "so as to include in such divestment" the said company's manufacturing plants and equipment, and all other property necessary to the conduct and operation thereof as a complete going concern, and so as neither directly nor indirectly to retain any of the fruits of the acquisition of common stock of Hart & Hegeman; or, in the alternative, to divest itself of "all the common stock of" Arrow in the same manner. It was further ordered "that such divestment of the common stock or assets" of Arrow or Hart & Hegeman, as the case might be, should not be made directly or indirectly to the petitioner or any stockholders, officers, employees, or agents of or under the control of the petitioner.

The findings with respect to the effect of the acquisition and ownership by the hold-

ing company of the shares of the two manufacturing corporations are attacked as unsupported in fact and unjustified in law. The record is said to disclose that competition was not in fact diminished but preserved. And it is further argued that if competition was or might be in some measure curtailed by the device of a holding company the result is unimportant and insignificant unless the public was injured, and not only is there a total absence of proof of injury to the public, but much affirmative evidence that consumers were benefited by reduction of prices consequent on manufacturing efficiency made possible by unified control.

It is unnecessary to discuss or to decide the questions thus raised, for we think the Commission lacked authority to issue any order against the petitioner.

Section 7 of the Clayton Act, forbids any corporation to acquire the whole or any part of the share capital of two or more corporations, where the effect of the acquisition or the use of the stock by voting or otherwise may be to substantially lessen competition between such corporations, restrain competition in interstate commerce or create a monopoly in any line of commerce. Section 11[3] specifies the remedy which the Commission may apply, namely, that it may, after hearing, order the violator to divest itself of the stock held contrary to the terms of the Act. The statute does not forbid the acquirement of property, or the merger of corporations pursuant to state laws, nor does it provide any machinery for compelling a divestiture of assets acquired by purchase or otherwise, or the distribution of physical property brought into a single ownership by merger.

If, instead of resorting to the holding company device, the shareholders of Arrow and Hart & Hegeman had caused a merger, this action would not have been a violation of the Act. And if, prior to complaint by the Commission, the holding company, in virtue of its status as sole stockholder of the two operating companies, had caused a conveyance of their assets to it, the Commission would have been without power to set aside the transfers or to compel a reconveyance. *Thatcher Mfg. Company v. Federal Trade Commission*, 272 U. S. 554, 560, 561.

Clearly, also, if the holding company had, before complaint filed, divested itself of the shares of either or both of the manufacturing companies, the Commission would have been without jurisdiction. And it might with impunity, prior to complaint, have distributed the shares it held pro rata amongst its stockholders. The fact that in such case the same group of stockholders would have owned shares in both companies, whereas theretofore some owned stock in one corporation only, and some held stock solely in the other, would not have operated to give the Commission jurisdiction. For if the holding corporation had effectually divested itself of the stock, the Commission could not deal with a condition thereafter developing although thought by it to threaten results contrary to the intent of the Act. Compare *National Harness etc. Association v. Federal Trade Commission*, 268 Fed. 705; *Chamber of Commerce v. Federal Trade Commission*, 280 Fed. 45.

Moreover, the holding company could have ousted the Commission's jurisdiction after complaint filed, by divesting itself of the shares, for that was all the Commission could order. And if it had so divested itself the transferees of the shares could immediately have brought about a corporate merger without violating the Clayton Act. We think that is precisely the legal effect of what was done in the present case. The holding company divested itself of the shares, and thereafter the owners of these common shares united with the holders of the preferred shares to bring about a merger.

The Commission apparently was doubtful of its authority to promulgate the order which it entered. This is evidenced by the terms of the findings and the order. In its final conclusion the Commission refers to "the acquisition by the said new respondent [the petitioner] through merger, of the common or voting stocks of the said Hart & Hegeman Manufacturing Company and Arrow Electric Company . . . ," and denominates this a violation of Section 7 of the Clayton Act. This, of course, is in the teeth of the obvious fact that the petitioner never acquired the stock of either Arrow or Hart & Hegeman. In its order the Commission directs that the petitioner cease and desist from violation of the provisions of Section 7 of the Act, and "divest itself absolutely, in good faith, of all common stock of the Hart & Hegeman Manufacturing Company acquired by it as a result of the merger"; and then adds that it shall do this so as to include in such divestment the manufacturing plants and assets of Hart & Hegeman; and in the alternative the order applies to the stock and manufacturing plants of Arrow. This is a tacit admission that the Commission is without jurisdiction to act unless the alleged violator holds stocks of other corporations. The Commission's own find-

[3] U. S. C. Title 15 § 21.

ings show that the petitioner never held any stock of either company, but the order, nevertheless, requires that the petitioner divest itself of those stocks.

The argument on behalf of the Commission is that while it is true that the petitioner never owned any stock of Arrow or Hart & Hegeman, the holding company, against whom the complaint was originally directed, did hold such stocks in violation of the statute when the proceeding was initiated; and, instead of parting with the shares in good faith, ineffectually attempted to alter the status by initiating and carrying through the merger, the dissolution of which is the aim of the Commission's order.

We think the Commission's premise with respect to the activities of the holding company in bringing about the merger is without support. When the Commission filed its complaint those who had previously been the common stockholders of Arrow and Hart & Hegeman, respectively, had become the owners of the shares of the holding company. While those shares represented at two removes the physical assets of the enterprise, they nevertheless evidenced the equity ownership of those assets. At that time Arrow and Hart & Hegeman were still separate corporate entities, and about 73% of their outstanding capital stock was preferred stock held by the public, in no wise affected by the creation of the holding company. After the holding company had conveyed the Arrow stock to a new holding company, and the Hart & Hegeman stock to another new holding company, the only persons who could bring about a merger and consequent consolidation of assets were the preferred and common stockholders of Arrow and Hart & Hegeman. Under the laws of Connecticut two-thirds of the outstanding stock of each class had to vote affirmatively to authorize a merger. While the holding company proposed the plan for accomplishing a merger, and sponsored the preliminary steps to that end, obviously that company had no power to consummate it. That power resided in the equity owners of the assets, the preferred and common stockholders of Arrow and Hart & Hegeman. The common stockholders acted through the two holding companies, but the ultimate decision and action was theirs, through whatever instrumentality effected. Quite as vital to the accomplishment of the plan was the consent of preferred stockholders. It is true the consent was given through execution of proxies; but the shareholders were at liberty to give or to withhold their proxies, and it would be quite beyond reason to hold, as the Commission suggests, that all corporate entities and all stockholder relationship to the property should be disregarded and the original holding company be treated as the sole and efficient agent in the accomplishment of the merger. To do this would be to disregard the actualities, including the fact that the holding company had been effectually dissolved before the merger was voted upon by any of those having an equity interest in the assets.

But if we assume that the holding company against which the complaint was originally directed, brought about a change in legal status, so that before the Commission acted, that company ceased to exist, as did the shares it formerly owned, and a corporation formed by merger held all the assets in direct ownership, the respondent's position is no better. The Commission is an administrative body possessing only such powers as are granted by statute. It may make only such orders as the Act authorizes; may order a practice to be discontinued and shares held in violation of the Act to be disposed of; but, that accomplished, has not the additional powers of a court of equity to grant other and further relief by ordering property of a different sort to be conveyed or distributed, on the theory that this is necessary to render effective the prescribed statutory remedy. Compare *Federal Trade Commission v. Eastman Kodak Co.*, 274 U. S. 619, 623. Where shares acquired in violation of the Act are still held by the offending corporation an order of divestiture may be supplemented by a provision that in the process the offender shall not acquire the property represented by the shares. *Federal Trade Commission v. Western Meat Co.*, 272 U. S. 554. In the present case the stock which had been acquired contrary to the Act was no longer owned by the holding company when the Commission made its order. Not only so, but the holding company itself had been dissolved. The petitioner, which came into being as a result of merger, was not in existence when the proceeding against the holding company was initiated by the Commission, and never held any stock contrary to the terms of the statute. If the merger of the two manufacturing corporations and the combination of their assets was in any respect a violation of any antitrust law, as to which we express no opinion, it was necessarily a violation of statutory prohibitions other than those found in the Clayton Act. And if any remedy for such violation is afforded, a court and not the Federal Trade Commission is the appropriate forum. Compare *Federal Trade Commission v. Western Meat Co., supra.*

The judgment is reversed.

MR. JUSTICE STONE: I think the decree should be affirmed.

While a proceeding was pending before the Federal Trade Commission to compel a holding company to divest itself of the controlling common stock of two competing corporations which it had acquired in violation of Sec. 7 of the Clayton Act, that stock was used to effectuate a merger of the competing corporations. It is now declared that, however gross the violation of the Clayton Act, however flagrant the flouting of the Commission's authority, the celerity of the offender, in ridding itself of the stock before the Commission could complete its hearings and make an order restoring the independence of the competitors, leaves the Commission powerless to act against the merged corporation. This is the case, it is said, because the Clayton Act does not, in terms, forbid mergers, which may be formed by the stockholders of independent competing corporations; and, since the holding company was not the "sole and efficient agent in the accomplishment of the merger," which was effected upon the consent of the various classes of stockholders of the merged companies, it is concluded that the holding company, by its divestment of the stock, complied with the Clayton Act and in effect did "all the Commission could order," so there is no longer any ground for complaint. Further, notwithstanding the authority broadly conferred on the Commission "to enforce compliance" with § 7 "whenever . . . any person . . . has violated" its provisions, it is said that as the statute in terms specifies only a single method by which compliance can be compelled, by ordering the offender to divest itself of the stock, the Commission can make no other form of order.

Apart from the objection that the decision now reached is calculated to encourage hasty and ill considered action by the Commission in order to avoid defeat of its jurisdiction by the adroit manipulations of offenders against the Clayton Act, I am unable to construe so narrowly a statute designed, as I think, to prevent just such suppression of competition as this case exemplifies.

1. It is true that the Clayton Act does not forbid corporate mergers, but it does forbid the acquisition by one corporation of the stock of competing corporations so as substantially to lessen competition. It follows that mergers effected, as they commonly are, through such acquisition of stock necessarily involve violations of the Act, as this one did. Only in rare instances would there be hope of a successful merger of independently owned corporations by securing the consent of their stockholders in advance of the acquisition of a working stock control of them. Hence, the establishment of such control by the purchase or pooling of the voting stock, often effected in secrecy, is the normal first step toward consolidation. It is by this process that most corporate consolidations have been brought about, often by adding one consolidation to another through periods of years. Compare *Standard Oil Co. v. United States*, 221 U. S. 1; *United States v. American Tobacco Co.*, 221 U. S. 106; *United States v. United States Steel Corp.*, 251 U. S. 417; see Bonbright and Means, The Holding Company, 30, 50.

Unless we are to close our eyes to this open chapter in the record of corporate concentration, an examination of the legislative history of the Clayton Act, and that of the earlier Sherman Act, can leave no doubt that the former was aimed at the acquisition of stock by holding companies not only as itself a means of suppressing competition but as the first and usual step in the process of merging competing corporations by which a suppression of competition might be lawfully perpetuated. The Clayton Act thus reached one of the evils aimed at, the merger of competing corporations through stock control, in its most usual form by forbidding the first step, the acquisition of the stock of a competing corporation, and by conferring on the Trade Commission authority to deal with the violation. It seems plain, therefore, that the illegality involved in acquiring the common stock of the competing companies, which was the first step upon the path leading toward the merger, was neither lessened nor condoned by taking the next and final steps in completing the fusion of interests. There is, then, no basis for contending that the Act has not been violated, or that the violation has been excused simply because events were pushed to the very conclusion that § 7 was designed to forestall.

2. It is also true that the holding company had divested itself of the stock of the two competing operating companies before the Commission had had an opportunity to make its order; but it does not follow that it had done all that the Commission could command and that thus the statute was satisfied. Mere divestment of the stock is not enough. The manner of divestment is likewise subject to the requirements of the Clayton Act. This Court has recognized that the purpose of the Act is to restore the competition suppressed by the acquisition of the stock and has specifically held, over objections such as are now made, that the Commission has power

not only to order divestment but to prescribe that it shall be done in a manner that will restore competition. *Federal Trade Commission v. Western Meat Company,* 272 U. S. 554.

Here the Commission has held that the divestment was not a compliance with the statute. In determining whether it was right in this conclusion, the manner of divestment and the activity of the holding company after the complaint of the Commission was filed and before the final merger of the two operating companies are of crucial significance.

When the complaint was filed the holding company was in complete control of the two operating companies through ownership of their common stock, which alone had voting power. From the moment of the acquisition of the stock it had been and it continued to be a violator of the Clayton Act. Promptly after the complaint was filed it took measures to secure all the fruits of its violation. It first proposed by letter to its stockholders a consolidation of the two operating companies, and at a special meeting its board of directors formulated a detailed plan for merger. This plan involved the organization of the two new holding companies, the transfer to them respectively by the first holding company of its respective holdings of the common stock in the two operating companies in exchange for the distribution by the new holding companies of their stock to the stockholders of the first holding company. Thus for each share in the first holding company owned by its stockholders they were to receive one share in each of the new holding companies. The original holding company was then to be dissolved and the four remaining companies, the two new holding companies and the two operating companies, were to be merged.

The plan, from the beginning, contemplated that the four companies should be bound by formal agreement to effect the merger. It was adopted at a specially called meeting of the stockholders of the first holding company and was carried into effect under its active direction and control. Before its dissolution, by exercising that control it had created the two new holding companies, committed all four of its subsidiary corporations to the merger both by their corporate action and by binding agreement, and had secured the approval of its action by its own stockholders. It will be observed that the original holding company did not divest itself of the stock of the two competing operating companies in the only manner by which competition could have been restored—by returning the stock to the respective stockholders of the operating companies, from whom it had been secured, or to their successors. Instead, it continued the suppression of competition by placing the stock of the two operating companies respectively in control of the two new holding companies, tied by contract to effect the merger, and by the method of distributing the stock of the new holding companies equally to its own stockholders it lodged common ownership and control of both the new holding companies in the two groups of stockholders of the original operating companies. The first holding company created the two new ones and throughout guided their policy, as it did that of the two operating companies. Acting in concert and in accord with the prearranged plan, all cooperated in executing it, and all, together with their creature, the merged company, were conscious beneficiaries of the violation of the statute.

By thus manipulating its illegally acquired stock control of the operating companies, the first holding company avoided such a distribution of the stock as would have restored competition, and made easy the merger which, if the stock had been returned to those from whom it had originally been acquired, would have been difficult or impossible. Upon these and other facts, which need not now be detailed, the Commission made its finding, abundantly supported by evidence, that the course of action taken by the holding company was not to restore competition between the operating companies, but was "an artifice and subterfuge designed in an attempt to evade the Clayton Act, to perpetuate the elimination of competition," which it had brought about by the acquisition of the stock of the operating companies.

That the stockholders in the successive holding companies, who were the ultimate owners of the operating companies, consented to all this; that two-thirds of the non-voting preferred stock of the operating companies which had never been lodged in the holding companies consented to it; that the merger might possibly have been effected in some other way, had competitive conditions been restored; all seems without significance. While under local statutes merger could not have been effected without the consent of the preferred stock, equally the consent of the common stock acquired through violation of the Clayton Act was required to accomplish the desired end. A prohibited act is no less illegal because its success involves the cooperation of other actors. It was the suppression of competition by the holding company, through the use which it made of the illegally acquired stock of the oper-

ating companies, and its manner of disposing of the stock so as to continue that suppression, which were violations of the Clayton Act and in conflict with the authority of the Commission. This was not any the less so because others consented.

Doubts whether the divestment effected by the first holding company was all that the Commission could have ordered are dissipated by our decision in *Federal Trade Commission v. Western Meat Company, supra.* There we upheld an order of divestment which directed that in transferring the stock the respondent corporation could not use it to acquire any of the property of the competing corporation, and that none of the stock could be transferred to anyone having any connection with or in any way under the influence of the offending corporation. Here we need not go so far.

3. There remains the question whether the Commission is now powerless to undo a consummation which, at an earlier stage, it could have prevented. It is said, as a matter of statutory construction, that the grant to the Commission of specific power to command offenders to divest themselves of illegally acquired stock excludes the possibility of its ordering anything more or different, however incidental or necessary it may be to the exercise of the granted power.

It would seem that this point also had been settled by our decision in the *Western Meat Company* case, where the offending company, through stock ownership, had acquired possession of the property and control of the business of a competitor. It wished to be free to divest itself of the stock without restriction, in order that it might acquire ownership of the competitor's property by transferring the stock to hands that would make merger easy. It was argued to us there, as it is here, that the statute provides only that the Commission may order divestment of the stock; that it does not say that the Commission can command relinquishment of the power, derived from the stock ownership, to bring the competitor, or its property, under the control of the offending corporation, either directly, or through transfer of the stock into friendly hands. But that argument was rejected, and the order directing divestment of both the property and stock by placing both in the hands of those not under the influence or control of the offender was upheld. This Court said, p. 559:

"Further violations of the Act through continued ownership could be effectively prevented only by requiring the owner wholly to divest itself of the stock and thus render possible once more free play of the competition which had been wrongfully suppressed. The purpose which the lawmakers entertained might be wholly defeated if the stock could be further used for securing the competitor's property. And the same result would follow a transfer to one controlled by or acting for the respondent."

No more here, than there, should it be said that the purpose of the statute must be defeated because the lawmakers did not attempt to provide with a meticulous precision how the Commission should proceed in every contingency that might arise. The dominating purpose of the statute is to restore to its original state the competition suppressed by the acquisition of the stock, and, just as we rejected a rigid literalism there in order to effect that purpose, and upheld an order which was but incidental, though necessary, to the effective exercise of the power specifically granted, so we should reject it now. Just as in that case we upheld the Commission's order directing the surrender of one of the fruits of the wrongful stock ownership—the power to place a competing unit under the offender's domination—so should we now sustain the order commanding relinquishment of another of the fruits of that ownership—the accomplished merger.

Even if the question were a new one in this Court, no plausible reason has been advanced for interpreting this remedial statute as though it were a penal law. The Clayton Act was designed to prevent abuses growing from deficiencies due to the generality of the Sherman Act. It sought to accomplish that end by conferring upon the Commission the power to strike at specific practices. In this, as in most schemes for regulation by administrative bodies, there must be a balance between the general and the particular. When the courts are faced with interpretation of the particular, administration breaks down and the manifest purpose of the legislature is defeated unless it is recognized that, surrounding granted powers, there must be a penumbra which will give scope for practical operation. In carrying such schemes into operation the function of courts is constructive, not destructive, to make them, wherever reasonably possible, effective agencies for law enforcement and not to destroy them.

That the merged corporation is different from the original offender should lead to no different conclusion. It is but the creature and *alter ego* of the offender, created by the offender's exercise of power over the illegally acquired stock for the very purpose of perpetuating the suppression of competition which the Commission from the start had power to forbid. To declare that an offender, whose cause is pending before the Commission, can effect through its creatures and agents what it may not itself do, would nullify the statute.

Some scope may be given to the doctrine of *lis pendens.* It is true that the Commission is an administrative body, and not a court. But it exercises many of the powers conventionally deemed judicial. It is authorized to bring offenders before it to determine whether they are violators of the Act, and, if so, "to enforce compliance" by commanding that the violation cease. There is as much reason to believe that Congress did not intend to deny to the Commission the authority to exercise effectively the granted power, and thus to preserve its jurisdiction until its function could be executed, as there would be were similar powers extended to a court of inferior jurisdiction. This is the more evident when it is remembered that obedience to the Commission's orders cannot be compelled without first subjecting them to the scrutiny of a court. Recognition of its authority involves neither departure from accepted principles nor any risk of abuse.

These considerations demand our rejection of the contention that an offender against the Clayton Act, properly brought before the Commission and subject to its order, can evade its authority and defeat the statute under cover of a cleverly erected screen of corporate dummies.

The CHIEF Justice, Mr. Justice BRANDEIS, and Mr. Justice CARDOZO concur in this opinion.

[¶ 55,047] Interstate Commerce Commission v. Pennsylvania Railroad Company et al.

United States Supreme Court. No. 361. March 19, 1934.

On writ of certiorari to the U. S. Circuit Court of Appeals, Third Circuit.

The acquisition of the stock of a competitor does not of itself constitute a violation of the Clayton Act, as it is necessary to prove more than the mere possibility that such control will be used to lessen competition.

The opinion of the Third Circuit Court of Appeals appears at ¶ 55,035.

PER CURIAM: Decree affirmed, by equally divided court. Mr. Justice Roberts took no part in the consideration or decision of this case.

[¶ 55,048] Federal Trade Commission v. Inecto, Inc.

United States Circuit Court of Appeals for the Second Circuit. April 2, 1934.

In an application by the Federal Trade Commission for the enforcement of an order, a motion by the Commission for leave to present only so much of the evidence as the Commission relies on to support those of its findings which bear upon the issues presented in the cause was denied, as Section 5 of the Federal Trade Commission Act require that the transcript of the entire record shall be printed unless the parties agree upon printing less.

Before: MANTON, SWAN and CHASE, Circuit Judges.

PER CURIAM: Under Sec. 5 of the Federal Trade Commission Act, the Commission is required to file in this court, a transcript of the entire record in a proceeding for the enforcement of an order made by the Commission to cease and desist a practice of the respondent in its business. Section 5 provides that this court has jurisdiction to "make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree affirming, modifying or setting aside the order of the commission. The findings of the commission as to the facts, if sup-

ported by testimony, shall be conclusive." (See: *F. T. C. v. Balme,* 23 Fed. 2, 615 [C. C. A. 2]).

The court will have no occasion to resort to the record on which the findings were based, unless it be asserted by the respondent that the order is not supported by the evidence. *Natl. Harness Mfgrs. Assn. v. F. T. C.,* 261 Fed. 170 (C. C. A. 6). Upon our review, it will be our duty to ascertain whether such finding is supported by any evidence, if it be challenged. Petitioner asserts that part of the issues of fact tried in this case were determined in favor of the respondent and are no longer in issue; that there will be no occasion to consider any portion of that evidence concerning these issues. The petitioner asks to print only so much of the evidence as it relies upon to support any finding or findings which bear upon the issues to be presented to this court.

Rule 21, subdiv. 2 of this court, in an application for the enforcement of an order, requires that the transcript of the entire record shall be printed and unless the parties agree upon printing less, we cannot do otherwise than require all the testimony to be printed as constituting the record for our review. Contentions are made by respondent that it would be necessary to examine it all to ascertain if there is a violation of the order to cease and desist. The one way that we can answer that inquiry is by reading the entire record and this we can only do if it is before us in the form required by our rule.

Motion denied.

[¶ 55,049] Quittner et al. v. Motion Picture Producers and Distributors of America, Inc., et al.

United States Circuit Court of Appeals for the Second Circuit. April 9, 1934.

On a motion of a litigant to sue as a pauper in a suit for treble damages for violation of the Clayton Act, it is not necessary for the attorney representing the litigant on a contingent contract to file a pauper affidavit in New York, as statutes of New York prohibit an agreement by an attorney to pay costs or printing expenses in a suit for a client.

MANTON, Circuit Judge. Appellants have appealed from a judgment of the United States District Court for the Southern District of New York entered upon a dismissal of their complaint at the end of their case. In this application they seek, pursuant to §§ 832, 834, Title 28 U. S. Code, to prosecute their appeals in forma pauperis. Permission so to do is granted to a citizen of the United States, in civil or criminal cases, upon the order of the court, without being required to prepay fees or costs or to pay for the printing of the record in the appellate court or to give security for costs. The affidavit justifying the entry of such an order must satisfy the court that, because of the poverty of the petitioner, he is unable to pay the costs of his appeal or to give security for the same, and that he believes that he is entitled to the redress he seeks in such appeal. He must set forth briefly the nature of his appeal. This the petitioners have done in their petition.

The record is voluminous and prohibitive for appellants to print. The affidavit of the appellant Quittner shows his impoverished state and financial inability to pay for the printing of the record or to give security for costs. There are 6000 pages of testimony and a great quantity of documentary evidence. It appears in his statement of facts and in the opinion rendered by the court below and counsel's certificate, that the appeal is taken in good faith with reasonable expectation of success. It is a suit for treble damages for violation of the provisions of the Clayton Act (15 U. S. C. § 15).

The attorneys for appellants are said to be interested in the outcome, because of a contingent interest in the proceeds for their professional services rendered and to be rendered, and therefore, it is said, they should file a pauper oath to justify the order prayed for. Their agreement with their clients does not require them to pay the costs or printing expenses. Such

an agreement would violate § 274 of the New York Penal Law and be against public policy and, indeed, would constitute a champertous agreement. *In the Matter of Gilman,* 241 N. Y. 265. As there stated, "There is to be no barter of the privilege of prosecuting a cause for gain in exchange for the promise of the attorney to prosecute at his own expense."

In a case where the court has required such an oath by the attorney (*U. S. ex rel. Randolph v. Ross,* 298 F. 64 [C.C.A. 6]), the district court rule required such an affidavit by the attorney who prosecuted the case on a contingent fee basis. There the statute of the State of Tennessee, where the cause of action was prosecuted (Act of 1899, ch. 173; Shannon's Code 1917, §§ 3174, 3175), did not make such an agreement unlawful. The court found the giving of cost bonds generally by attorneys not to be unethical. There is similar authority in the 9th Circuit (*Chetkovich v. United States,* 47 F. 2, 894 [C.C.A.]; also *Boyle v. Great No. Ry. Co.,* 63 F. 539 [C.C.D. Washington] and *Feil v. Wabash Ry.,* 119 F. 490). In each case the attorneys had a contingent contract and it was held that the plaintiff was not entitled to sue as a poor person upon an affidavit showing the poverty of the litigant only, but that the attorney must also file a like oath or go security for costs. In *Clark v. United States* [D. C. W. D. Mo.] (57 Fed. 2, 214), in a well reasoned opinion, it was held that a pauper affidavit by an attorney who represented the pauper on the contingent contract was unnecessary as a condition precedent to the prosecution of the action. We are in accord with the reasons set forth in that opinion.

An attorney having a contingent interest in a litigation, as payment for his services, is in a different situation from one having a direct interest in the recovery. Attorney's services, in his professional capacity, are subject to the restrictions placed upon him by the rules of ethics of his profession. He may not or should not be permitted to do more than give his services upon the prospect of success. He should never be called upon nor promise to finance the litigation, either by paying the expenses or the printing charges. In New York State to do so would run counter to the statute declaring such conduct champertous. There is nothing in the statute which requires the attorney to make such an affidavit. The humane thought underlying the statute is to assist the poor and afford an opportunity to prosecute their just claims where, if they met the costs of litigation, it would be prohibitive. It would conflict with the phrase of the statute and surely with its spirit to say that not only must the litigant, who sues, show himself to be a pauper but that his attorney must be found in the same category. The statute was intended for the benefit of those who are too poor to give security for costs; it was not intended to compel pauper lawyers to represent them; it is an affront to the dignity of the profession to think otherwise.

The corporation may not succeed in this motion for it is not a citizen. The individual has shown reason and justification for his petition and the motion will be granted as to him. Three copies of the stenographer's minutes and copies of the exhibits should be furnished.

Motion granted accordingly; denied as to appellant corporation.

L. HAND (dissenting): So far as I can find, it is established by all the well-considered cases that, whenever no champertous agreement is involved, an attorney prosecuting an action on a contingent basis must under this statute show that he also is too poor to print the appeal papers. *United States ex rel. Randolph v. Ross,* 298 Fed. Rep. 64 (C. C. A. 6); *Cheklovich v. United States,* 47 F. (2d) 894 (C. C. A. 9); *Boyle v. Gt. Northern Ry. Co.,* 63 Fed. Rep. 539; *Feil v. Wabash Ry. Co.,* 119 Fed. Rep. 490; *Silvas v. Arizona Copper Co.,* 213 Fed. Rep. 504. He is regarded as one of the beneficiaries, really a part owner of the cause of action, and falls within the rule that all beneficiaries must join in the oath. *Clay v. Southern Ry.,* 90 Fed. Rep. 472 (C. C. A. 6); *Volk v. Sturtevant Co.,* 99 Fed. Rep. 533 (C. C. A. 1); *Reed v. Pennsylvania Co.,* 111 Fed. Rep. 714. In *United States ex rel. Payne v. Call,* 287 Fed. Rep. 520 (C. C. A. 5), the attorney had agreed to pay the expenses of the suit at the time of his retainer, and that was concededly champertous. *Clark v. United States,* 57 Fed. (2d) 214, is in frank disagreement with the general rule, and rests upon a distinction between an attorney and other beneficiaries which is not apparent to me. There would be nothing champertous in the attorneys' defraying the cost of an appeal in this case, and indeed if the client is as poor as he says, I cannot see how it can be prosecuted even on typewritten papers unless they do so in part. I agree of course that they could not agree to pay the expenses of the litigation as a consideration of their retainer. But if they did not do so, and if, as they lawfully might, they had a contingent interest in the recovery, it is not the law of New York that advances voluntarily made by them to protect that interest are champertous. *Weeks v. Gattel,* 125 App. Div. 402; aff'd. 193 N. Y. 681; *In re Gilman,* 251 N. Y. 265. I can see no

reason for refusing to follow the uniform rule in other Circuit Courts of Appeal, or why a lawyer who has made himself in effect a part owner of the cause of action, should enjoy an immunity which other persons in the same case do not have.

[¶ 55,050] United States v. Weiner et al.

United States District Court, Southern District of New York. March 29, 1934.

Under the federal law, persons who were not parties to an injunction suit may nevertheless be found guilty of the violation of such injunction if they had knowledge of such injunction, even though obtained merely through a newspaper statement.

The opinion of the Court, delivered by District Judge Caffey, is digested as follows:

Defendant Schomer is not on trial. Nothing said or done in disposing of the case, as it affects the remaining defendants, is to be taken as applying to him. The court is here concerned only with the decree of February 6, 1932. It has been argued that the decree is not applicable to the Schoctim Union or to defendant Frankel, because they were not parties to the injunction suit.

Held that this contention is without merit. It is plain that both had knowledge of the injunction. It is further established beyond the realm of controversy that each of the defendants had knowledge of the injunction at the time of the occurrence of any of the events which it is material to consider on this trial. In that respect, the Federal law is different from the State law. Under the Federal law there is no necessity, as there is under the State law, of service of an injunction order or of a certified copy of it. Knowledge, even though obtained merely through a newspaper statement, of an injunction by a Federal court puts it into effect so far as concerns its prohibitions against all who by its terms are to be bound. The determination of this case turns on the credibility of witnesses and the weight of evidence. It was the intention, so far as, in the performance of its duties under the law, the court could do it, to put an end to unlawful evil practices in the poultry industry and to bring future conduct of those who were enjoined into harmony with the laws of the United States. The prohibitions of the decree are not to be defied. Whether those prohibitions be wise or unwise, whether those prohibitions be right or wrong,—and in this instance they are right, because the Supreme Court of the United States has said they are right,—they are to be obeyed so long as they stand. The proof of guilt with respect to the use of the positions of the delegates in the sale of poultry feed is overwhelmingly convincing. It is established by the evidence to the court's satisfaction beyond a reasonable doubt that defendants Joseph Weiner and Arthur Herbert are guilty. The court is not convinced by the requisite measure of proof, however, of the guilt of Charles Herbert. In so far as count 4 concerns defendant Rosenstein, the court will consider it in connection with so much of count 21 as relates to the sale of poultry feed. Under the proof, defendant Rosenstein is equally guilty with defendants Weiner and Arthur Herbert under count 4. Rosenstein is also guilty of the charge in that portion of count 21 with respect to poultry feed. Defendants Weiner and Arthur Herbert are not named in count 21. Rosenstein knowingly participated in the prohibited use of the delegates. It is the same, so far as affects the issue of his guilt or innocence, as if he had himself been a delegate. He was the president of the corporation. He employed and associated himself with the delegates in carrying out the plan for using those delegates with the aim and intention of putting such pressure on marketmen, and others engaged in the poultry business where there was occasion to employ union labor, that they dare not refuse to buy poultry feed from the Metropolitan corporation. Under counts 5 and 6 as to the S. S. & B. Market, defendant Weiner is overwhelmingly proved guilty. There is no explanation whatsoever in the credible testimony, nor on the established facts, except that defendant Weiner either caused or participated in causing the wrecking of that market. Under count 11, concerning Schechter Brothers, defendant Frankel in the court's judgment is clearly guilty. It is not established to the court's satisfaction that he was a participant in the injection

of emery into the oil or otherwise into the motor; but that he was a participant in the doing of the act charged in count 11 is established beyond a reasonable doubt. The forcing of the purchase of poultry feed from particular sellers at high prices,—at prices higher than the marketmen could buy from other dealers in poultry feed,—put an additional burden on the backs of consumers. That is a thing the decree was designed to correct. The forcing upon marketmen of the payment of high charges for the use of coops likewise was intended to be stopped, in order to avoid the additional expense imposed on the consumer. As to the charges in counts 12, 13 and 16, and as to so much of count 17 as concerns interference with or refusal of loading, the evidence establishes beyond a reasonable doubt that defendant Keslin is guilty as charged. The three union defendants, defendant Charles Herbert and defendant Aaron Weissler are acquitted of all charges. The sentence of the court is that defendant Weiner be imprisoned in the United States House of Detention for six months; and that under counts 5 and 6 he be imprisoned in the penitentiary for two years; service of the two years' sentence to begin when defendant is released from the sentence that he is now serving under conviction in the State court. In so far as lawful, the court would be willing to arrange in the judgment that the six months' sentence shall run concurrently with the two-year sentence. Upon that question the parties may be heard. Term of the court extended for that purpose. Defendant Arthur Herbert is to be imprisoned for six months, defendant Rosenstein for six months, and defendant Frankel for three months, in the United States House of Detention. The sentence of defendant Keslin is three months in the United States House of Detention.

[¶ 55,051] Scurlock Chevrolet Co., a corporation, v. Chevrolet Motor Company of California, a corporation, et al.

United States District Court, Southern District of California, Central Division. No. 6173-C. March 19, 1934.

An agreement among manufacturers and distributors of Chevrolet automobiles to adhere to a fixed schedule of prices at which used automobiles are to be accepted in part payment for Chevrolet automobiles, is not in violation of Section 1 of the Sherman Anti-Trust Act.

COSGRAVE, District Judge. The plaintiff held under contract, executed by one of the defendants, an agency for the sale of Chevrolet motor vehicles and replacement parts in the City of Van Nuys in this district. The commodities which were the subject of the contract were manufactured in the State of Michigan and shipped from that state to the State of California. The contract provides that either party thereto may cancel it on giving the other party thirty days' notice. The defendants are the manufacturers residing outside of California, the distributor, a California corporation, and others associated with it residing in California. Such being the case it is plain that unless the action is found to be brought under the anti-trust laws of the United States this court has no jurisdiction, as diverse citizenship is lacking between some of the parties defendant and plaintiff.

Plaintiff pleads that a certain condition in the contract, being that which permitted either party to cancel the same upon thirty days' notice to the other, was waived by an executed oral agreement. This executed oral agreement arose from the fact that before entering into the contract the defendant agreed that it would not enforce the particular clause referred to if the plaintiff invested certain money in the enterprise. This was before or contemporaneously with the signing of the contract.

Far from showing an executed oral agreement this is merely an attempt to vary the terms of a written agreement by a parol agreement contemporaneously made. The complaint is demurrable in this regard. Relief on this ground might be obtained in an appropriate action for reformation of the contract.

The complaint charges that the defendants entered into a conspiracy and agreement in restraint of interstate trade in that they agreed upon a schedule of prices at which used automobiles, when accepted by the dealers, such as the plaintiff, in

part payment for Chevrolet automobiles, were to be accepted and credit given according to a fixed schedule of prices. The plaintiff had developed a valuable business and when free to fix his own price to be paid for such used machines taken in trade it prospered. That defendants threatened that unless plaintiff adhered to the schedule of prices fixed by them its contract of agency with the California corporation would be cancelled. It was thereby put in fear, and by such compulsion reluctantly and unwillingly became a party to such agreement. Because it was not free to fix its own prices to be allowed for such used machines taken in trade its business was destroyed and it became insolvent.

The question presented is whether or not a combination to enforce such a contract, being one by which the local dealer is compelled to adhere to a certain schedule of prices for used cars taken in part payment for new ones sold, is a violation of the anti-trust laws of the United States.

I view the agreement referred to, that is, the forcing of a standard of prices at which used automobiles can be received in part payment of new Chevrolet vehicles, as merely a method of fixing the retail price of the latter. There is here no suggestion of any agreement among automobile manufacturers generally upon the price to the public of all vehicles. This merely affects the price at which this particular make of machine is sold in full competition with all other makes. There is nothing unreasonable in such a practice. It has been generally held that only unreasonable restraints are prohibited by the Sherman law. *Bedford Co. v. Stone Cutters' Association,* 274 U. S., 37, and cases there cited. My study of the case forces the conclusion that it is only when a substantial part of the trade or business is controlled that price fixing is prohibited. *U. S. v. Trenton Potteries Co.,* 273 U. S. 392, (398). *Tyson & Brother v. Banton,* 273 U. S. 418 (430), Syll. 6. *Federal Trade Commission v. Beech-Nut Packing Co.,* 257 U. S. 441 (452).

Motion of defendant to strike is granted and demurrer to complaint is sustained. Plaintiff may present motion to amend if so advised.

[¶ 55,052] Paul C. McAbee v. Pure Carbonic Co. of America et al.

United States District Court, Southern District of New York. L 54-465. April 9, 1934.

Although plaintiff's customers may have a right of action against certain defendants under the Clayton Anti-Trust Act, their failure to defend their rights confers no right of action on plaintiff, who is at best only indirectly affected by the alleged discrimination against plaintiff's customers. Where persons act allegedly in concert and as conspirators to discriminate against plaintiff, the remedy, if any, is under the Sherman Anti-Trust Act.

KNOX, D. J. The immediate victims of the wrongful acts charged against defendant in the second cause of action are the purchasers of plaintiff's machine. Such injury, if any, as has been sustained by plaintiff, is of a distinctly secondary nature. If it be that the immediate victims of defendants' price discriminations are vested, under the provisions of the Clayton Act, with valid causes of action against defendants, and if it be assumed that such causes are successfully prosecuted, and that damages for all injuries sustained, are recovered, it could hardly be contended that plaintiff, as a consequence of price discriminations, practiced upon his customers, can also hold defendants to liability and collect damages growing out of the same discrimination. And, if plaintiff's customers are content, as apparently they are, to submit to wrongful conduct upon the part of defendants, and plaintiff is thereby indirectly injured, the default of his customers in vindicating their right, confers none upon plaintiff. A doctrine to the contrary, in my opinion, would be insufferable. Not only would defendants be open to suit by plaintiff's customers, but by their employees, by plaintiff, and his employees, and possibly, the steel makers who supply the material out of which plaintiff manufactures his tanks.

Plaintiff is not a competitor of defendants, or of any of them. He buys nothing from defendants, or from any of them, nor does he desire to do so. He is in a business in which, he feels a repercussion of a wrong practiced upon his customers. It is, however, so far as the Clayton Act is concerned, but an incidental and non-actionable injury.

Its quality is not changed through the circumstance that, in practising discrimination against plaintiffs' customers, they act in concert and as conspirators. The remedy, if any, that is open for the protection

of plaintiff against the acts of defendant, is to be found in the Sherman Anti-Trust Act. The second cause of action is dismissed.

[¶ 55,053] Boss Manufacturing Co. v. Payne Glove Co.

United States Circuit Court of Appeals, Eighth Circuit. No. 9794. May Term, A. D. 1934. Decided May 24, 1934.

Appeal from the District Court of the United States for the District of Nebraska.

The sale by defendant of a specially made cotton glove at a reduced price, but similar in quality to the standard lines of both plaintiff and defendant, is not a violation of the Clayton Act in the absence of evidence that such cheaper product was offered for sale to all prospective purchasers.

Before STONE and SANBORN, Circuit Judges and WYMAN, District Judge.

WYMAN, District Judge, delivered the opinion of the Court.

This action was instituted in the District Court of Nebraska by the Payne Glove Company, a corporation, as plaintiff, v. Boss Manufacturing Company, a corporation, as defendant, to recover damages alleged to have been sustained by the plaintiff company as a result of certain alleged discrimination in price between different purchasers of certain cotton fabric husking gloves and husking mittens in violation of the provisions of the Act of Congress commonly known as the Clayton Act. For convenience the parties will be referred to as plaintiff and defendant as in the Court below.

The essential facts as disclosed by the record are as follows: Plaintiff is a Nebraska corporation, with its principal place of business at Lincoln, Nebraska, where it is engaged in the manufacture of cotton fabric husking or working gloves and mittens for sale in the state of Nebraska and adjoining states. Defendant is an Illinois corporation, engaged in a similar business, with its principal place of business at Kewanee, in the state of Illinois, and it also operates several branch factories at different points in the United States, the products of which are sold and offered for sale throughout the United States.

Among the products of the defendant company are a twelve ounce, two thumb, standard size, welt seam, nap outside, knit wrist, cotton flannel, husking mitten; also an eleven ounce husking glove, of similar material and construction, which said gloves and mittens were announced in December, 1929, by the defendant as a part of its line for the 1930 season, as Nos. 376 and 734, respectively, at a price of $1.55 per dozen pair. At about the same time, plaintiff announced its line and price list for the season of 1930, which included a twelve ounce, cotton flannel, two thumb, husking mitten known as No. 376, similar as to material and construction to the defendant's product No. 734. Plaintiff's line also included an eleven ounce, cotton flannel, husking glove, known as No. 311, similar to defendant's product No. 376, both of which gloves and mittens were priced at $1.50 per dozen pair. Above mentioned commodities were all made of the best grade of eastern flannel and were all practically the same in workmanship and construction. In February, 1930, the defendant announced a special cotton flannel, husking mitten known as No. 200, and the special cotton flannel, husking glove known as No. 300, which it offered for sale and sold at the price of $1.32½ per dozen pair. These special gloves and mittens were similar in construction and appearance to the defendant's regular products known as Nos. 376 and 734, respectively, but they were made of a cheaper grade of material known as southern flannel; the workmen employed in their construction were less expert than those who worked on the manufacture of the regular products, and they were less rigidly inspected. All of the salesmen of the defendant company were supplied with samples of both the regular or higher priced products and the special or lower priced products, and the special or lower priced gloves and mittens were offered for sale in the month of March, 1930, to wholesalers throughout the country and sales were made to wholesalers in Lincoln, Nebraska, and other cities in that vicinity, some of whom were customers of the plaintiff company.

After defendant had placed its special or lower priced gloves and mittens on the market, plaintiff reduced the price on its products Nos. 376 and 311 to $1.32½ per dozen pair, which resulted in financial loss to plaintiff.

The case was tried to a jury and at the conclusion of the evidence the defendant moved for a directed verdict in its favor on the ground of the insufficiency of the evidence, which motion was denied by the Court and exception allowed to the defendant. The jury returned a verdict in favor of the plaintiff and the case comes to this Court upon appeal from the judgment thereafter entered.

While there are several assignments of error, the real question upon which the case must turn is that raised by Assignment of Error No. 1, which challenges the action of the trial court in overruling defendant's motion for a directed verdict. If the record discloses any substantial evidence to support the verdict of the jury, then there was no error in the ruling complained of.

As indicated above the action is based upon an alleged violation of Section 2, of the so-called Clayton Act, (Title 15, Sec. 13, U. S. C. A.), which, insofar as applicable, reads as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof * * * where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce; Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality and quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition; And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

The question for determination is whether or not the record discloses any substantial evidence to support a verdict in favor of the plaintiff.

Passing for the present the question as to whether or not there was, in fact, any discrimination in price between purchasers, does the record disclose any substantial evidence in support of the finding that there was no sufficient difference in grade or quality between the regular and special products to justify a discrimination in price under the proviso of the statute? The undisputed evidence shows conclusively that the regular mittens and gloves, No. 734 and 376, respectively, were made of the best grade of eastern flannel; that the special mittens and gloves, Nos. 200 and 300, respectively, were made of southern flannel, which is an inferior grade of flannel, cheaper in price, and less durable than the eastern flannel; that the wrists of the special mittens and gloves were made of a poorer lot of knit tubing; that the special products were made by workmen of less experience, and that the inspection of these products was not as rigidly made as was the inspection of the regular gloves and mittens. The only evidence in the record which could be said to in any way support a finding of no difference in grade or quality between the so-called regular and special products, is the testimony of Mr. Hartmann, president of the plaintiff company, and several other dealers in cotton flannel husking gloves and mittens, each of whom, after examination and comparison of samples of the special Nos. 200 and 300, and the regular Nos. 734 and 376, testified as an expert that the so-called Nos. 200 and 300 appeared to be the same or that they were, in the opinion of the witness, identical, or that there was no difference so far as the witness could observe between them and the regular Nos. 734 and 376. In view of the physical facts as to the difference in material and construction between the special Nos. 200 and 300 and the regular product, as disclosed by the undisputed evidence in the record, the opinion testimony of the several witnesses to the effect that there was no difference between the two commodities cannot be regarded as a substantial evidentiary showing. The undisputed physical facts conclusively show that there was a difference in the grade and quality of the two sets of mittens and gloves, and in view of the fact that the difference in price was only 22½¢ per dozen pair, which would amount to less than two cents a pair, in the absence of substantial evidence to the contrary, the difference between the commodities would justify the discrimination in price.

Is there substantial evidence in the record which tends to show a discrimination in price between purchasers? A careful examination of the record convinces us that this question must be answered in the negative. While the evidence shows that the Boss Manufacturing Company offered and sold its special Nos. 200 and 300 to wholesalers at Lincoln, Omaha, Kansas City and other points in the trade territory of the plaintiff company, it also shows that each of the defendant's salesmen was provided with samples of both the regular and special numbers; that all of said commodities were offered for sale, and equal opportunity given to all prospective purchasers to buy any or all of said gloves and mittens. There is nothing in the record upon which to base a conclusion that there was any discrimination by defendant between prospective purchasers. Evidence tending to show the sale of Nos. 200 and 300 to a wholesaler at Lincoln, Nebraska, at $1.32½ per dozen pairs, and to sell Nos.

734 and 376 to another wholesaler at some other point in the United States at $1.55 per dozen pair, would not, in the absence of proof that the products were substantially the same, and the purchaser of the higher priced commodity was not permitted to purchase that of the lower price, support a finding of a discrimination between purchasers condemned by the statute.

There being no substantial evidence in the record tending to show discrimination between purchasers, the denial of the defendant's motion for a directed verdict constitutes error necessitating a reversal of the judgment.

In view of the foregoing conclusions we deem it unnecessary to consider the remaining assignments of error.

The judgment is, therefore, reversed and the case remanded.

SANBORN, Circuit Judge, concurring.

I agree that the evidence was insufficient to justify the conclusion that there was no difference between the special gloves and the regular gloves offered by the defendant to the trade and the conclusion that the defendant had offered the special gloves solely to the customers of the plaintiff or in the territory where they would do the plaintiff the most harm, and not to the trade generally. However, I think the judgment should be reversed only because of the insufficiency of the evidence to establish territorial discrimination. Had that been established, then I think that the jury might have found from the evidence that the differences between the specials and the regulars were so insubstantial as to indicate that the specials were being offered to a portion of the trade for the purpose of injuring the plaintiff's business and thus lessening competition. While circumstances established by the evidence create a strong suspicion that the defendant may have put out these special gloves for the purpose of injuring the plaintiff's business, as the plaintiff believes, they are not necessarily inconsistent with a hypothesis that these special gloves were offered generally to the trade, and if they were so offered, then, even though the differences were slight, there was no violation of the Clayton Act, since all purchasers had the opportunity to purchase the same gloves at the same price. The vital defect in the plaintiff's case, as I see it, is in its failure to take the question of territorial discrimination out of the realm of speculation and conjecture. I therefore concur.

STONE, Circuit Judge, dissenting.

I am unfortunate in not being able to see the evidence in the same way as the majority of the Court. While appellant attacks the sufficiency of the petition and also the admission of several pieces of evidence, the main controversy here is the sufficiency of the evidence. This being true, it is not useful in a dissent to discuss the minor issues more than to state that I find no basis for the challenges of the petition or of the admissions of evidence.

The attacks upon the sufficiency of the evidence are (1) that it failed to show discrimination in prices between different purchasers; (2) that it showed differences in grade and quality of the gloves, justifying price differences: (3) that it failed to show the effect would be lessening of competition or tendency to create monopoly.

(1) As to discrimination in prices between different customers, there was evidence which, if believed by the jury, would justify a conclusion that the cheaper glove was being offered only to customers of appellee with the statement that there was only a limited quantity and that purchases must be made immediately. The natural effect of this would be to stock up such customers resulting in loss of business to appellee, while the regular customers of appellant were not informed of this cheaper glove and would continue to pay the regular price for substantially the same glove. Where appellant's own customers did find out, from other sources, of the cheaper glove, it seems they could get it, but that glove was offered to and pushed upon a preferred line of purchasers—customers of appellee.

(2) Much of the evidence in the record is devoted to the question of whether the cheaper glove ($1.32½) was different in grade or quality from the higher priced glove ($1.55). I cannot read the evidence as to this as being undisputed. That of appellant tended to show many differences—such as in the grade of flannel used, in the grade of wrist tubing, in the grade of material used for the thumb patch, in the care and costs of manufacture (cutting, stitching, character of workmen and of inspection). However, appellee countered with evidence from experienced persons that the two gloves were substantially the same. This raised a conflict in the testimony.

(3) As to competition and monopoly, appellee showed that appellant was the largest concern of its kind; that appellee was a small concern with more limited trade territory; that the cheaper glove was offered by appellant to appellee's customers at a price below appellee's cost of manufacture; that this offer was concentrated on such customers. If these things be true (as the jury might find them to be), not only the natural but the inevitable result would be to lessen competition by driving appellee out of business and, also, thereby and to that extent, tend to create a monopoly in appellant.

I think that the evidence was sufficient in the respects in which it is attacked; that there was no error in the trial; and that the judgment should be

Affirmed.

[¶ 55,054] U. S. v. Millinery Quality Guild, Inc., et al.

U. S. District Court, Southern District of New York. In Equity, No. 75-99. June 8, 1934.

A conspiracy to fix minimum prices at which reproductions of French millinery were to be sold was enjoined by a consent decree.

Final Decree

The United States of America having filed its petition herein on the 23rd day of March, 1933, and each of the defendants, except Bonhotal Co. and Vogel Hat Co., Inc. (which have gone out of business) having duly appeared by their solicitors, and all the defendants who have appeared herein having by their solicitors consented

to the entry of this decree, without contest and before any testimony had been taken, and it appearing to the Court that the petition states a cause of action, it is

ORDERED, ADJUDGED and DECREED:

I. That the Court has jurisdiction of the subject-matter hereof and of all persons and parties hereto, and that the petition herein states a cause of action against the defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", commonly known as the Sherman Anti-Trust Act.

II. That the word "reproductions" as used in this decree means reproductions of women's hats, the originals of which were designed, manufactured or sold by milliners in France.

III. That defendants and each of them, their respective officers, directors, agents, servants, and employees, and all persons claiming to act on behalf of them or any of them be, and they hereby are, perpetually enjoined, restrained and prohibited from carrying out, directly or indirectly, expressly or impliedly, the combination and conspiracy alleged in the petition for fixing minimum prices for reproductions, and from entering into or carrying out any similar conspiracy, or any contracts, agreements or understandings between themselves and wholesale or retail milliners, relating to the prices at which such wholesale or retail milliners shall sell or resell such reproductions.

IV. Specifically, and without thereby limiting the generality of the foregoing, that the defendants and each of them, and each and all of the officers and directors of the respective corporate defendants, and any and all agents, servants and employees of defendants, and all persons acting or claiming to act for or in behalf of the defendants or any of them, be and they hereby are perpetually enjoined, restrained and prohibited from—

1. Requiring the sale of reproductions at not less than agreed minimum prices.

2. Selling or delivering labels to be affixed to said reproductions on the condition or requirement that the purchasers or users thereof, or anyone else, shall sell or resell the reproductions to which such labels shall be attached only at not less than agreed minimum prices.

3. Requiring purchasers or users of any such labels to be affixed to said reproductions to agree to sell said reproductions to others only on the condition or requirement that they be resold at not less than agreed minimum prices.

4. Requiring purchasers or users of such labels to keep and disclose to the defendants records showing the prices at which reproductions to which such labels are attached have been sold, or any other records, for the purpose of ascertaining the price or prices at which such reproductions to which such labels are attached have been sold.

5. Refusing to sell reproductions or furnish such labels to any persons, firms or corporations for the reason that such persons, firms or corporations are selling or reselling, or have sold or resold, reproductions at prices other than those named, suggested or otherwise indicated by the Guild or the other defendants.

V. Nothing in this decree shall be deemed or construed to prevent any defendant, its officers, agents, servants, employees, or persons acting under, through, by or in behalf of it, or claiming so to act, from doing any of the acts authorized, permitted or required by the Code of Fair Competition for the Millinery Industry approved by the President December 15, 1933, by the amendments thereto approved March 24, 1934, pursuant to the Act of Congress of June 16, 1933, known as National Industrial Recovery Act, by any further modification of, addition or amendment to said Code, or by any new code for the millinery industry which may hereafter be approved by the President, or on his behalf, under said Act during such time as and to the extent to which the same shall remain in effect and shall be in accordance with the National Industrial Recovery Act.

VI. The United States may at any time apply to the Court for further relief herein, on the ground that operations under, or purporting to be under, the said Code of Fair Competition, the amendments thereto approved March 24, 1934, or under, or purporting to be under, any further modification of, addition or amendment to said Code, or any new code for the millinery industry, which may hereafter be approved, are promoting monopolies, or are eliminating, oppressing or discriminating against small enterprises, or are permitting monopolies or monopolistic practices.

VII. That petitioner shall recover from defendants its taxable costs herein.

VIII. That jurisdiction of this cause is hereby retained for the purpose of modifying or enforcing this decree. Dated: June 8, 1934.

Jno. C. Knox, United States District Judge.

[¶ 55,055] United States v. Kansas City Ice Co. et al.

U. S. District Court, Western District of Missouri. Filed June 5, 1934.

Defendants, engaged in the ice business, enjoined under the Federal Anti-Trust Laws from having agreements or understandings as to exclusive territories, curtailment of supply, elimination of retail ice stations and discrimination in prices.

Decree

This cause coming on to be heard this 5th day of June, 1934, on a regular court day of the April Term, and the several defendants having appeared, the petitioner moved the Court for a decree in conformity with the prayers of the Petition; and the defendants having consented to the making and entering of this decree;

Now, therefore, it is Ordered, Adjudged, and Decreed as follows, as to all defendants except Armour and Company, Mountain Ice Company, William J. Sinick, and W. N. Shoemaker.

I

That the Court has jurisdiction of the subject matter and of all the parties hereto; that the petition states a cause of action against the defendants under the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" and acts amendatory thereof and supplemental or additional thereto, known as the Federal Antitrust Laws.

That the Kansas City Ice Company will be hereinafter referred to as "the Combine." The remaining corporate defendants will be hereinafter referred to as "corporate defendants," and independent contractors commonly known as "ice dealers," or "ice peddlers," will be hereinafter referred to as "the Dealers."

II

That the defendants and each of them, individually and collectively, their successors, members, officers, directors, managers, agents, servants, employees, and all persons acting or claiming to act, under or in behalf of them, or any of them, be and they hereby are permanently and perpetually enjoined and restrained from in any way maintaining, continuing, or reviving, either directly, or indirectly, by any means whatsoever, the combination, conspiracy, and monopolization of trade and commerce in ice and the ice business described in the petition herein, or any combination, conspiracy, or monopolization similar thereto, and which is in contravention of the Federal Antitrust Laws.

III

That the contracts between the Combine and the corporate defendants and the lease agreements between the Combine and certain of the corporate defendants, be declared in violation of the Federal Antitrust Laws, particularly "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, and that the following specific contracts and lease agreements are hereby declared null and void:

(a) The contract of October 13, 1933, between Artificial Ice Company and the Combine.

(b) The contract of October 13, 1933, between City Ice Company and the Combine.

(c) The contract of October 13, 1933, between Consumers Ice Company and the Combine.

(d) The contract of October 13, 1933, between Empire Storage and Ice Company and the Combine.

(e) The contract of October 13, 1933, between Midwest Ice and Cold Storage Company and the Combine.

(f) The contract of October 13, 1933, between Railways Ice Company and the Combine.

(g) The contract of October 13, 1933, between Southwest Ice Company and the Combine.

(h) The contract of October 13, 1933, between Superior Ice and Coal Company and the Combine.

(i) The contract of October 13, 1933, between United States Cold Storage Company and the Combine.

(j) The contract of October 13, 1933, between Western Ice Service Company and the Combine.

(k) The lease agreement of January 1, 1934, between City Ice Company and the Combine.

(l) The lease agreement of January 1, 1934, between Consumers Ice Company and the Combine.

(m) The lease agreement of January 1, 1934, between Artificial Ice Company and the Combine.

(n) The lease agreement of January 1, 1934, between Western Ice Service Company and the Combine.

IV

That the defendants and each of them, their successors, members, officers, directors, managers, agents, servants, employees, and all persons acting or claiming to act under or in behalf of them, or any of them, be and they are hereby, permanently and perpetually enjoined or restrained from agreeing among or between themselves, or having understandings or agreements amongst or between them, to—

(a) Make, or induce, persuade or coerce the Dealers to make or enter into, contracts with them, whereby said Dealers surrender their routes of delivery and lists of customers and accept in place thereof, restricted and exclusive territories; or whereby said Dealers agree to refrain from purchasing ice from manufacturing plants and wholesalers other than the defendants or any of them; or whereby said Dealers agree to refrain from invading zones or territories assigned to other Dealers; or whereby the Dealers agree to refrain from operating retail cash-and-carry ice stations;

(b) Close down a large number of their

manufacturing plants, so as to seriously curtail a large proportion of the volume of ice needed to supply demands of consumers;

(c) Eliminate, suppress, or curtail the retail ice stations or any part of them now available to and used by cash-and-carry consumers;

(d) Discriminate in prices between Dealers in ice, where such Dealers are of the same class, and where the grade, quality or quantity of ice purchased is approximately the same in such class, or where there are no existing differences in the cost of selling or transportation.

V

That the Kansas City Ice Company shall wind up its affairs and be dissolved within three months after the date of entry of this decree.

VI

That jurisdiction of this cause is hereby retained for the purpose of enforcing this decree, or enabling the parties to apply to the court for modification or enlargement of its provisions on the ground that they are inadequate or have become inappropriate or unnecessary.

VII

That petitioner have and recover of the defendants the costs of this cause.

MERRILL E. OTIS,
United States District Judge

[¶ 55,056] Kellogg Company v. National Biscuit Company.

U. S. Circuit Court of Appeals, Second Circuit. June 18, 1934.

If the acts of the defendant, falsely representing in deliberate bad faith that it has an exclusive right to the name "shredded wheat" and to the form in which its biscuits are marketed, are part of an attempt to effectuate a monopoly, the plaintiff can maintain suit for treble damages under the Clayton Act even though ordinarily such acts would establish a cause of action for unfair competition or malicious prosecution only and would have nothing to do with the anti-trust acts.

Before: MANTON, AUGUSTUS N. HAND and CHASE, Circuit Judges.

Appeal from United States District Court for the Southern District of New York.

From an order dismissing the amended complaint in an action by plaintiff to recover treble damages from the defendant pursuant to Section 4 of the Clayton Act, the plaintiff appeals. Reversed.

AUGUSTUS N. HAND, Circuit Judge: It might at first seem that this action against the National Biscuit Company by a competitor to recover treble damages under Section 4 of the Clayton Act was without foundation but we are on the whole inclined to think that enough is set forth in the complaint to withstand demurrer and to require the defendant to submit to trial.

The charge in general is of an unlawful attempt to monopolize the business of selling shredded wheat. This charge is confused with claims that the defendant is responsible for acts done by Shredded Wheat Company, a predecessor corporation from which it purchased a business in shredded wheat, together with certain trade-marks and property. It is nowhere alleged that this purchase involved a merger, consolidation or other method of succession whereby the defendant would become responsible for the liabilities in contract or tort of its predecessor. For all we know, it acquired the properties for cash and succeeded to none of the liabilities of Shredded Wheat Company.

A great part of the verbose and at times confused allegations of the amended complaint relates to transactions of defendant's predecessor which it is sought to impute to the defendant by alleging that it "has ratified, adopted and still continues the before described scheme of its predecessor to suppress competition in said interstate shredded wheat business and thereby secure to itself a complete monopoly therein * * *." As the complaint stands, this portion of what may be termed the prologue is almost entirely irrelevant to a cause of action that only arose after the defendant had purchased the business and trade-marks of Shredded Wheat Company in 1930, and has no application except as it contains allegations of vague import that since the purchase the defendant has continued the course of conduct of its predecessor. But the alleged torts of the defendant should not rest on indefinite comparisons with another corporation, but on precise allegations as to its own actions.

Clause 43 and the clauses following, however, seem to contain certain allegations pertinent to the cause of action asserted.

They state that about the year 1930 the defendant purchased the going business and property of the Shredded Wheat Company and directed its salesmen to slander plaintiff and its product by telling dealers that its product is an inferior and outlaw product, that it is not shredded wheat, but a spurious and inferior imitation and that the defendant alone has the exclusive legal right of making and selling shredded wheat. The complaint further alleges threats that dealers will be prosecuted as contributory infringers for buying, handling and vending plaintiff's product and must cease on pain of being unable to procure other of defendant's products; that they will be boycotted and held up to the trade as infringers and conspirators with the maker of outlaw goods and that they must break their contracts with plaintiff. It is further alleged that through newspapers, magazines and trade journals of the nation a similar false, intimidating and libellous campaign of propaganda has been directed by defendant against plaintiff, its product and dealers, defendant at times basing such propaganda upon false claims of exclusive rights to expired patent processes and trade-mark words, all for the purpose of destroying plaintiff's competitive business in shredded wheat biscuits and of exclusively appropriating the same to itself. The plaintiff likewise alleges that the defendant as a further step in its monopolistic scheme in bad faith instituted, in June, 1932, an "unwarranted, vexatious and unjustifiable" action in the United States District Court for the District of Delaware to restrain the manufacture of shredded wheat in the form and shape shown in the expired design patent formerly belonging to defendant's predecessor and to enjoin the use of the words "shredded wheat" in any way and that it has threatened a large number of customers of plaintiff through the several states whose names are set forth, warning them that plaintiff's product is not shredded wheat and that defendant has exclusive right to sell that product. These things are alleged to have been done by the defendant though it knew that its exclusive monopoly and trade-mark claims were invalid and in order to restrain competition and secure a monopoly in the business of shredded wheat. It is further alleged that defendant, in the year 1932, as a part of its unlawful scheme, marketed a new size of biscuit substantially indistinguishable from the biscuit which plaintiff had designed in order to differentiate its goods from those of defendant and that this was done in order that defendant's biscuit might be substituted for plaintiff's biscuit and palmed off as such. The complaint further alleges that by reason of the vexatious suit, and the attempted monopoly and false propaganda, plaintiff has been damaged in its business and property in a sum in excess of $1,000,000.

Reading the complaint as a whole it seems probable that plaintiff little relies on the simple allegations that defendant has falsely represented that plaintiff's goods are of inferior quality and infringe process patents, and on threats to do no business with concerns that are customers of plaintiff, but really bases its cause of action on the ground that defendant has asserted to the trade that plaintiff could not make its biscuits in the shape of defendant's and could not use the words "shredded wheat" in any way and has made this assertion in spite of the fact that defendant has no valid trade-mark or other rights either in the name "shredded wheat" or in the shape of the biscuits it sells and was aware of this fact. This interference with plaintiff's use of descriptive words and forms of shredded wheat functionally necessary is said to have prevented it from marketing its goods and to have tended both to restrain competition and to effect a monopoly. In support of this view, plaintiff argues that in *Shredded Wheat Co. v. Humphrey Cornell Co.*, 250 Fed. 960, we decided that, while the shape of shredded wheat biscuits employed by the Shredded Wheat Company had acquired a secondary meaning indicating that such biscuits were the product of that company, we would not require the defendant in that case to change the shape or size of its biscuits but only to affix a mark or tag thereon that would indicate that they were not the goods of the Shredded Wheat Company. Plaintiff alleges that it has made its biscuits of a different shape from those of defendant and that they are now readily distinguishable from the usual shape of the latter. Therefore, plaintiff says, defendant's claims to the trade of exclusive rights are only calculated to prevent plaintiff from competing and to aid defendant in maintaining a monopoly. Plaintiff likewise argues that the decision of the Court of Appeals of the District of Columbia in *Natural Food Co. v. Williams*, 30 App. D. C. 348, shows the lack of foundation and bad faith of defendant's claim of an exclusive right to use the name "shredded wheat," for that court refused to sustain a trade-mark in the words "shredded whole wheat" under the Act of February 20, 1905, on the ground that the language was purely descriptive and had not been exclusively used by Natural Food Company, one of the predecessors in title of National Biscuit Company, for more than ten years.

We cannot regard either *Shredded Wheat Co. v. Humphrey Cornell Co.* or *Natural*

Food Co. v. Williams, supra, as showing that defendant's claims of an exclusive right to use the name "shredded wheat," or the shape in which it vends its biscuits, are without merit or indeed as determining the rights of either party hereto. Nor would they in any event afford controlling criteria either for this court or the District Court of Delaware where the parties are not the same and the proofs may entirely differ. Moreover, the decision in *Natural Food Co. v. Williams* affected only trademarks issued under the Act of 1905, and was only that the words "shredded whole wheat" had not at the time been exclusively used by Natural Food Company for more than ten years. There seems nothing in either decision that necessarily determines the rights of the parties here.

The question arising upon the trial of the present action will be of the sufficiency of proof of acts showing an attempt to effect a monopoly and substantially to restrain competition in shredded wheat. To bring the defendant under the anti-trust acts, the plaintiff may show that defendant has threatened to cease dealings with customers unless they declined to deal with plaintiff, has falsely represented plaintiff's goods to be inferior and has in bad faith and without probable cause told plaintiff's customers that they could not use the words "shredded wheat" or market a biscuit of the shape employed by the defendant. It is alleged that the plaintiff has been doing business recently without using shredded wheat as a name to designate its goods and it may not appear that any loss has followed from that course. If such should be the case, it is difficult to suppose that plaintiff has suffered damage unless from false propaganda to the effect that plaintiff's goods were inferior, or that they were covered by patents which had in fact expired—that is to say, from threats of one kind or another whereby plaintiff has been deprived of customers.

Defendant earnestly contends that even deliberate bad faith in claiming an exclusive right to the name "shredded wheat" and to the form in which its biscuits are marketed would only establish a cause of action for unfair competition or malicious prosecution. We are not convinced that such is the case. Undoubtedly such causes of action would ordinarily have nothing to do with the anti-trust acts. But if they were part of an attempt to effectuate a monopoly we cannot see that they would certainly fall outside of the statute merely because the facts furnished a basis for causes of action for unfair competition or malicious prosecution. If a person having no substantial claim to a trade-mark in the words "shredded wheat" uses the claim in bad faith to threaten a competitor and his customers with lawsuits in order to prevent dealings by the latter in that commodity, they would seem to be steps in an attempt to obtain a monopoly. If he claims, without probable cause and in bad faith, that he is entitled to sell all the shredded wheat of a certain size or shape that would be a further step.

It must be borne in mind, however, that it would not be enough to show that the defendant brought a groundless suit to establish a trade-mark or the exclusive right to market goods of a certain shape. There must be adequate proof that it was with the attempt not to establish the right but to restrain competition and monopolize part of the trade or commerce between the several states. *Virtue v. Creamery Package Co.,* 227 U. S. 8, 38. While it doubtless would not be within the anti-trust acts to bring a suit to assert a patent or trademark right whatever the motive, if the claim was valid, an attempt to assert a known invalid claim would be a different matter. *Virtue v. Creamery Package Co.,* 179 Fed. 115, 120, affirmed 227 U. S. 8; *Mitchell Woodbury Corp. v. Albert Pick Barth Co., Inc.,* 41 Fed. (2d) 148. The remarks to the contrary in *International Visible Systems Corp. v. Remington-Rand, Inc.,* 65 Fed. (2d) 540, with all respect, we are unable to agree with. But questions as to the purpose of prosecuting the Delaware suit are for the trial court and cannot be determined on a motion attacking the complaint.

On the trial, the principal question will be whether the defendant has attempted to monopolize the trade in shredded wheat, or only to establish exclusive rights in certain trade-names, trade-marks and shapes of the manufactured product. If the latter, the cause of action so far as it is based on bringing the Delaware suit must fail. Indeed, unless much more can be established than the bringing of that suit and that it is unlikely to succeed, it would seem that this plaintiff should try out its rights there and not burden the courts with an action which would, in that event, show no promise. In view of the rule that on demurrer every intendment is taken to be in favor of the pleader, we think there are enough general allegations to prevent a dismissal.

It is contended by defendant that its registered trade-marks cannot be attacked collaterally. While it is true that a registered trade-mark cannot be cancelled except by direct attack in the way prescribed in the statute, trade-marks registered under the law of 1920, as those in question were, are not thereby rendered valid. Their validity may still be questioned in any suit in which they are relied upon. That act was for

the purpose of enabling persons in this country to register trade-marks so that they might obtain registration under the laws of foreign countries. As we said in *Charles Broadway Rouss v. Winchester Co.*, 300 Fed. 706, it has no effect on the domestic rights of the person whose trade-mark is registered. In short the registration cannot in itself determine any of the issues involved in the present case.

The order is reversed with direction to deny the motion to dismiss the complaint.

[¶ 55,057] Baush Machine Tool Company v. Aluminum Company of America.

United States Circuit Court of Appeals for the Second Circuit. July 9, 1934.

In a suit to recover damages caused by violation of the monopoly provisions of the Sherman Act, evidence is admissible as to acts performed by the defendant prior as well as subsequent to the inquiry to the plaintiff, as to contracts entered into by the defendant with foreign as well as domestic corporations, and as to facts implying although not directly proving an agreement to distribute markets.

Before: MANTON, SWAN and CHASE, Circuit Judges.

Appeal from the District Court for the District of Connecticut. Suit to recover damages caused by violations of Sec. 2 of the Sherman Act (15 U. S. C. 2).
Judgment for defendant; plaintiff appeals. Reversed.

MANTON, Circuit Judge. This case was tried before a jury and the issues raised were submitted to the jury which found a verdict for the appellee. The appellant, complaining of errors in the exclusion of evidence and in the charge of the trial court, appeals.

Appellee, a Pennsylvania corporation, is engaged in producing aluminum alloys, including an alloy known as duralumin, and in fabricating sheet, rods, tubing, forgings, and other products from such alloys and aluminum. It sells such alloys and fabricated products in competition with the appellant throughout the United States. Duralumin, produced by the appellant, is composed of 4% copper, .6% manganese, .5% magnesium, .1% chromium and the balance aluminum of a purity described as 99 plus. Appellee's duralumin contains 4% copper, .5% magnesium, .5% manganese and the balance 99 plus aluminum. Duralumin is a strong alloy of aluminum having a tensile strength of mild steel and 36% of its weight. Other strong alloys are manufactured by the appellee. Appellant also made what was termed modified duralumin. Both made pure aluminum sheets, or commercially pure, 99% or better. The primary business of the appellee is the production and sale of aluminum. Thus engaged in the production of aluminum alloys, they were in competition. In producing that metal, appellee mined bauxite, the ore from which aluminum is made, refined it into aluminum oxide and then reduced the composition into aluminum by electrolytic process. The electricity for this is generated by hydro electric power plants and therefore water power plants and water power rights are valuable assets. Ingot aluminum thus made is either sold in that form or fabricated into the products referred to. Fabrication process is carried further in other plants to finished products, such as kitchen utensils and household wares. Appellee sells its own products and the products of its wholly owned subsidiaries. These subsidiaries include companies performing the operations referred to, the only direct manufacturing operations of the appellee being the reduction of aluminum at three plants. A fourth reduction plant was operated by a subsidiary, the Carolina Aluminum Company. Prior to June, 1928, the appellee owned a large number of subsidiaries in foreign countries. May 31, 1928, it caused to be formed Aluminum Limited, a Canadian corporation and caused to be transferred to it all its foreign interests.

Aluminum is a basic metal in appellant's products. Dealings in this metal by both necessarily occurred and because of the acts complained of this controversy developed. Appellant charges that appellee monopolized commerce in aluminum among the several states and that appellee has attempted to monopolize commerce in aluminum alloys and aluminum products, and that products are sold at a price which would yield no profit to any manufacturer who purchased aluminum at the monopoly price fixed by the appellee. Moreover, it

charged that prices were fixed at an artificial level, above prices yielding a fair and reasonable profit over the costs of production and above the prices which would have existed in a fair and competitive market. Its complaint is that these conditions in both the aluminum and the duralumin markets were bound to and did cause damage to it. Appellee and its wholly owned subsidiary, the Carolina Aluminum Co., are the sole producers of virgin aluminum in the United States. The appellant claims the appellee expanded by the acquisition of substantially all of the commercially available bauxite deposits in the United States and by the suppression of independent attempts to enter upon the production of aluminum. The trial court excluded evidence offered in substantiation of this charge and appellant complains of this ruling.

The appellee is the largest producer of aluminum in the world and Aluminum Limited is the second largest. Four foreign corporations, one British, one French, one Swiss and one German located selling agencies in the United States in competition, but their importations were relatively small. The significance of this is of primary importance because of the past relations between appellee and these corporations. The appellee had been associated with the British and the French companies in the ownership of a Norwegian corporation and with the French company in the ownership of another smaller French company and an Italian company. The appellee with the Swiss corporation, and the French corporation had formed a Spanish corporation.

The principal European producers were members of a cartel, an association which could limit competition. In 1912, the Northern Aluminum Co. of Canada, a subsidiary of the appellee, entered into an agreement with the French Company, the Swiss Company, the British company, two other English companies and an Italian company to form an association, the object of which was to regulate and control the sale of aluminum outside of the United States. It was not clearly shown whether or not this organization continued after the World War. There was, however, an aluminum association in existence until 1931 of which the appellee denies it was a member. After organizing Aluminum Limited, the appellee no longer engaged in foreign trade. Aluminum Limited did not compete in the United States. In addition to that fact, there was substantial evidence to indicate that the two organizations were treated as a unit. The appellee from 1925 to 1931 inclusive, controlled from 85 to 95 per cent of the supply of aluminum in this country, whether produced here or imported and it controlled approximately 90% of the bauxite of the United States, whether mined here or imported. From this large percentage of control it was argued that the jury might have found power to control and the actual control of prices. Moreover, it was shown that prices were constant for long periods at levels far above cost plus a normal profit from which the jury might say there was monopolization within the statute. (15 U. S. C. 2) Besides the claimed monopoly in aluminum, the appellant also offered evidence showing appellee's policy of selling duralumin at prices which would eliminate the possibility of a producer, in appellant's position, making a profit if it were forced to purchase aluminum at the prevailing prices.

The appellant offered in evidence contracts and agreements entered into between the appellee and various corporations before the present controversy arose. These corporations were engaged in the same industry as appellee or owned large deposits of bauxite or water rights. The contracts provided for the absorption of these corporations or the acquisition of their assets by the appellee. In some instances, the contracts contained clauses restricting the transferors from engaging in a similar or competing business. Also it offered in evidence an agreement between the earlier Canadian subsidiary and the Swiss company whereby certain countries were selected and each covenanted not to sell in each other's territory. A clause of that contract provided that "The Northern Aluminum Co. engages that the Aluminum Company of America will respect the prohibitions hereby laid upon the Northern Aluminum Co." Although the appellant contended the evidence was material, since it was attempting to show by this evidence the elimination of all possible competition, the court excluded it on the ground that it bore only on intent which the court held to be a collateral matter. Intent may well be more than a collateral matter. *United States v. Corn Products Refining Co.*, 234 Fed. 964, 1013. It was error to exclude the evidence showing the purchase of the stock and assets of the other corporations, even though the transactions occurred long before the injury complained of. Monopolies are frequently attained by the acquisition of the controlling interest in one corporation after another. *Standard Oil Co. v. United States*, 221 U. S. 1; *United States v. American Tobacco Co.*, 221 U. S. 106; *Aluminum Co. of America v. Federal Trade Comm.*, 234 Fed. 401 (C. C. A. 3). Although the acquisition of itself is not illegal, the stifling of competition by the application of the concentrated power is.

United States v. Eastman Kodak Co., 226 Fed. 62. The appellant should have been permitted to show that the absorption of these smaller domestic corporations had created a monopoly even though the transaction had occurred before the present controversy arose. The history of the organization throws light upon its illegality. The conduct of persons, agreements and acts done preceding the vesting of power may show monopoly—and these acts may be weighed although they occurred prior to the injury. *Chicago Bd. of Trade v. United States*, 246 U. S. 231; *Standard Oil Co. v. United States, supra.*

It was shown that Aluminum Limited sold large quantities of metal for delivery in the United States, but to the appellee, and not in competition with it; ten million pounds were sold in May, 1929, at 22¼¢ per pound for 99 grade ingot, duty paid, and forty-two million pounds in October, 1929, at 20¢ per pound for the same grade, duty paid. The price quoted by the appellee for this grade in 1929 was 24.3¢. Subsidiaries of Aluminum Limited obtained alumina from a subsidiary of the appellee in large quantities in 1929 and 1930, just as they did prior to June, 1928. The price charged Aluminum Limited for alumina was the same price which the appellee's subsidiary charged the appellee.

Appellee transferred its foreign selling agencies to Aluminum Limited and then ceased to compete outside the United States. The appellant argues, that had not the issues been submitted to the jury in the restricted manner hereafter referred to, the jury might have found that the appellee and Aluminum Limited were parts of the same organization, corporate instrumentalities, though separate in form, owned and controlled by the same small group of men, who preferred to cause Aluminum Limited to sell in foreign markets and to exclude that organization from the markets of the United States in order that the appellee might sell here at a higher price per pound. Aluminum Limited entered into a written agreement with the British, French, German and Swiss companies with respect to the Japanese market and with the British company with respect to the Indian market with the same monopolization in mind.

Appellant purchased exclusively from foreign producers from 1925 to 1931 inclusive. During the six years just preceding the date of this suit (July 1931), it bought and paid for 4,035,904 pounds. By analysis, the appellant showed that throughout it paid for metal a price which it claimed was unnecessarily high, considering the cost and reasonable profit, and that it was obliged to do so because of the domination and control by the appellee of the aluminum market. It also claimed damages sustained by reason of cutting the prices of aluminum alloys. There was evidence from which the jury might reasonably conclude that there was a fixity of price made and controlled by the appellee from which the appellant suffered damages.

Appellant's claim for damages is based upon the claim that the appellee had a monopoly. It was obliged to prove injury by the monopoly. It first attempted to show there was in fact a monopoly and, for this purpose, evidence was admissible to show the conduct of persons in control and agreements and acts done preceding the vesting of power. Such evidence could be considered, although the acts occurred prior to the injury. To exclude this evidence was error. Nor should the appellee have been restricted to the introduction of evidence relating to transactions with domestic corporations. Relations with foreign corporations were admissible also for another reason. A monopoly within the United States created by contract or agreement with foreign corporations is unlawful. *United States v. American Tobacco Co.*, 221 U. S. 106. The contracts entered into by the appellee and the appellee's subsidiaries with foreign corporations and the purchase of stock in these foreign corporations were admissible for the purpose of showing a tacit understanding not to compete. Although the court indicated that the jury could find that an agreement existed between the appellee and the foreign corporations without finding an express agreement, portions of the charge completely limited the scope and effect of that instruction, for the court ruled that evidence of such agreement must be found in the testimony of Haskell, appellant's president, charging:

"* * * I have been constrained to rule that the circumstantial evidence in this case is insufficient to constitute independent evidence of an agreement between the defendant and the foreign producers, speaking now of the foreign producers exclusively of Aluminum Limited, the Canadian concern. It results that if there is anywhere in the case evidence of an agreement, independent evidence of an agreement between the defendant and these foreign producers, it must be found in the direct testimony of Mr. Haskell. * * *"

The evidence of uniformity of prices in the United States which the appellee and the foreign producers charged over the period from 1919 to 1931 inclusive, under the circumstances, as the evidence disclosed, might well support a finding by the jury of an agreement between the appellee and the foreign producers. This issue should have been submitted to the jury irrespective of belief or disbelief of Haskell's testimony. Conspiracies are sel-

dom capable of proof by direct testimony and may be inferred from the things actually done and from the circumstances. *Frey & Son v. Cudahy Packing Co.*, 256 U. S. 208; *United States v. Shrader's Son, Inc.*, 252 U. S. 85; *Eastern States Retail Lumber Dealers Asso. v. United States*, 234 U. S. 600. The evidence presented by the appellant should have been submitted without the restriction contained in the charge quoted, for it showed the past mutual undertakings and stock transactions between foreign producers and the appellee and its subsidiaries. It showed the past close relationship from which might be implied, together with other evidence, a mutual understanding not to compete and to maintain fixity of price. Moreover, the relationship of Aluminum Limited with the appellee and the holdings of Aluminum Limited in the foreign corporations, were items not to be disregarded. Aluminum Limited on its organization had transferred all of its shares to the appellee in exchange for all of the foreign business and holdings of the appellee. The appellee distributed these shares to its stockholders. In December, 1931, control of a majority of the shares of this corporation was in the hands of four men of prominence in appellee's organization—its chairman of the Board of Directors, its President, a director and a large stockholder of the appellee. Numerous other officers of the appellee also held stock in Aluminum Limited. Although such a relationship would imply the dictation of the policies of Aluminum Limited by its controlling bodies—and therefore an order rather then an agreement not to compete in the United States—that implication does not negative the fact that the close relationship of the two competitors might carry with it a tacit agreement between the two corporations proper not to compete with each other. Nor does it eliminate the possibility of an authorization of the offspring, by the appellee, to arrange for the distribution of available markets with foreign producers. Juries are allowed to act upon probable and inferential as well as direct proof. *Story Parchment Co. v. Paterson Paper Co.*, 282 U. S. 555.

It is not necessary that the authorization of Aluminum Limited or an agreement between the appellee and Aluminum Limited be express and formal to be found illegal. If it were necessary, acts otherwise illegal could be made legal freely. The appellee may not so easily avoid the statute. See *United States v. Northern Securities Co.*, 120 Fed. 721, C. C. D. Minn., 193 U. S. 197. It is sufficient if the directors of the two corporations understood the arrangement. Moreover, when, in addition to these circumstances, there is added the testimony of Haskell, it was incumbent upon the trial judge to submit all the evidence to the jury and it was for the jury to say whether or not there was the control and domination charged. The fact that the jury were disinclined to believe Haskell's testimony has not been lost sight of, but it should be considered that the jury was directed to consider Haskell's testimony by itself. If the evidence produced by him was considered along with the corroborating evidence, the jury might find differently. The instructions to the jury which directed that the jury would have to find for the appellee if they found no agreement in effect between appellee and the foreign producers or between appellee and Aluminum Limited to control the price of aluminum or to restrain competition in the United States was erroneous. *Standard Oil Co. v. United States*, 15 U. S. C. A. 2.

The fact that the Appellant could obtain the metal from other sources—scrap metal or by purchase from foreign producers—does not make the appellee's control of the market any less a monopoly. *Straus v. Victor Talking Machine Co.*, 297 Fed. 791. If there was domination and control of the market in the United States and appellee suffered injury, approximately caused by these illegal acts the jury might award damages. *Story Parchment Co. v. Paterson Paper Co., supra.* And appellant was entitled to a jury's determination of whether in fact there was this illegal domination and control and stifling of competition. The evidence referred to was admissible for the jury's consideration as tending to show that competition was being stifled and prices fixed.

The appellant offered in evidence an agreement between the appellee and the General Chemical Co., dated July 25, 1905, by which appellee acquired shares of the General Bauxite Co. and undertook to supply the General Chemical Co. with Bauxite over a period of 50 years, the latter covenanting not to use or to permit bauxite to be sold to it to be used for conversion into aluminum. This evidence should have been admitted. It tended to show a combination to monopolize in violation of the statute when considered with the other testimony in the case, showing the history of the appellee and its course of conduct. It supported the charge that the appellee's monopoly had been formulated by acquisition of substantially all commercially available bauxite deposits within the United States and by suppression of independent attempts to enter into the production of aluminum. *Standard Oil Co. v. United States, supra; United States v. American Tobacco Co., supra.* By reason of the same rule and for the same purpose, it was error to

exclude Exhibit 261 for identification. The exhibit consisted of an agreement between the president of the appellee and James B. Duke, dated April 15, 1925, by which they agreed to cause a merger of the appellee with a company to be formed which should hold certain water rights on the Saguenay River in Canada. It was also error to exclude the exhibit which showed the agreement between the appellee and the Canadian Mfg. & Development Co. of July 9, 1925. This was part of the merger planned which was consummated.

These errors to which we have called attention sufficiently show that the appellant did not have a fair trial and that the case must be retried. At the new trial, the appellant should be permitted to show what was the differential or spread between the price of ingot and that of sheet of various gauges, both flat and coil, made by the appellee in its price lists and that the spread was insufficient to enable appellant to operate without a loss. *Baush Machine Tool Co. v. Aluminum Co. of America,* 63 Fed. (2d) 778 (C. C. A. 2).

We need not consider other errors alleged to have been made in the charge for upon the new trial, the principles we have announced should avoid the commission of such error. The jury should be informed that the appellant might recover damages to its business caused by unfair price fixing if such price fixing precluded the possibility of profitable operation by the appellant and if it was done for the purpose of creating a monopoly. *Baush Machine Tool Co. v. Aluminum Co. of America, supra.*

Judgment reversed and new trial ordered with costs.

Swan, J. concurring in opinion.

SWAN, C. J.: I concur in the result. Restraint of trade was charged both in keeping unreasonably high the price of aluminum ingots and in unreasonably reducing the price of aluminum alloys with the result, as the plaintiff alleges, that it could make no profit. The failure to submit to the jury the second branch of the complaint was an error which in my opinion requires reversal.

As to costs I would allow the appellant but half the costs of printing the record because of its unnecessary prolixity. See *Kynerd v. Hulen,* 5 F. (2d) 160, 162 (C. C. A. 5).

[¶ 55,058] First National Pictures, Inc., a corporation, Metro-Goldwyn-Mayer Distributing Corporation, a corporation, Universal Film Exchanges, Inc., a corporation, Fox Film Corporation, a corporation, and Los Angeles Film Exchange Board of Trade, Inc., a corporation, v. Fae Robison.

United States Circuit Court of Appeals for the Ninth Circuit. No. 7260. July 11, 1934.

Where plaintiff, operator of a motion picture theatre, sues for damages under the Sherman Anti-Trust Act alleging injury because of the zoning practices used by defendant producers and distributors of motion picture films (claimed by plaintiff to be a combination in restraint of trade), and where the alleged damages rest on loss of business because of a rezoning rather than because of the zoning per se, no recovery of damages may be had. The Court added: "It should be observed that we are not passing upon the validity of the method of zoning adopted by the parties hereto."

Upon Appeal from the District Court of the United States for Southern District of California, Central Division.

Before: WILBUR, SAWTELLE and GARRECHT, Circuit Judges.

WILBUR, Circuit Judge: From a judgment for $35,336.15 in favor of plaintiff and appellee, appellants have appealed. For convenience we will refer to the parties as plaintiff and defendants rather than appellee and appellants.

This action was brought to recover damages alleged to have resulted to the plaintiff and her predecessor by reason of a combination or conspiracy of the defendants alleged to be in restraint of trade in violation of the Sherman Anti-Trust Act. The plaintiff and her husband owned and operated the Seville moving picture theater in the city of Inglewood, California. The defendants are producers and distributors of moving picture films such as were used in the plaintiff's theater. In an equitable action brought by the United States government the defendants were declared guilty of a combination in restraint of interstate commerce and enjoined from con-

tinuing the use of certain provisions concerning arbitration in a standard form of contract between the exhibitors of moving pictures and the producers and distributors thereof theretofore used by the defendants, and from acting in concert under certain rules of the defendants for the enforcing of the awards of the arbitration boards set up under the terms of the standard form of contract, by a boycott of the theater owner who failed or refused to abide by the award. (*Paramount Famous Lasky Corp. et al. v. United States,* 282 U. S. 30; 34 F. (2d) 984). The plaintiff relies on this adjudication as establishing the fact of monopoly and as tolling the statute of limitations (15 U. S. C. A. § 16; ch. 323, § 5; 38 Stat. 731). The present controversy relates to the matter of zoning of territory by the defendants for the purpose of fixing the time for the exhibition of moving pictures, and, consequently, the priority of such exhibition and the rental to be charged for such use. It appears that the commercial life of a moving picture is very short, about 50 per cent of the return therefrom being derived in the first run showings of such picture. The first exhibit of moving pictures is made in the downtown areas of large cities. Thereafter the pictures are used in suburban moving picture houses and in smaller cities and towns. The first showing in any zone is called the first run of the picture and any showing thereafter of the same picture in the same zone is called the second or subsequent run of the picture. If no exhibitor in the zone desired a certain picture as first run, it was sometimes rented at the price of a second run picture to an exhibitor who was in fact the first to run the picture in the zone. In the suburban first run a great advantage arises to the exhibitor by reason of the advertisement of the first showing in the large centers and to the popularity of the film due to a successful showing therein. Exhibitors are expected to contract at one time for all the films of a given producer which the exhibitor expects to use for one year. The exhibitor may contract for all of the productions of one or several producers or for a part of the productions of any number of producers. The form of contract with each producer is the standard form above referred to but the price of each film and the date of its showing is arranged with the producer which furnishes the film. These dates of exhibition and the price of the film to the exhibitor are arranged with reference to the area or zone in which the picture is shown. The defendants claim that the zones are not fixed by the producers but by agreement between the local agents of the producers and the exhibitors, each being represented by three members of a joint committee for zoning, and, consequently, that if the agreement to zone and to supply pictures according to the zones so fixed is illegal that the theater owners, including the plaintiff, are *in pari delicto.* The plaintiff contends that the defendants act in concert in selling exhibition rights of their respective films and that films cannot be had from any of the defendants except in accordance with the zoning agreement, while the defendants claim that the zoning is voluntary and that compliance with such zoning is not only optional with each producer, but that in fact all have not conformed thereto. These respective claims were presented in evidence and to some extent were resolved by the verdict of the jury. They involve a number of legal principles, a consideration of which may be deferred until after a further statement of the facts. Suffice it to say for the present that what the plaintiff is complaining of is that the Seville Theater was arbitrarily removed from one zone to another and that by reason of such changed zoning she has been damaged because of her inability to secure first and second run pictures, as theretofore, but was compelled to secure them in accordance with the new zoning. The Seville Theater was located at the extreme northeast corner of the city of Inglewood. Inglewood is bounded on the north and east by Los Angeles City. We may ignore a cemetery which forms a part of the east boundary of Inglewood and lies between the boundaries of the two cities. Thus, the Seville Theater is at the point of a wedge extending about a mile and three quarters into the side of Los Angeles City. The Seville is located in residential territory. There is nothing to distinguish the territory in the city of Los Angeles from that in the city of Inglewood other than the street marking the boundary between the two municipalities. The plaintiff and her husband, who was her business partner, selected the location of the Seville Theater, which was built for them and purchased by them in February of 1924 because of its favorable position with relation to zoning. The Seville Theater was able to secure motion pictures at the same time; that is, first or second run, as in the down town theaters in Inglewood, the Inglewood Theater, and later the Granada Theater, which was opened in the fall of 1924, the former 1.83 miles away and the latter 1.73 miles away from the Seville, but separated from each other by only a block. The nearest theater in Los Angeles City was the Rivoli, 2.95 miles distant from the Seville. Subsequently another theater, the Carlton, was opened in the fall of 1924 in Los Angeles, 2.30 miles

distant from the Seville, and .65 miles south of the Rivoli, both being located on Western Avenue. By the zoning system in force at the time the Seville was built, it was enabled to secure first run pictures before the Rivoli or any other theater between the Seville and the larger down town theaters in Los Angeles, some ten miles distant. Later, the Mesa Theater, was built in Los Angeles City at the corner of Slauson Avenue and Crenshaw Boulevard, distant .75 miles from the Seville, and opened April 15, 1926. The Mesa seated 1700 and the Seville 786; the Rivoli between 900 and 1,000, the Granada 1,000, and the Carlton about 1,200. Thus, after the Seville was opened, theaters having four times its seating capacity were opened in that vicinity. When the Mesa theater was building the zoning committee of the producers and exhibitors decided that the Mesa and Seville theaters were competing theaters and put them in the same zone so that they could compete on equal terms. This arrangement was protested by plaintiff's husband, who was managing the Seville Theater, but his protest was overruled. As this protest is a fair statement of the position which the plaintiff now seeks to maintain, and which was accorded to her by the verdict and judgment in the court below, we quote from the letter of protest as follows:

"A resolution adopted by the Film Board of Trade on December, 22nd, 1925, regarding rezoning of the Seville Theatre, has just come to my attention. As this resolution is clearly detrimental to my business, I must ask you to reconsider this matter, for the following reasons,—

1. It would make my playing dates from three to five weeks later than the present ruling allows me.

2. The Seville Theatre is located in Inglewood, outside of the city of Los Angeles. Our patrons are largely Inglewood people; we are paying taxes in Inglewood and the rules of the Film Board of Trade for zoning, regarding territory outside of Los Angeles City limits, should continue to apply in the case of the Seville Theatre.

3. My past Exchange experience has taught me that it would be impossible to secure play dates on the city break week, due to the shortage of prints at that time, and would therefore put my playing dates back to at least two weeks after the City break week. This would naturally decrease my patronage to the extent, that it would be impossible for me to present the type of pictures that I have been in the habit of presenting; even at greatly reduced prices.

4. When we built the theatre about two years ago, we selected Inglewood because we had the advantage of earlier play dates than we could *of* had, had we built in Los Angeles. Had this not been the case we would *of* selected a more favorable location in Los Angeles.

5. Our policy is, and always has been, to feature pictures. We have only a few acts of Preview Vaudeville on Wednesday nights. We are therefore depending on pictures for the success of our business.

6. According to the resolution the zoning was changed to meet the requirements of a new theatre in Los Angeles, which is to open soon. While the new Mesa has my best wishes, its success must not be sought by applying unfair methods against the Seville.

7. Mr. G. H. Westing my business associate, joins me in protesting against any change in zoning for our theatre, which beyond any doubt will result in a serious loss to our business, and we must insist that our present arrangement be continued. Yours very truly, The Seville Theatre."

The position of the plaintiff is also shown by an instruction to the jury proposed by her and given by the court, as follows:

"If you find from the evidence that the defendants herein entered into any arrangement, conspiracy or agreement whereby they undertook, or arranged, by concert of action, not to furnish motion picture films to the Seville Theatre, except in accordance with the zoning and clearance rules and regulations, as fixed and provided by the ruling of the Los Angeles Film Exchange Board of Trade, Inc., on December 22, 1925, as set forth in the so-called 'black book', and if you further find that, pursuant thereto, defendants thereafter refused to enter into contracts with plaintiff or her associate, for the exhibition of first or second-run pictures at said Seville Theatre, upon an equal basis with competitive theatres in that vicinity, and that, as a result thereof, plaintiff, or her associate, suffered injury to their business and/or property, then your verdict should be for the plaintiff."

This instruction to the jury, in view of the uncontroverted facts concerning the resolution of December 22, 1925, and the parity of the Seville and Mesa Theaters, and the parity or superiority of the Seville Theatre with or over the Rivoli and Carlton theaters, could mean nothing more nor less than that the plaintiff was entitled to a verdict if she was not accorded parity of play dates with the down town Inglewood theaters; in short, if she was not accorded priority over a new theater only 6½ blocks away. Parenthetically we call attention to the fact that although this and many other instructions to the jury were excepted to by the defendants' attorneys who tried the case in other respects with meticulous care, no ground for the exceptions was stated to the court, and consequently such exceptions cannot be considered. (*Royal Finance Co. of Cal. v. Miller*, 47 F. (2d) 24; *Sacramento, etc. v. Lanks*, 36 F. (2d) 921; *Sacramento, etc., v. Johnson*, 36 F. (2d) 925; *Standard Acc. Ins. Co. v. Van Altena*, 67 F. (2d) 836; *Order of United Travelers, etc. v. Greer*, 43 F. (2d) 499; *Sacramento, etc. v. Weber*, 41 F. (2d) 514; *National Union Fire Ins. Co. v. Kaplan*, 41 F. (2d) 569; *State Life Ins. Co. v. Sullivan*, 58 F. (2d) 741; *Hammond v. U. S.*, 246 Fed. 40; *Morse v. Tillotson*, 253 Fed. 340; *Dayton Rubber Mfg. Co. v. Sabra*, 63 F. (2d) 865; *Al G. Barnes Show Co. v. Eichelbarger*, 269 Fed. 132.)

The damages claimed in the complaint were loss of profits and loss of the theater itself, by surrender to vendor on account of unpaid purchase price, all "because of the arbitrary actions of the defendants * * * in maintaining and enforcing the reclassification and rezoning mentioned in paragraph XVI hereof [December 22, 1925]". The trial court instructed the jury as follows:

"Plaintiff charges that the unlawful combination and conspiracy was the agreement among the defendants and others to release their pictures only according to zones or areas by which the period allowed for exhibitions of the released pictures was determined. That the defendants agreed among themselves to observe the zoning thus established, and thereafter refused to furnish pictures to plaintiff for exhibition purposes, except in accordance with the zoning rules and regulations thus established, and that as a result of this agreement the plaintiff and her associates were injured in their business and property."

It must be obvious at this juncture that the plaintiff is claiming a vested interest in the very monopoly she attacks as invalid. That is, she claims the benefit of the zoning in existence at the time the Seville Theatre was opened, while denouncing the rezoning as a violation of the Sherman Anti-Trust Act, because of its restraint of trade and its interference with interstate commerce. If it was unlawful for the defendants to combine in 1925 to define zones of competition in the exhibition of motion pictures it was equally unlawful in 1924 when the Seville Theatre was opened. On the other hand, if it was legal to establish such zones in 1924 it was equally so in 1925, and the establishment of a new theater in such close proximity to the Seville as the Mesa Theatre justified a change in the interest of fair competition. To repeat, the plaintiff's real contention is that a competing theater was allowed to compete with her on equal terms and not that competition was stifled by undue restraint. The situation is admirably stated on page 243 of appellants' overlong brief (360 pages) as follows:

"Thus, again we repeat, plaintiff's complaint boils itself down to the rather anomalous contention that the defendants violated the Sherman Act to her damage, because they refused to continue to sell her pictures in accordance to a zoning and clearance plan which in itself she claimed to be a violation of the Sherman Act".

Upon what basis then can the plaintiff claim a right of recovery under Sec. 4 of the Sherman Anti-Trust Act (15 U. S. C. A. § 15, § 4; 38 Stat. 731) which gives a right to treble damages to "any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws". Plaintiff's allegation and proof were of damage from rezoning and not of damage from zoning per se. The allegation we have quoted above. The proof offered was a comparison of receipts and profits before and after rezoning. The evidence presented no other basis for estimating the damage suffered by the plaintiff.

The motion of the defendants for a directed verdict in their favor should have been granted. In view of this conclusion it is unnecessary to consider the many other questions involved which are carefully briefed. It should be observed that we are not passing upon the validity of the method of zoning adopted by the parties hereto.

Judgment reversed.

[¶ 55,059] National Foundry Company of New York v. Alabama Pipe Company et al.

United States District Court, Eastern District of New York. July 16, 1934. Equity No. 7281.

Motion to dismiss a complaint for an injunction charging respondents with conspiring to sell cast iron soil pipe below cost denied because it states a prima facie case under the Clayton Anti-Trust Act.

Triple damages for violation of the Clayton Act cannot be awarded under a bill in equity.

A corporation may be sued for violation of the Clayton Act in a jurisdiction where it transacts business although not resident or "found" therein.

GALSTON, D. J. The complaint sets forth that the defendants are engaged in the business of manufacture, selling and distributing cast iron soil pipe and fittings shipped in interstate commerce to New York and distributed in the so-called "metropolitan" area of New York.

The gist of the allegations of the complaint is that the defendants have violated the anti-trust laws. In this respect it differs from the complaint in the law action pending in this Court between the parties, which as will appear from the opinion filed concurrently herewith, sets forth a violation by these defendants of the Cast Iron Soil Pipe Code of Fair Competition.

It is alleged that the defendants conferred with one another and exchanged information with an unincorporated group of corporations and individuals, known as the Cast Iron Soil Pipe Association, regarding the establishment of prices and terms, conditions and practices in connection with the use of said prices in the sale of cast iron soil pipe and fittings; also that the defendants, during the six months preceding the filing of the bill, have "by various acts, unjustified reductions in prices, changes in terms, conditions and practices, and by other unjustified and unfair schemes and devices, demoralized the cast iron soil pipe trade in the City of New York, and have created a condition which is destructive to petitioner's business," and further, that the defendants "seek to disrupt and destroy the good relations existing between petitioner and its customers, by the circulation of false and unfounded rumors to the effect that petitioner was and is engaged in the manufacture of cast iron soil pipe and fittings in violation of certain statutes of the United States;" and that petitioner operates the only cast iron soil pipe foundry in the City of New York.

It is alleged that the plaintiff has been caused great damage by these defendants; that the acts amount to unfair and unjust trade and also amount to a substantial monopoly of the said trade in New York City.

It is also alleged that in quantities of less than 40,000 pounds, by common agreement, the defendants offered to sell and do sell their products at less than cost of production in New York City; and that they are seeking to eliminate the plaintiff from the industry.

Though the suit is in equity, the plaintiff seeks a judgment in the sum of $100,000.00, and treble damages, and an injunction.

A number of the defendants have moved to dismiss the complaint on various grounds: first, that it appears from the face of the complaint that the Court has no jurisdiction over the subject matter of the action; secondly, that the plaintiff has not legal capacity to sue; and thirdly, because the facts alleged do not state a cause of action.

The defendants, in seeking a dismissal of this complaint, mistakenly read into it the allegations of the law action. Since the motion is one for a dismissal, the sufficiency of the complaint can be adjudged only by what the allegations of the complaint set forth. There is no reference in this complaint to the National Recovery Act or the Trade Code.

In consequence, the argument that is advanced that plaintiff as a private corporation has no status to bring suit for violation of the National Recovery Act, is without applicability. In saying this, however, I do not mean for a moment to indicate that the real facts; not the ostensible facts, may present such a situation either at the trial or on a motion for a preliminary injunction as may make that defense available.

In the present state of the case, however, and based solely on a consideration of the complaint, it is idle also for the defendants to argue that the anti-trust laws are tolled by the National Recovery Act, Title 15, U. S. C. Sec. 705, for that section provides merely that while the National Recovery Act is in effect and for sixty days thereafter, "any code, agreement, or license approved * * * and in effect under this chapter, and any action complying with the provisions thereof * * * shall be exempt from the provisions of the anti-trust laws of the United States."

Therefore, the residual question is whether the complaint sets forth a cause of action under the anti-trust laws. If it does, then plaintiff is given status to bring the action by virtue of the Clayton Act, Title 15, U. S. C. Sec. 26, which provides:

"Any person, firm or corporation * * * shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws * * * when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. * * *"

It may be noted that this section does not go farther in terms, however, than to give an injunction to private persons against threatened loss.

An award of triple damages provided by Section 15 of Title 15, U. S. C., cannot be given in equity. *Fleitmann et al. v. Welsbach Street Lighting Company,* 240 U. S. 27. In that case a stockholder brought an action against the Consolidated Street

Lighting Company and a number of other corporations and individuals, to compel the defendants, other than his own company, to pay to the latter, threefold damages under the Sherman Act. Mr. Justice Holmes wrote:

"We agree with the courts below that when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law."

Venner v. Pennsylvania Steel Co., 250 Fed. 292; *Meeker v. Lehigh Valley R. R. Co.*, 162 Fed. 254; *Decorative Stone Co. v. Building Trades Council of Westchester County*, 23 Fed. (2d) 426.

It clearly appears, therefore, that if the complaint states a cause of action, the plaintiff must elect as between the two remedies which he seeks herein, for if the complaint is to be considered as a bill in equity, which must be done in its present form, then no relief can be granted under Section 15 of Title 15, U. S. C.

The discussion now brings us to the sufficiency of the complaint. None of the many defendants raised this question either at the argument or in the briefs submitted. The Sherman Act, Sec. 1, Title 15, U. S. C. provides that:

"Every contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal. * * *"

The complaint charges the defendants with having effected reductions in prices and conditions of sale which have demoralized the industry in the City of New York and created a condition destructive to the petitioner's business; and that the defendants seek to disrupt and destroy the petitioner's business by circulating false rumors concerning the plaintiff. That the acts of the defendants are unfair and amount to an unjust restraint of trade and create a substantial monopoly of the trade in New York City; and that in so doing, they have "collaborated and transpired to disrupt and break down the cast iron soil pipe industry in New York City for the purpose of eliminating the petitioner from the industry."

I think by a fair test that this in outline presents a compliance with the statute. *Albert Pick-Barth Co. Inc. v. Mitchell Woodbury Corporation.* 57 Fed. (2d) 96 Accordingly, the motion to dismiss the complaint is denied.

The defendants, The Hedges-Walsh-Wiedner, Reading & Foundry and Supply Company, Sanitary Company of America Corporation, and A. L. Gunther, appear specially for the purpose of moving to vacate and set aside the process of the Court served upon those defendants.

Louis B. Laddoux, Inc., the complaint alleges, is a New Jersey corporation, engaged in the sale and distribution of cast iron soil pipe and fittings in New York, as agent for the defendant, Reading Foundry and Supply Company. The affidavit of its president shows that process was served upon its agent, the Corporation Guaranty and Trust Company in Wilmington, Delaware. Louis B. Laddoux avers that his corporation is not the agent of the Reading Foundry and Supply Company; but does not state that Louis B. Laddoux, Inc. is engaged in the sale of soil pipe and fittings, and makes sales thereof, upon a commission basis, in New York.

The Reading Foundry and Supply Company is in the complaint alleged to be a Delaware corporation, having its principal place of business in Reading, Pennsylvania, and having an agent, Louis B. Laddoux, Inc. maintaining an office at 220 Fifth Avenue, New York City, through whom the defendant distributes cast iron pipe and fittings in the Borough of Brooklyn, in the District of New York.

The affidavit of John Marx shows that service was effected upon the corporation in Delaware. The return of the United States Marshal of the Southern District of New York shows that service upon this defendant was effected by subpoenas served upon Louis B. Laddoux, the president of Louis B. Laddoux, Inc., at 220 Fifth Avenue, New York City.

The defendant, The Sanitary Company of America Corporation, is alleged in the complaint to be a Delaware corporation, engaged in the manufacture of cast iron soil pipe and fittings, with its principal office in Lincoln, having an agent, A. L. Gunther, with an office in Long Island City, through whom it sells and distributes cast iron soil pipe and fittings in New York. This corporation files the affidavit of August L. Gunther, wherein it is averred that he is a salesman in the employ of the Sanitary Company, and that that corporation does not transact any business in New York State. The affidavit, however, contains no denial that he sells and distributes cast iron pipe and fittings in New York for the account of the Sanitary Company of America Corporation.

The Hedges-Walsh-Wiedner Company is alleged in the complaint to be a Delaware corporation, with its principal office in Chattanooga, Tennessee, and that it has an agent, the Continuous Sales Corporation in Long Island City, through which

agent it sells and distributes its products in the New York district.

The affidavit of MacIlburne Voorhies, one of the attorneys of this company, avers that service was made on Albert E. Cohen, President of the Continuous Sales Corporation, although the Marshal's return indicates that it was served on a Mr. Horowitz, treasurer of the Continuous Sales Corporation.

The affidavit of Albert E. Cohen shows that he is the president of the Continuous Sales Corporation. He asserts that that corporation was organized under the laws of the State of New York, and is entirely separate and distinct from the defendant, The Hedges-Walsh-Wiedner Company; that that company is in no way financially interested in nor does it control the activities of his company; that his company sells a variety of products manufactured by various foreign corporations, among which is the cast iron pipe and fittings manufactured by The Hedges-Walsh-Wiedner Company. The expenses of doing business are paid by his own corporation, and no part thereof is paid by The Hedges-Walsh-Wiedner Company. The latter name does not appear on any letterhead of his company, does not appear on the sign upon his premises, and the telephone service is listed in the name of his corporation and not in that of the Hedges-Walsh-Wiedner Company.

Section 22 of Title 15, U. S. C., is the authority for effecting service on those corporations which are not inhabitants of the judicial district in which the suit is brought. The section reads:

"**Sec. 22.** District in which to sue corporation. Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found. (Oct. 15, 1914, c. 323, Sec. 12, 38 Stat. 736.)"

The courts have given great latitude to the term "transacts business," as used in the foregoing section. The case of *Eastman Kodak Co. v. Southern Photo Materials Company,* 273 U. S. 359, was one in which the suit was brought by the plaintiff in the Federal District Court of Northern Georgia, against the Kodak Company, a New York corporation, to recover damages for injuries sustained by the plaintiff through the defendant's violation of the Anti-trust Act. Under the foregoing section of the Clayton Act, process was issued and served upon the defendant, pursuant to an order of the court, at Rochester, New York, where it had its principal place of business. The defendant appearing, specially, traversed the return, entered a plea for jurisdiction, and moved to quash the service. The opinion holds:

"And we think it clear that, as applied to suits against corporations for injuries sustained by violations of the Anti-Trust Act, its necessary effect was to enlarge the local jurisdiction of the district courts so as to establish the venue of such a suit not only, as theretofore, in a district in which the corporation resides or is 'found', but also in any district in which it 'transacts business'—although neither residing nor 'found' therein—in which case the process may be issued to and served in a district in which the corporation either resides or is 'found'; and, further, that a corporation is engaged in transacting business in a district, within the meaning of this section, in such sense as to establish the venue of a suit—although not present by agents carrying on business of such character and in such manner that it is 'found' therein and is amenable to local process,—if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character. This construction is in accordance, not only with that given this section by the two lower courts in the present case, but also with the decisions in *Frey & Son v. Cudahy Packing Co.*, 228 Fed. 209, and *Haskell v. Aluminum Co. of America*, 14 F. (2d) 864. And see *Green v. Chicago, B. & Q. Ry.* 205 U. S. 530, in which it was recognized that a corporation engaged in the solicitation of orders in a district was in fact 'doing business' therein, although not in such sense that process could be there served upon it."

"We are further of opinion that a corporation is none the less engaged in transacting business in a district, within the meaning of this section—which deals with suits respecting unlawful restraints upon interstate trade—because of the fact that such business may be entirely interstate in character and be transacted by agents who do not reside within the district. And see *International Harvester v. Kentucky*, 234 U. S. 579; *Davis v. Farmers Co-operative Co.* 262 U. S. 312."

Mr. Justice Sanford, moreover, adds:

"To construe the words 'or transact business' as adding nothing of substance to the meaning of the words 'or is found', as used in the Anti-Trust Act, and as still requiring that the suit be brought in a district in which the corporation resides or is 'found', would to that extent defeat the plain purpose of this section and leave no occasion for the provision that the process might be served in a district in which the corporation resides or is found. And we find nothing in the legislative proceedings leading to its enactment which requires or justifies such a construction."

See also *Jeffrey-Nichols Motor Co. v. Hupp Motor Car Corporation,* 46 Fed. (2d) 623; *Northern Kentucky Telephone Co. v. Southern Bell Telephone & Telegraph Company,* 54 Fed. (2d) 107.

Thus, within the interpretation of the statute, it may well be that all of these protesting defendants are transacting business within the Eastern District of New York; but as to some, process obviously was not properly served.

The alleged service on Sanitary Company of America Corporation, according to the Marshal's return, was effected by leaving the subpoena with the wife of A. L. Gunther. Such service is effective against him personally, but it was not sufficient as service upon the Sanitary Company of America Corporation, since the wife of A. L. Gunther is not alleged to be engaged in transacting business for the

Sanitary Company of America Corporation. The motion of that corporation to set aside the alleged service is granted.

Whether The Hedges-Walsh-Wiedner Company or the Reading Foundry and Supply Company "transacts business" in the Eastern District of New York within the meaning of the aforesaid statute cannot be determined in view of the contradiction resulting from the allegations of the complaint and the averments of the affidavits in support of the motion to vacate and set aside the alleged service. The matter must be referred to a special master to take evidence and report his findings. Settle orders on notice.

[¶ 55,060] Chicago Flexible Shaft Company v. Katz Drug Co.

Third U. S. Circuit Court of Appeals. July 31, 1934.

The decision of the lower court refusing a preliminary injunction against a retailer for selling plaintiff's products below the regular price, sustained on appeal on the ground that the retailer had legally purchased them and could therefore sell at any price it chose.

A manufacturer has the right to refuse to sell its products to retailers who sell below the price suggested by the manufacturer and such practice is not in restraint of competition.

Before BUFFINGTON, WOOLEY and THOMPSON, Circuit Judges.

BUFFINGTON, J. In the court below the plaintiff brought suit against defendant charging it with unfair competition and praying, inter alia, that "a preliminary injunction may be granted and may be issued out and under the seal of this Court enjoining the Katz Drug Company, its agents, its servants, officers or employees and each of them from advertising for sale or offering for sale or representing for sale or selling Mixmasters below the regular retail selling price of such Mixmasters in the sum of $21." After hearing, the court refused to grant such injunction, whereupon plaintiff took this appeal. After due consideration, we are of opinion such refusal was within the discretion of the court and we, therefore, dismiss the plaintiff's appeal. But while we agree with the conclusion of the court, we do not agree with the court's reason therefor, viz: "Plaintiff's bill of complaint and the unchallenged facts in this record disclose" (on its own part) "a systematic infraction of the policy of the law against restraints of trade and of free competition."

From the proofs it appears the plaintiff was a large manufacturer of a kitchen utensil called "Mixmaster." In handling its product and reaching the ultimate user, the plaintiff's trade policy and practice was this. Plaintiff sold to such jobbers as it selected, but so long only as the jobbers adhered to plaintiff's plan, Mixmasters for $10.50 each. The jobbers sold to such retailers as they selected, and so long only as such retailers adhered to plaintiff's plan, Mixmasters for $12.60 each. The retailers sold Mixmasters to customers for $21.00 each. If a retailer sold at less than $21.00, he was dropped; and if a jobber sold to a retailer who did not live up to the plan, the jobber was dropped. It will thus be seen there was no contract, or an equivalent of a contract, between maker, jobber and retailer to maintain prices. *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373; *Federal Trade Comm. v. Beech-Nut Co.*, 257 U. S. 441. The jobber bought the Mixmasters; the title was in him, as it was later in the retailer, and, as purchasers, each had a lawful right to sell to whom he pleased, and at any price. But by refusing to adhere to the plaintiff's trade policy, and selling at lower prices, he put himself in a position where the plaintiff was no longer willing to employ him in marketing its product. In substance, what the plaintiff did was to outline a plan to market its product at fixed prices through agents of its own selection. It was selling its own "Mixmasters." It was not suppressing competition; it was not restraining commerce. This view of the situation is, in our judgment, in accord with the decisions. See *U. S. v. Colgate,* 250 U. S. 300.

Turning to the defendant, a cut rate dealer, it is evident it must have bought the "Mixmasters" it sold from some of the plaintiff's unfaithful jobbers or retailers. Whatever we think of the ethics of such disloyal agents and of the cut rate defendant in buying from them, it is clear that as such jobbers and retailers had bought and paid for the "Mixmasters," the defend-

ant had a legal right to buy them and to sell them at such price as it chose. Although in advertising them for sale, the defendant indulged in expressions which did not always adhere to the truth, we cannot find that they imputed approval by, or connivance with, the plaintiff. Finding no error in the Court's refusal to grant a preliminary injunction, the plaintiff's appeal is dismissed.

[¶ 55,061] Fleetway, Inc. v. Public Service Interstate Transportation Company.

United States Circuit Court of Appeals, Third Circuit. August 28, 1934.

The mere competitive reduction in bus fares can in no sense be construed as a monopoly or even an attempt to monopolize any part of trade or commerce under the Sherman Act.

The transportation of passengers by motor bus is not a commodity within the meaning of the Clayton Act and therefore the defendant can not be enjoined from discriminating in price in order to take away plaintiff's business.

Before WOOLLEY, DAVIS and THOMPSON, *Circuit Judges.*

DAVIS, *Circuit Judge.* This is an appeal from a decree of the District Court denying injunctive and other relief prayed for under the provisions of the Sherman Anti-Trust Act and the Clayton Act and dismissing the bill of complaint.

The plaintiff, Fleetway, Inc., is or was a transportation Company operating nine buses engaged in carrying passengers for hire from Fairview, an outlying section of the City of Camden, New Jersey, to the Reyburn Plaza, City Hall, Philadelphia, Pennsylvania. The defendant is likewise engaged in operating a line of four hundred or more buses in southern New Jersey. Some of these likewise carry passengers for hire through Camden over the Delaware River Bridge to the Reyburn Plaza.

When the plaintiff began the operation of its buses on September 9, 1932, defendant had been operating its line for a long time. Two of its fare zones concern us here. One, called the first zone, was from Fairview to Ninth Street and Kaighn Avenue, in the City of Camden, for which it charged a fare of 10 cents a ride, and the other called the second zone, was from Ninth Street and Kaighn Avenue to Reyburn Plaza, Philadelphia, for which it charged 15 cents a ride. When the plaintiff began its operations in these zones, it charged the same cash fares for a ride, but in the first zone it also sold 12 tickets for $1.00 or 8⅓ cents a ride instead of 10 cents, as defendant then charged, and in the second zone, from Ninth Street and Kaighn Avenue, Camden, to Philadelphia, it sold 12 tickets for $1.50 or 12½ cents a ride instead of 15 cents, as then charged by the defendant.

This rate of fare continued until October 7, 1932, when the plaintiff, while maintaining its price of 10 cents and 15 cents a ride in the first and second zones respectively, further reduced its fare for tickets in the first zone. It sold 2 tickets for 15 cents in the first zone, or 7½ cents a ride instead of 8⅓ cents, and 2 tickets for 25 cents, or 12½ cents a ride in the second zone. The fare was the same in this zone, the difference being that the passenger was required to purchase only 2 tickets instead of 12 in order to get the reduced rate.

One month and two days later, on November 9, 1932, defendant met the reduction of the plaintiff by making a greater reduction in tickets, the fares for single rides remaining the same. It sold 2 tickets for 10 cents, or 5 cents a ride in the first zone instead of 7½ cents charged by the plaintiff; and 2 tickets for 20 cents, or 10 cents a ride in the second zone, instead of 12½ cents as charged by plaintiff.

Two days later, November 11, 1932, plaintiff reduced its cash fare to 5 cents a ride in the first zone and 10 cents a ride in the second zone, thus making its price for cash fares the same as defendant's for tickets. This had the effect of eliminating the necessity of purchasing tickets in order to get the reduced rates.

This situation as to operation continued until the end of the year, December 31, 1932, when the plaintiff went out of business. However, on November 11, 1932, plaintiff filed its bill of complaint against the defendant praying for relief.

The plaintiff alleges that in addition to the demoralizing and uneconomic rates of fare initiated by the defendant, it began from the day of the operation of plaintiff's line a campaign of destructive competition with plaintiff's buses. As many as 12 of the defendant's buses were assigned

to cover the operation of a single bus of plaintiff's.

Defendant's plan, plaintiff alleges, was to start several of its buses immediately ahead of plaintiff's single bus, while others would follow it. The buses that followed would cut in ahead of plaintiff's bus as it approached the curb at street crossings where passengers were waiting and thus secure the passengers or obstruct their passage to plaintiff's bus. These tactics were practiced, it asserts, along the entire route, especially Broadway, Camden, and in Philadelphia; that this so-called "wildcatting" and "bottling" conduct on the part of defendant's employees was practiced day after day and was practiced when the bill of complaint was filed.

Plaintiff further alleged that the driver's of defendant's buses, acting under instructions from the defendant's officers, continuously endeavored to damage and wreck plaintiff's buses by driving or backing into them, especially into the sides of plaintiff's buses, where the motors are located, in order to damage the frames and motors; that numerous accidents have been caused and many persons have been injured thereby; that some of defendant's drivers have been arrested and their licenses suspended.

Plaintiff contends that under Section 2 of the Sherman Anti-Trust Act and Section 2 of the Clayton Act, it is entitled to an injunction restraining defendant from continuing its unlawful and discriminatory practices which tend to monopolize the carriage of passengers in interstate commerce and to destroy competition in the carriage of such passengers.

Sections 1 and 2 of the Sherman Act provide as follows:

"Section 1. Trusts, etc., in restraint of trade illegal; penalty. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, Sec. 1, U. S. C. A., Title 15, Sec. 1.)

"2. Monopolizing trade a misdemeanor; penalty. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. (Ibid., Sec. 2)."

Section 1 of that Act refers to operations of two or more persons in restraint of trade or commerce among the several states or with foreign nations. Section 2 was intended to supplement Section 1. *Standard Oil Company v. United States,* 221 U. S. 55. But any individual person alone may offend against the provisions of Section 2 of the Act by monopolizing or attempting to monopolize trade or commerce among the several States or with foreign nations. *United States v. MacAndrews and Forbes Company,* 149 Fed. 823; *United States v. Standard Oil Company,* 173 Fed. 177, 195; *United States v. Reading Company,* 183 Fed. 127. The pertinent question here is whether or not the acts of the defendant in this case monopolized or attempted to monopolize trade or commerce between New Jersey and Pennsylvania.

The reduction in fares can in no sense be construed as a monopoly or even an attempt to monopolize any part of trade or commerce. The reduction by the defendant became necessary to hold the normal trade which it had before the plaintiff entered the field. It could not be avoided if the defendant was to meet a situation created by the plaintiff and thrust upon the defendant.

The "campaign of destructive competition" of which the plaintiff complains was begun and led by it in an effort to capture the patrons of the defendant. So plaintiff cannot complain that defendant used the methods which plaintiff initiated to meet a condition created by it. This cannot constitute a monopoly or an attempt to monopolize. Plaintiff because of its more limited means was defeated in a contest which it instigated. That is all there is to the rate cut question.

Section 2 of the Clayton Act provides that:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities, which commodies are sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia, or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce; Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition; And Provided Further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade. (Oct. 15, 1914, c. 323, Sec. 2, U. S. C. A., Title 15, Sec. 13.)"

The learned trial judge construed this section to apply to "commodities" and not to transportation of passengers by motor buses. The section prevents discrimination in price between different purchasers of commodities which are sold for use, consumption or resale within the United States, etc. This clearly refers to a com-

modity such as merchandise and has no reference to transportation of passengers by buses, for discrimination in price between purchasers of commodities on account of differences in grade, quality or quantity or a discrimination which makes only due allowance for difference in the cost of selling or transportation is not prohibited. It would be a strange and strained construction that would apply this language to transportation of passengers by buses.

The plaintiff strenuously argued in the District Court and argues here that the word "commodity" may be construed "to cover the service of transporting passengers in interstate commerce."

The case cited by it which is admittedly most apposite is *McKinley Telephone Co. v. Cumberland Telephone Co.*, 140 N. W. 38.

The Statute there involved provided:

"Any corporation organized under the laws of this State which shall enter into any combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this State, or constituting a subject of trade or commerce therein, shall, upon proof thereof, in any court of competent jurisdiction, have its charter or authority to do business in this State canceled and annulled."

In construing the statute the Court said:

"It is obvious that the statute is directed against contracts which are violative of the public policy of the State respecting restraints of trade and competition in the supply of any commodity in general use constituting a subject of commerce. The furnishing of telephone service may be classed within the general terms of the statute as the supplying of a commodity constituting a subject of commerce."

There the court was dealing under the statute with "the supply or price of any article or commodity," and under the statute, furnishing a telephone service might be stretched to mean the supply of a commodity, but the language of Section 2 of the Clayton Act forbids such construction of the word "commodity" as there used.

It follows that the plaintiff under the facts of this case is not entitled to the relief for which it prayed either under the Sherman Anti-Trust Act or the Clayton Act. But if in the operation of its buses, its property has been damaged or destroyed, it has a remedy at law, but under the facts of this case, it is not entitled to equitable relief.

The decree of the District Court is affirmed.

[¶ 55,062] Glenn Coal Company, a corporation, v. Dickinson Fuel Company, a corporation, et al.

United States Circuit Court of Appeals, Fourth Circuit. At law, No. 3664. October 2, 1934.

Where there are two competitors in interstate trade in the same type of coal, the registration of a trade mark by one does not give the other a cause of action for threefold damages within the Sherman Anti-Trust Act, upon the mere allegation that the registration was unlawful and in furtherance of a conspiracy to restrain and monopolize interstate commerce in that type of coal.

Appeal from the District Court of the United States for the Southern District of West Virginia at Charleston.

Before NORTHCOTT and SOPER, Circuit Judges, and CHESTNUT, District Judge.

CHESTNUT, District Judge: The appellant in this case, as plaintiff in the district court, brought a civil suit at law against the defendants to recover three-fold damages alleged to have been sustained by violation of the Sherman Anti-Trust Act (15 USC, s. 15). A demurrer to the declaration was sustained with leave to the plaintiff to amend; and after an amendment not deemed to substantially alter the nature of the case, the demurrer was again sustained. The plaintiff declined to further amend and judgment went for the defendants, from which this appeal has been taken.

The only question here is whether the amended declaration, consisting of a single count extending over twelve pages of the printed record, sufficiently states a cause of action under the statute. It is unfortunately prolix but, after analysis, the substance of the case as stated may be summarized as follows. It is alleged that the plaintiff, a West Virginia corporation, has been engaged since September 1, 1920, in mining and selling in interstate commerce bituminous coal produced from the "Black Band seam of coal, one of the Kanawha measures and seams of coal, located in the well-developed, well-defined and extensively known Kanawha coal field of West Virginia," which was and had been for many years well and favorably known in the trade as "Black Band" coal, and by reason of its superior qualities generally commanded a market price somewhat larger than other bituminous coals; and that the

defendant, the Black Band Consolidated Coal Co., also a West Virginia corporation, was likewise engaged during said period in producing and selling the same kind of coal in interstate commerce as a competitor of the plaintiff; and that another defendant, the Dickinson Fuel Company, likewise a West Virginia corporation, was the sales agent for the coal produced by the Black Band Company. In addition to the corporate defendants, two individuals were also named as defendants, one C. C. Dickinson, a citizen and resident of West Virginia, being the president of the Dickinson Fuel Company, and J. Edwin Horn, a non-resident, being the president of the Black Band Company. Of the four defendants only two, the Dickinson Fuel Company and C. C. Dickinson, its president, were summoned; and it does not appear why the Black Band Company, a West Virginia corporation, was not summoned. It is stated that the only other producer of this Black Band Coal was the Kanawha Black Band Coal Company, of West Virginia.

It is further alleged, in the language of sections 1 and 2 of the Anti-Trust Act (15 U. S. C., sections one and two) that the four named defendants on or about the 5th of June, 1923, and thereafter until the commencement of the suit, May 12, 1932, unlawfully combined and conspired, in restraint of trade, to monopolize and did monopolize and unlawfully control the market in the sale and price of said Black Band seam of coal in interstate commerce, and destroyed competition between the plaintiff and the Kanawha Black Band Coal Company, on the one hand, and the defendant, the Black Band Consolidated Coal Company on the other hand, in consequence of which the Black Band Company was enabled to sell its coal at a higher price than could have been obtained if the market had been free, and the plaintiff was injuriously affected to the extent that its own sales of coal during said period was lessened by 100,000 tons and it was compelled to sell at least 150,000 tons at a price of twenty-five cents per ton less than it was really worth, and thus lost \$62,500. It is further alleged that the plaintiff suffered this loss because, by reason of the defendants' activities, it was not able to sell its coal as "Black Band" coal. The means by which the object of the conspiracy was effected is alleged to have been the illegal and unlawful procurement by the Black Band Consolidated Coal Company, with the connivance of the other defendants, of a United States trade mark, consisting of the words "Black Band" numbered 182,171, for the coal produced and sold by it. and thereafter threatened the plaintiff and its customers with suits for damages if the plaintiff's coal should be sold as "Black Band". It is further alleged that on November 20, 1923, while the application for the trade mark was "secretly pending" and its pendency was unknown to the plaintiff, the Dickinson Fuel Company took from the plaintiff an exclusive coal sales agency for the sale of its coal as "Black Band" coal and thereafter fraudulently and deceitfully and without the knowledge of the plaintiff, sold its coal not as "Black Band" coal as it had been sold and was being sold when said agency was taken, but as "Kanawha" coal or "Blue Ribbon" coal until January 10, 1924.

The question presented is whether the amended declaration discloses in substance a violation of the Anti-Trust Act by the defendants with consequent material injury to the plaintiff. The language of section 15, on which the action is based, is as follows:

"Any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust Laws may sue therefor in any district court of the United States in the district in which the defendant resides, is found or has an agent, without respect to the amount in controversy, and shall recover three-fold damages by him sustained including full costs of suit and including attorneys' fee."

To recover, the plaintiff must establish two things: (1) a violation of the Anti-Trust Act and (2) damages to the plaintiff proximately resulting from the acts of the defendant which constitute a violation of the Act. In a civil suit under this section, the gist of the action is not merely the unlawful conspiracy or monopolization or attempt to monopolize interstate commerce in the particular subject matter, but is damage to the individual plaintiff resulting proximately from the acts of the defendant which constitute a violation of the law. A mere conspiracy with intent to violate the law while it may be the basis of a valid indictment under the criminal sanction of the Anti-Trust Act, does not give rise to a personal civil suit for damages.

Thus it has been held in numerous federal decisions that in a civil suit under this special Act the declaration must allege facts from which the court can determine that there has been a violation of the Act with resultant damage proximately caused thereby to the plaintiff. In *Alex. Milburn Co. v. Union Carbide and Carbon Corp.*, 15 F. (2d) 678 (C. C. A. 4) (certiorari denied, 273 U. S. 757) this Court, by Judge Parker, said:

"for it is not sufficient that the declaration be framed in the words of the statute or that it allege mere conclusions of the pleader. It must describe with definiteness and certainty the combination or conspiracy relied on, as well as the acts done which resulted in damage to plaintiff, and, in doing so,

must set forth the substance of the agreement in restraint of trade, or the plan or scheme of the conspiracy, or the facts constituting the attempt to monopolize. 19 R. C. L. 87; *Cilley v. United Shoe Mach. Co.* (C. C.) 152 F. 726; *Rice v. Standard Oil Co.* (C. C.) 143 F. 464."

The same rule has been announced in other cases. *Jack v. Armour & Co.* (C. C. A. 8) 291 F. 741; *Tilden v. Quaker Oats Co.* (C. C. A. 2) 1 F. (2d) 160; *Witherell & Dobbins Co. v. United Shoe Co.* (C. C. A. 1) 267 F. 950; *Corey v. Independent Ice Co.* (D. C. Mass.) 207 F. 459; *Dueber Watch Co. v. E. Howard Watch Co.* (C. C. S. D. N. Y.) 55 F. 851; *Blumenstock Bros. v. Curtis Pub. Co.* 252 U. S. 436, 440; Compare *Albert Pick-Barth Co. v. Mitchell-Woodbury Corp.* 57 F. (2d) 96, (C. C. A. 1).

In this case we must, therefore, carefully analyze the declaration to ascertain what act or acts of the defendants are alleged which amount to a violation of the law with consequent damage to the plaintiff. It is alleged in the declaration with much emphasis and repetition that the defendant's unlawfully combined and conspired to violate the law, and to restrain and monopolize the trade and also that their acts were unlawful, fraudulent, deceptive and accompanied by the intent to violate the law. These are, however, only general allegations and in themselves no more than conclusions of the pleader in the absence of averment of specific acts of the defendants from which it can be determined as a matter of law whether the Act has in fact been violated with resultant damage to the plaintiff. Here we find that only two specific acts are set out consisting of (1) defendants' activities with respect to the allegedly deceitfully procured exclusive sales agency taken by the Dickinson Fuel Company from the plaintiff, and (2) the registration of the trade mark with threat of suit if infringed. As to the former, it appears its duration was limited to the period from November 20, 1923, until January 10, 1924, less than two months, and it terminated more than 8 years prior to the commencement of the suit. As the plaintiff is seeking to recover damages by virtue of the defendants' conspiracy for only five years (the period of limitations) preceding the institution of the suit, it seems obvious that the allegedly deceitfully procured and unfairly executed sales agency by the Dickinson Fuel Company could not possibly have been an effective cause of the plaintiff's damages sustained during this five-year period. This allegation may, therefore, be dismissed from further consideration. The only remaining act of the defendants alleged as showing a violation of the Anti-Trust Act and causing damage to the plaintiff is the registration of the trade mark. The exact date of this registration is not stated in the declaration but was admitted to have been April 1, 1924. While the declaration alleges that the registration of the trade mark was procured illegally and unlawfully, it does not specify in what the illegality and unlawfulness consisted. Nor does it show that the plaintiff has ever taken any action to have the trade mark cancelled as authorized by section 93 of Title 15 USC, or to bring an action for damages against the Black Band Consolidated Coal Company, the registrant of the mark, as authorized by section 104 of Title 15 USC; nor does it appear from the declaration that the plaintiff has asserted its rights in litigation or otherwise to continue to sell its coal as "Black Band" coal despite the allegedly unlawful registration of the trade mark by the registrant.

It is thus seen that the question of law presented as to the sufficiency of the declaration is simply this: where there are two competitors in interstate trade in the same article, does the registration of a trade mark by one, with incidental insistence on exclusive proprietary rights therein, of itself constitute a violation of the Anti-Trust Act, upon the mere allegation that the procurement of registration was unlawful (without specification as to how or why), coupled with the allegation that it was done in furtherance of a conspiracy to restrain and monopolize interstate commerce in the article, thus entitling the plaintiff to three-fold damages. In our opinion the answer must be in the negative. The law with regard to registration of interstate trade marks has been very fully covered by statutes which provide the terms and conditions for their registration, for the cancellation thereof if improperly registered, and for damages to individuals resulting from improper registration as a result of a false or fraudulent declaration or representation, oral or in writing, or by any false means. The measure of damages is simply the actual damage sustained. We think it quite unreasonable to conclude that it was the intention of Congress in providing for three-fold damages in a civil suit for violation of the Anti-Trust Act to have intended to thereby give to a plaintiff in a case of this kind three-fold damages in addition to those given by the trade mark law, merely on the allegation that the registration was in furtherance of a conspiracy to violate the Anti-Trust Act. See *Keogh v. C. & N. W. Rwy. Co.* 260 U. S. 156, 162. Such a construction would necessarily extend the scope of the latter Act to cases beyond its fair import and make it possible to convert almost any and every trade

mark controversy into a civil suit under the Sherman Act. It is well known that the main purpose of the Anti-Trust Act was to protect the public from monopolies and restraint of trade and the individual right of action was but incidental and subordinate. This was well expressed by Mr. Chief Justice White in *Wilder Mfg. Co. v. Corn Products Co.* 236 U. S. 165, 174, in the following language:

"In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but that harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statue but the remedies which it provided were co-extensive with such conceptions."

Thus, the declaration to be good must show not only damages sustained by the individual plaintiff but even more importantly a violation of public rights prohibited by the Act. It is not sufficient that the declaration shows merely a good cause of action at common law. As was said by the Supreme Court in the *Blumenstock case, supra:*

"In order to maintain a suit under this act the complaint must state a substantial case arising thereunder. The action is wholly statutory and can only be brought in a District Court of the United States, and it is essential to the jurisdiction of the court in such cases that a substantial cause of action within the statute be set up."

There is much internal evidence in the amended declaration itself and in facts of which we may fairly take judicial notice, that the substantial grievances complained of are private rather than public. The subject matter relates to coal mined from a particular seam in a very limited coal mining area in one county of West Virginia. There are only three producers of this particular bituminous coal, the defendant, the Black Band Company, having an annual production of 100,000 tons; the Kanawha Coal Company, producing 30,000 tons, and the plaintiff, having an actual production of 50,000 tons per year with an allegedly possible output of 70,000 tons per year, or in all, not more than 200,000 tons per year for all three producers, or 1,000,000 tons in the five years prior to the institution of the suit, as compared with the total output for the years 1928-32, inclusive, for the whole country, amounting to 2,191,016,256 tons. During the same years the amount of bituminous coal produced in West Virginia was 578,181,824 tons. It is mathematically obvious that the amount of bituminous coal produced from the Black Band seam in West Virginia is almost infinitesimal as compared with the total country-wide production, and it is not reasonable to infer that the public interest has been appreciably affected by the private controversy between the parties growing out of the registration of the name "Black Band" as a trade mark applicable to the defendants' coal. (Note) We cannot accept the appellant's contention that the alleged superior quality of Black Band coal so sets it apart from other bituminous coal that the public interest must thereby be considered to have been affected. In this respect the situation is not dissimilar to that dealt with by the Supreme Court in the first *Coronado* case, 259 U. S. 344, 412, where the court held that an alleged conspiracy to suppress the production of 5,000 tons a week of coal, in a national weekly production of from 10,000,000 to 15,000,000 tons, or a production in the particular district of 150,000 tons a week, was too negligible an amount to have any appreciable effect upon the interestate price of coal. Other cases holding that the public interest is not involved unless the restraint of interstate trade is substantial in amount are *McLatchey v. King,* (D. C. Mass.) 250 F. 920; *Marienelli v. United Booking Office of America,* (D. C. S. D. N. Y.) 227 F. 165; *Dueber Watch Case Mfg. Co. v. Howard Co.* (C. C. S. D. N. Y.) 55 F. 851; *Konackey v. Jewish Press* (C. C. A. 8) 288 F. 179; *Standard Oil Co. v. United States,* 283 U. S. 163, 176; *Indiana Farmers' Guide Pub. Co. v. Prairie Farmer Pub. Co.* 70 F. (2d) 2, 5, (C. C. A. 7). Compare *Albert-Pick-Barth Co. v. Mitchell Woodbury Corp.,* 57 F. (2d) 96 (C. C. A. 1.); *Mitchell Woodbury Corp. v. Albert-Pick-Barth Co. Inc.,* 41 F. (2d) 148 (C. C. A. 1), reversing 36 F. (2d) 974.

We do not mean to hold that the illegally procured registration of a trade mark may not properly be considered with other well pleaded acts of the defendants as a part of a larger plan to violate the Anti-Trust Act where it can be seen from facts alleged in the declaration that there has been a substantial violation of the public interest protected by the Act. See *Standard Oil Co. v. United States,* 283 U. S. 163. But here we find nothing alleged beyond the bare fact that a trade mark was procured and rights thereunder asserted by the defendants without the allegation of any other facts, apart from general averments of violation of the Act as conclusions of the pleader. It is true that the

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Note: The figures are given in the appellee's brief without contradiction by appellant's counsel, and are said to be shown by the reports of the U. S. Bureau of Mines and published in Saward's Annual for 1933, p. 11, and given wide publicity in trade journals and other publications.

mere registration of the mark is not itself conclusive, but the presumption is of validity and regularity in the registration until it is overcome by proof to the contrary. And we do not think the mere general allegation that the mark was illegally and unlawfully procured is sufficient of itself to show an intent to monopolize trade in the subject matter to which the mark is applicable, especially where it does not clearly appear that the public interest was substantially involved. Nor does the allegation in the declaration that the defendants knew the mark was not susceptible of registration substantially better their case in this respect, in the absence of some alleged fraudulent act or misrepresentation. An obvious possible objection to the mark was that it was descriptive and a geographical term, but even such terms have been held good marks in certain cases. In the absence of specific fraud alleged, the matter of registration was evidently one of opinion only.

The Circuit Court of Appeals for the Sixth Circuit recently dealt with a somewhat similar case in *International Visible Systems Corp. v. Remington-Rand, Inc.*, 65 F. (2d) 540, where an allegation, that the defendant maliciously and without probable cause and with intent to destroy business of the plaintiff and smother competition instituted a pretended patent infringement case, was held not sufficient to sustain a declaration in a civil suit under the Anti-Trust Act.

The demurrer was also properly sustained because it appears that the plaintiff's cause of action was barred by limitations. Under the later West Virginia cases this is a defense which may be availed of on demurrer in law cases. *Doss v. O'Toole,* 80 W. Va. 46, 48 (1917); *Cameron v. Cameron,* 111 W. Va. 375 (1921). In West Virginia the suing out of the summons is the commencement of the action for the purpose of applying the statute of limitations. *Lambert v. Ensign Mfg. Co.,* 42 W. Va. 813. In this case the record shows that the summons was sued out on May 12, 1932. As the Anti-Trust Act does not itself prescribe the period of limitations for civil suits and there is no other federal statute applicable thereto, the period of limitations is that fixed by the local law of the State of West Virginia. *Chattanooga Foundry and Pipe Works v. Atlanta,* 203 U. S. 390. The applicable West Virginia statute is section 12, Article 2, Ch. 55, West Virginia Code of 1931, which provides:

"12. *Personal Actions Not Otherwise Provided For:* Every personal action for which no limitation is otherwise prescribed shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that, in case a party die, it can be brought by or against his representative; and if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued, and not after."

The appellant contends that under this statute the period of limitations for this case is five years, while the appellees contend that it is only one year. Which view is correct is to be determined not from the local West Virginia decisions but from federal decisions construing the Act of Congress in the light of the common law and determining whether the nature of the civil action is one that survives or abates upon the death of the party. And on this question the federal decisions are in conflict. See *Caillouet v. American Sugar Refining Co.* (D. C. La.) 250 F. 639; *Bonvillain v. American Sugar Refining Co.* (D. C. La.) 250 F. 641; *Haskell v. Perkins,* (D. C. N. J.) 28 F. (2d) 222; *Perkins v. Haskell,* (C. C. A. 3) 31 Fed. (2d) 53, holding that the cause of action does not survive; while *Sullivan v. Associated Bill Posters, etc.* (C. C. A. 2) 6 F. (2d) 1000, (Circuit Judge Hough dissenting); *United Copper Securities Co. v. Amalgamated Copper Co.* (C. C. A. 2) 232 F. 574; *Imperial Film Exchange v. General Film Co.* (D. C. N. Y.) 224 F. 985, hold that it does survive. It is, however, unnecessary for us to decide in this case whether the period of limitations is five years or one year because under either holding, in our opinion, the declaration is demurrable on the ground of limitations in view of what is now to be stated.

The heart of the plaintiff's case lies in the allegation that its business profits were impaired during the period of five years prior to the commencement of the suit by the defendants' insistence on its alleged trade mark rights. The declaration does not show what resistance the plaintiff made to the defendants' claims regarding the trade mark but the inference from the allegations of the declaration is that it was unable to successfully combat them in the trade. This obviously could be true only if the trade mark remained uncancelled, because it would be idle to contend that the defendants' claims could have been the proximate cause of the plaintiff's loss if the plaintiff had successfully asserted the invalidity of the mark. While the declaration is entirely silent as to what defensive measures, if any, the plaintiff used against the defendants' claim it appears as one of the grounds of demurrer that the trade mark was in fact cancelled more than five years prior to the commencement of this suit, and we are referred to the opinion of the Court of Appeals of the District of Columbia in the case of *Black Band Consolidated Coal*

Company v. Glenn Coal Company, (the same parties named herein) 20 F. (2d) 284, from which it appears that in September 1924, the plaintiff instituted a cancellation proceeding against the trade mark and in August 1925, the Examiner of Interferences, after hearing the evidence, recommended that the registration be cancelled. This decision was affirmed by the Commissioner of Patents and the registration was in due course cancelled. The cancellation was put upon the ground that the mark was purely descriptive and geographical; and it does not appear that there was any issue as to fraud or misrepresentation in procuring it. On appeal (submitted May 9, 1932) the Court of Appeals of the District of Columbia affirmed the cancellation on May 26, 1927.

It further appears from other assigned causes in support of the demurrer, that thereafter the plaintiff brought suit in the District Court for the Southern District of West Virginia against the Black Band Consolidated Coal Company for damages sustained by the registration of the mark and recovered therein a judgment of $20,642. And it likewise further appears that the plaintiff and the Dickinson Fuel Company have litigated the alleged breach of the agency agreement referred to in the declaration. See *Dickinson Fuel Company v. Glenn Coal Company,* 103 W. Va. 366 (1927). In view of these disclosures the statement of the case as contained in the declaration assumes an air of unreality. Nevertheless the appellant invokes the generally accepted rule of pleading that only the facts disclosed by the declaration, in connection with other facts of which the court may properly take judicial notice, may be considered on demurrer. We are not now concerned with the question as to whether the recovery in the damage suit is a bar to the present suit; nor, in view of what has already been said is the litigation over the agency agreement of importance here. But we cannot approve the appellant's contention that the cancellation of the trade mark more than five years prior to the commencement of this suit must be disregarded. It is said that we may not take judicial notice of the decision in the case of the *Black Band Consolidated Coal Company v. Glenn Coal Company,* 20 F. (2d) 284, and the facts therein stated, although the appellant here was a party to the case and the other party, the Black Band Consolidated Coal Company, was named as one of the defendants in this case, because the decision reported is the decision of another federal court. Assuming, without deciding, that the objection is well taken so far as the doctrine of judicial notice is concerned, we cannot accept the view that we must disregard the fact of the cancellation of the mark which has been expressly admitted to be true by counsel for the appellant in open court here. It is one of the essential functions of the judicial process to determine the law applicable to established facts and there is no necessity to invoke the doctrine of judicial notice with regard to a relevant and indeed controlling fact which is freely admitted by counsel in argument. The admission of this fact in this case is tantamount to an admission that the case as stated in the declaration cannot be maintained. It was stated by counsel for the appellant that the omission from the declaration of the fact of cancellation of the trade mark was probably due to inadvertence of the pleader but this seems hardly an adequate explanation in view of the nature of the subject matter. It seems rather more reasonable to infer that the fact was omitted from the declaration in order to avoid the application of the statute of limitations. In view of the admission of the fact we feel obliged to consider it in determining the legal effect of the declaration, especially as there is no express affirmative allegation on the point contained in the declaration. And so considered, it is apparent that the declaration does not allege acts of the defendants within five years prior to the commencement of the suit which could fairly be regarded as the proximate cause of the plaintiff's alleged damage.

It is contended by appellant's counsel that, on the point of limitations, the date of the affirmance of cancellation by the Court of Appeals of the District of Columbia (May 26, 1927), fourteen days after five years prior to the commencement of the suit, rather than the cancellation itself by the Commissioner of Patents, more than five years prior to the suit, should be regarded as the effective date. But we are unable to accept this view because we are referred to no provision of law which has the effect of suspending or superseding the cancellation by the Commissioner of Patents pending appeal. It is also contended by counsel for the appellant in a brief filed after the oral argument when these questions were raised, that the effect of the alleged wrongful registration and the defendants' claims thereunder should be considered as having continued in their effect on the trade for some indefinite time after the actual cancellation. But even if this could be assumed, the nature of the plaintiff's declaration is wholly inapplicable to such

a situation.

We conclude the judgment of the district court must be and it is hereby

Affirmed.

[¶ 55,063] Northern Kentucky Telephone Co. v. Southern Bell Telephone & Telegraph Co., Cincinnati & Suburban Telephone Co., and Citizens Telephone Co.

United States Circuit Court of Appeals, Sixth Circuit (Ky.), November 7, 1934.

No period of limitation being provided in the Sherman Anti-Trust Act, or other applicable federal statutes, the Kentucky law governs as to actions in Kentucky.

The statute of limitations begins to run when there is an overt act, or the last of a series of overt acts.

The law in Kentucky provides that the limitation on the bringing of an action for conspiracy shall be one year and on an action upon a liability created by statute five years. Held, that the specific limitation of one year in regard to conspiracy governs this case and plaintiffs' action is barred.

Before HICKS, SIMONS and ALLEN, Circuit Judges.

SIMONS, Circuit Judge. The action was brought under Sec. 7, of the Sherman Anti-Trust Law, to recover treble damages for a conspiracy in restraint of interstate commerce, declared illegal by Sec. 1. The plaintiff having demurred to the several answers of the defendant, which pleaded the Kentucky Statute of Limitations, the demurrers having been overruled as to the answers but sustained as to the petition under Kentucky practice, and the plaintiff having declined to plead further, the District Court entered an order dismissing the petition, and the plaintiff appeals.

The first questions to be answered are, (1) what statute of limitations was applicable, and (2), when did it begin to run? If these questions are answered as they were below, they control the case, and nothing else need be decided. To understand the issues, however, some explanation of the controversy must be given.

The plaintiff's petition was filed May 2, 1931, and amended October 14, 1932. It alleges the formation of a conspiracy among the several defendants and others in August, 1926, for the purpose of preventing the plaintiff from securing a franchise in Bracken County, Kentucky, and preventing it from securing connections either with defendants' lines or those of other companies in privity with them for the purpose of exchanging interstate telephone messages. In furtherance of the conspiracy a number of overt acts are alleged to have been committed by the defendants and others, including the employment in 1926 by the Citizens Company and another, of attorneys to oppose the plaintiff's application for a franchise in the Fiscal Court of Bracken County; the refusal in February, 1927, by the Southern Bell and the Cincinnati Bell Co's., to agree to an interchange of interstate messages through the physical connection of their lines with the lines of the Higginsport Telephone Co.; the refusal in 1927 by the same defendants to an interchange of messages through a physical connection with the lines of the Felicity Home Telephone Co.; the refusal in December, 1926, by the Southern Bell to agree to an interchange of messages over the lines of the Robertson County Telephone Co., which had been acquired by the plaintiff; threats in 1927 by Southern Bell to discontinue contracts for long distance service with other independent companies in the event that they should establish physical connection with the plaintiff, or enter into agreements with it for the interchange of messages, and the refusal in 1927 by the Citizens Co., to make physical connection with the plaintiff's lines, or to enter into an agreement with it for the interchange of long distance messages. It will be noted that the alleged conspiracy was formed, all of the overt acts relied upon to establish it were committed, and damage therefrom resulted, more than one year prior to the bringing of the action. The importance of these circumstances will presently appear.

Sec. 1, of the Sherman Anti-Trust Act, provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." Sec. 7 of the Act. (Sec. 15, T. 15, U. S. C. A.), provides, "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court in the United States in the District in which the defendant resides * * *" It is under this section that the action was brought.

The defendants rely upon Sec. 2516, Kentucky Statutes, which interposes a bar of one year to certain specified actions, including an action for conspiracy. There being no period of limitation provided in the Sherman Anti-Trust Act, or other applicable Federal statutes, it is agreed that Kentucky law governs. *Chattanooga Foundry v. Atlanta*, 203 U. S. 390. The plaintiff,

however, urges that Sec. 2516 is not applicable because its action is not for conspiracy, but one to recover damages resulting from acts done pursuant to conspiracy, and because Sec. 2515, Kentucky Statutes, which provides a five year period of limitation for "an action upon a liability created by statute, when no other time is fixed by the statute creating the liability," governs because its action is upon such a liability.

The distinction urged between an action for a conspiracy and one for damages growing out of a conspiracy, would seem to be a mere play upon words. Plaintiff's amended petition repeatedly charges the existence of the conspiracy not only among the defendants but between the defendants and others. Moreover, acts are relied upon as being unlawful which were committed by one or more of the defendants but not by all. The joinder of defendants not participating in alleged wrongful acts can be supported only upon the theory that they were conspirators, in which case the act of one is attributable to all after the formation of the conspiracy and during its existence. Finally, wrongful acts are alleged to have been committed by parties not joined, and acts are relied upon which are not themselves unlawful, and such acts can be brought home to the defendants only upon the assumption of conspiracy. It is clear, therefore, that the suit is one for conspiracy within the statutory and common law meaning of that term.

But the plaintiff contends that notwithstanding the action may be, strictly speaking, one for conspiracy, the five year period of limitation applies in view of the language of the statute making Sec. 2515 applicable to liabilities created by statute. However, it is a long recognized rule of construction that where there is conflict between the general words of the statute and particular words in a subsequent provision, the general language must yield to the specific. *Townsend v. Little,* 109 U. S. 504, 512. This would seem to be a case for the application of the rule even were it one of first impression. But the Kentucky courts have furnished us with a rule of decision in respect to 2515. In Kentucky, actions for injury to the person resulting in death, and actions for damages for the escape of a prisoner, are governed by statute. Such actions are held to be governed by Sec. 2516 and the one year period of limitation provided for therein. *Irwin v. Smith,* 150 Ky. 147; *Howard v. Middlesboro Hospital,* 242 Ky. 602; *Roush v. Wolf,* 243 Ky. 180.

There remains to be determined the question as to when the statute of limitations begins to run against an action for conspiracy. It is the contention of the plaintiff that a conspiracy, until successful or terminated, is a continuing wrong, and that so long as damages flow, and this without regard to the time of formation or the commission of overt acts, the statute does not begin to run. Reliance is placed upon *United States v. Kissel,* 218 U. S. 601; *Patterson v. United States,* 222 Fed. 599, (C. C. A. 6), and *Eldredge v. United States,* 62 Fed. (2d) 449 (C. C. A. 10). These decisions do not sustain the plaintiff's contention. They go no further than to hold that a conspiracy continues so long as overt acts are being committed by one or more of the conspirators, even though there is no new agreement among them subsequent to the original agreement. This is made clear by the language of Mr. Justice Holmes in the *Kissel* case, at pp. 607-608, "A conspiracy is a partnership in criminal purposes. That as such it may have a continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act," and by the comment of the court in the *Eldredge* case, "The overt act is an essential ingredient of the crime; a conspiracy which contemplates a series of overt acts is a continuing conspiracy, and the statute does not commence to run until the last overt act, performed in compliance with the original agreement has been accomplished." Since in the *Eldredge* case overt acts in furtherance of the conspiracy charge were proven to have been committed within a few months of the indictment, it was held that such acts were the acts of members of the conspiracy.

In the instant case there are no overt acts alleged to have been committed within one year prior to the filing of the action. In *Nalle v. Oyster,* 230 U. S. 165, at 182, it was said to be a well settled rule that no civil action will lie for a conspiracy unless there be an overt act that results in damage to the plaintiff. A necessary corollary to this rule would seem to be that when there is an overt act, or the last of a contemplated series of overt acts, the cause of action accrues and the statute of limitations begins to run. If this were not true, then it would result that in every case where damages resulting from a wrongful act are in their nature continuing, there would be no limitation upon the right of action, and the beneficent purpose of the statute to put a period to the right to sue would be defeated. This would apply equally whether the one year or the five year statute governed. We conclude that the plaintiff's action is barred, and it becomes unnecessary to consider the other questions in the case.

The order below is affirmed.

[¶ 55,064] Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., Wallace Publishing Co., Wisconsin Farmer Co., McKelvie Publishing Co., Webb Publishing Co., Midwest Farm Paper Unit, Inc.

Supreme Court of the United States. December 3, 1934.

In order to recover threefold damages under the Sherman Act for injuries caused by a restraint of trade affecting commercial advertisements in farm papers, the right of the plaintiff to recover does not depend upon the proportion that respondents control of the total farm paper advertisements in the entire country, and it is not required to prove that respondents imposed a restraint or attempted monopolization that would affect all commercial advertisements in all farm papers wherever published or circulated. The provisions of Secs. 1 and 2 of the Sherman Act have both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Justice BUTLER delivered the opinion of the Court.

Petitioner brought this action against respondents alleging facts upon which it claimed that they violated sections 1 and 2 of the Sherman Act and thereby caused injury to its property and business for which it prayed recovery of three-fold damages under section 7. The respondents answered separately by general denial. At the close of all the evidence they submitted a written motion that the court direct a verdict in their favor. The court granted the motion and entered judgment. The Circuit Court of Appeals affirmed 70 F. (2d) 3.

Section 1 of the Sherman Act denounces "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U. S. C., § 1. Section 2 declares: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor." 15 U. S. C., § 2. Section 7 provides: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor . . . and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." 26 Stat. 210.

For a number of years, 1928 to 1932 inclusive, next prior to the commencement of this action the petitioner and each respondent other than the Midwest Farm Paper Unit, Inc., was a publisher of one or more farm papers. Each is a general, and not a vocational, paper; the larger part of its circulation is in the State where printed: it does not circulate in any substantial number throughout the country as a whole and is called a state or sectional paper in order to distinguish it from publications having a wider and what is referred to as a national circulation. Petitioner publishes weekly "The Indiana Farmer's Guide" at Huntington, Indiana. Its circulation is about 160,000 of which over two-thirds is in Indiana and approximately 50,000 in other States. The respondent Prairie Company publishes in Illinois "The Prairie Farmer" and the "Indiana Edition" of the same, which has a large circulation in Indiana. The Wallace Company publishes in Iowa "Wallace's Farmer and Iowa Homestead." The Wisconsin Company publishes in Wisconsin the "Wisconsin Agriculturist and Farmer." The McKelvie Company publishes in Nebraska "The Nebraska Farmer." The Webb Company publishes in Minnesota "The Farmer and Farm, Stock and Home" and the "Dakota Edition" of the same. Advertising matter carried by each of these publishers includes classified and display or commercial advertisements. The latter only is involved in this case. Each is largely dependent for financial success upon revenue derived from these advertisements. Most of the advertisers are located in States other than those in which the papers are published. About ninety per cent of petitioner's advertisements comes from points outside Indiana and is obtained by correspondence, traveling solicitors and representatives located in different parts of the country. Advertisers, in order to enable petitioner to print their advertisements as desired, send to it from outside Indiana electrotypes which, after being used, are returned to the advertiser or held subject to his order.

The Midwest Unit is an agency incorporated in 1931 and the successor of an organization formed in 1928. Its officers and directors are representatives of the other respondents which make use of that agency, as similarly use was made of its predecessor, to procure at combination

rates identical advertisements to be published in their seven farm papers. The gist of the complaint is that respondents entered into a contract, combination and conspiracy for the purpose of obtaining a monopoly of the farm paper business including the publication, circulation and distribution of advertisements of peculiar interest to farmers "within the territory covered" by their publications; that in furtherance of this contract, combination and conspiracy they conceived a plan and design calculated to break down and destroy "competition with other farm publications within said territory"; and that in order to effectuate that purpose they agreed upon a combination schedule of advertising rates for all their publications materially below the total of the separate rates of each.

There was evidence tending to show: That the combination rate for advertisements in respondents' seven papers was much less than the total of the separate charges for the same advertisements in any six; that respondents acting separately and in concert sought and obtained advertisements for all seven papers at rates much less than the charges would have been for identical advertisements if, omitting the "Indiana Edition" of "The Prairie Farmer," they were published in the other six and in petitioner's "Indiana Farmer's Guide." Thus, at least according to petitioner's contention, it appears that by means of the combination rate, respondents, acting together pursuant to agreement to that end, gave a substantial financial advantage to advertisers choosing the "Indiana Edition" instead of the Farmer's Guide.

Petitioner contends that the ground upon which the district court directed the verdict was that its activities were not shown by the evidence to constitute interstate commerce. The record is ambiguous. Respondents' motion did not specify any grounds upon which they claimed to be entitled to the peremptory instruction. There is nothing to indicate the arguments submitted or authorities cited by either party. The court orally instructed the jury: "There has been, in my opinion, a failure on the part of the plaintiff in this case to show that there has been any restraint of trade as between the different states . . . That being true, this court would not have jurisdiction to entertain the case, at all, and your finding, under that state of facts, should be for the defendants."

Respondents take no issue with the petitioner's assertion of fact. But, impliedly assuming its correctness, they argue that, while petitioner and respondents are engaged in interstate commerce in the circulation of their papers, the subject matter of the suit is not that business but the making of contracts by respondents for the insertion of advertising matter in their papers and that therefore the case is ruled by *Blumenstock Bros. v. Curtis Pub. Co.*, 252 U. S. 436, 438. And they say the trial court did not err in holding that "there can be no restraint or monopoly of interstate commerce when the subject matter of the complaint does not relate to interstate commerce at all." Thus, by a construction of the complaint that is utterly untenable, they support the very basis upon which petitioner maintains the district court rested its decision. Inferentially their contentions go far to show—and in the light of all the circumstances we find—that the trial court's direction of verdict and its judgment rests solely upon the ground that petitioner failed to introduce evidence that its business or that of respondents included interstate commerce.

Blumenstock Bros. v. Curtis Pub. Co., supra, gives no support to that ruling. There, an advertising agency sued a publishing company under § 7 of the Sherman Act for damages alleged to have been caused to the agency by the publisher's violation of § 2. Defendant moved to dismiss on the ground that the complaint did not allege a cause of action within the provisions of the Act. The district court granted the motion and entered judgment dismissing the suit for want of jurisdiction over the defendant or the action, and included in the record a certificate in accordance with § 238 of the Act of March 3, 1911, 36 Stat. 1157, that the question involved was whether the facts alleged constituted a cause of action under the Act.

We said (p. 442): "In the present case . . . the subject-matter dealt with was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant. It may be conceded that the circulation and distribution of such publications throughout the country would amount to interstate commerce, but the circulation of these periodicals did not depend upon or have any direct relation to the advertising contracts which the plaintiff offered and the defendant refused to receive except upon the terms stated in the declaration. The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce. This case is wholly unlike *International Textbook Co. v. Pigg*, 217 U. S. 91, wherein there was a continuous interstate traffic in textbooks and apparatus for a course of study pursued by means of correspondence, and the movements in interstate commerce were held to bring the subject-matter within the domain of federal control, and to exempt it from the

burden imposed by state legislation." And after reviewing earlier decisions the opinion continued (p. 444): "Applying the principles of these cases, it is abundantly established that there is no ground for claiming that the transactions which are the basis of the present suit, concerning advertising in journals to be subsequently distributed in interstate commerce are contracts which directly affect such commerce."

The business that is here alleged to have been damaged is the publication and circulation of these farm papers. That business includes the obtaining of advertising, the transportation between States of electrotypes sent respectively to petitioner and respondents by their customers to be used in setting up advertisements and the transportation of substantial quantities of the papers in interstate commerce. Advertising at compensatory rates is an essential element. The opinion in *Blumenstock Bros. v. Curtis Pub. Co., supra,* assumed that a publishing business such as that now under consideration would amount to interstate commerce. There is no ground for the contention that the evidence in this case is not sufficient to go to the jury on the question of interstate commerce. *International Textbook Co. v. Pigg, supra,* 106-107. *Pensacola Tel. Co. v. West., etc. Tel. Co.,* 96 U. S. 1, 9-10. *Dahnke-Walker Co. v. Bondurant,* 257 U. S. 282, 290-291. *Di Santo v. Pennsylvania,* 273 U. S. 34, 36. *Eastman Co. v. Southern Photo Co.,* 273 U. S. 359, 370, 374. *Furst v. Brewster,* 282 U. S. 493, 497. Cf. *N. Y. Life Ins. Co. v. Deer Lodge County,* 231 U. S. 495, 510, *et seq.*

The Circuit Court of Appeals did not consider the ground upon which the district court put the judgment. It impliedly assumed that petitioner's business does include interstate commerce. It accepted the assertion that, due to the combination rate of respondents, petitioner lost commercial advertisers. In decision of the case, the court said (p. 5): "We are, however, not satisfied that appellant has established a fact which rested upon it to prove; viz., that through this combination there was effected such a restraint of interstate commerce as would materially affect the entire farm journal advertising business. Such is the requirement laid down in *Standard Oil Co. v. United States,* 283 U. S. 163. The facts in that case indicated a much greater control of the gasoline production industry than is present in the case before us. . . . Likewise, it seems the facts in *Appalachian Coals, Inc., v. United States,* 288 U. S. 344, presented a case of much stronger domination by the combinations that had formed than the one before us. . . . we cannot escape the force of appellees' statement—' . . . . If, as held in *Standard Oil Co. v. United States* . . . the owners of 55 per cent of the gasoline in the United States could not by combination obtain a monopoly in violation of the Sherman Act, and if, as held in *Appalachian Coals, Inc., v. United States,* . . . the owners of 74 per cent. of the coal mined in a certain territory could not obtain a monopoly in violation of the Sherman Act, then how can it be held that 5 out of approximately 300 newspapers can obtain a monopoly of advertising, and how can it be held that newspapers which do only approximately 15 per cent of the advertising in the farm journal field can obtain a monopoly?' In the face of these two decisions we agree with Judge Baltzell that a proper case for the application of sections 1, 2, and 7 of the Sherman Anti-Trust Act was not established."

The Circuit Court of Appeals makes the relation between the amount of farm journal advertising controlled by respondents to the total in the entire country a basis of its judgment affirming that of the district court. But the complaint charges restraint and attempt to monopolize only in the territory served by respondents' publications, being five—or seven if the Indiana and Dakota editions are separately counted —out of a total of 23 papers in that territory.[1] Petitioner claims that during the five-year period respondents' advertisements ranged from 44.37 per cent to 66.92 per cent of the total in the territory properly to be taken into account.[2] The record contains no suggestion by respondents or by either court that petitioner's allegations are not sufficient to charge a violation of §§ 1 and 2.

[1] The petition contains the following computation to show the number and type of farm papers published in the eight states in which petitioner's and respondents' papers principally circulate:

	Total Number of Papers	General	Vocational or Technical
Illinois	36	5	31
Indiana	10	4	6
Iowa	10	5	5
Minnesota	8	2	6
Nebraska	3	1	2
North Dakota	1	0	1
South Dakota	1	1	0
Wisconsin	8	5	3
Total	77	23	54

[2] Petitioner's computation follows:

	Total Lineage Carried by all Papers	Total Lineage Carried by Respondents' Papers	Per Cent of Respondents' Lineage to Total
1928	7,490,806	3,323,256	44.37
1929	6,844,629	3,235,364	47.26
1930	5,172,535	2,980,963	57.63
1931	3,562,695	2,207,650	61.97
1932	2,151,376	1,439,753	66.92

Its right to recover does not depend upon the proportion that respondents control of the total farm paper advertisements in the entire country, and it was not required to prove that respondents imposed a restraint or attempted monopolization that would affect all commercial advertisements in all farm papers wherever published or circulated. The provisions of §§ 1 and 2 have both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce. *Standard Oil Co. v. United States,* 221 U. S. 1, 61.

Our decision in *Standard Oil Co. v. United States,* 283 U. S. 163, has little if any bearing upon the question whether the facts alleged in the complaint and supported by the evidence in this case reasonably may be held to constitute a violation of § 1 or § 2. That was a suit for injunction, § 4, to prevent an alleged combination from creating a monopoly or restraining interstate commerce by control of the part of gasoline produced by cracking. The district court granted some of the relief sought. The case came here on defendants' appeal. Slight notice of the principal features of the case is sufficient to distinguish it from the one now before us. Three producers, owning patents for cracking by which the yield of gasoline is greatly increased, joined with the owner of similar patents in agreements for the exchange of patent rights and division of royalties which were challenged by the government as a violation of the Act, chiefly upon the ground that they enabled the parties to the agreement to maintain existing royalties. Cracked gasoline is not distinguishable from the straight run. They are mixed or sold interchangeably. The output of cracked gasoline was about 26 per cent of the total. The record did not show the production of cracked by licensees. It was not shown that by agreeing on royalties defendants could control price or supply. We held that the United States was not entitled to any relief and reversed the decree of the district court.

Appalachian Coals, Inc., v. United States, 288 U. S. 344, was brought here on appeal from a decree of the district court granting an injunction against a combination of producers of bituminous coal in a suit by the United States under the Sherman Act. It may be taken for present purposes that the defendants' production was 74.4 per cent of the total in the territory in which they operated. But this was only about 12 per cent of the production east of the Mississippi. It was shown that relatively little bituminous coal is consumed in the district in which the defendants operate mines. They marketed most of their coal in highly competitive territory. We held, in view of the conditions disclosed by the record, that there was no basis for concluding that competition anywhere would be injuriously affected by the cooperative plan adopted by the combination, and reversed the decree.

The Circuit Court of Appeals, while recognizing that "there are essential fact differences which make comparisons of different industries of little value," rested its judgment upon respondents' arguments based upon these cases. But the abridged statements of issues there involved and decided are sufficient to show that respondents' contention reflected inadequate ascertainment and appreciation of the facts and considerations there held controlling and that these decisions turned upon the government's failure to prove restraint of competition and that they are not in point here. It results therefore that the ground on which the Circuit Court of Appeals rested its judgment cannot be sustained.

Petitioner sought this writ upon the ground that the Circuit Court of Appeals held it bound to prove that respondents effected such a restraint of interstate commerce as would materially affect the farm journal advertising business in the entire country and misapplied our decisions in the *Standard Oil Company* case and the *Appalachian Coals* case. Respondents had opportunity here to show that, although given on untenable grounds, the judgment below is right and should be affirmed. And, if by the record they could so demonstrate, this court, if satisfied beyond doubt that it could do so without prejudice to petitioner, properly might refrain from reversal. *Deery v. Cray,* 5 Wall. 795, 807. *Vicksburg & Meridian Railr'd v. O'Brien,* 119 U. S. 99, 103. *Peck v. Heurich,* 167 U. S. 624, 629. But respondents suggest nothing to justify the direction of verdict and judgment in their favor. Certainly, in the absence of a claim on their part that, conceding the errors exposed by this opinion, the judgment is right, we will not examine the record to discover grounds to sustain it. Cf. *Chicago, Milwaukee &c. R'y v. Tompkins,* 176 U. S. 167, 179. *Hammond v. Schappi Bus Line,* 275 U. S. 164, 170 *et seq.* We intimate no opinion whether, upon the question of restraint or monopoly or upon the question of injury to petitioner or its business, the evidence is sufficient to warrant a verdict in its favor.

The judgment of the Circuit Court of Appeals should be reversed and the case remanded to the district court with directions that petitioner be granted a new trial.

So ordered.

[¶ 55,065] H. Wagner and Adler Company v. J. T. Johnston Mali, individually and as a co-partner with Henry J. Mali, doing business under the trade name and style of Henry W. T. Mali and Company, and Henry J. Mali, individually and as a co-partner with J. T. Johnston Mali, doing business under the trade name and style of Henry W. T. Mali and Company.

United States Circuit Court of Appeals, Second Circuit. January 14, 1935.

A bill of discovery is maintainable in aid of an action at law for treble damages under the anti-trust acts, but interrogatories calling for evidence which shows defendants guilty of defrauding the customs and conspiracy to defraud the United States should be excluded as improper where defendants are individuals and not corporations.

Appeal from the District Court of the United States for the Southern District of New York.

Before MANTON, L. HAND and SWAN, Circuit Judges.

Bill for discovery by H. Wagner & Adler Company against J. T. Johnston Mali and Henry J. Mali, individually and as copartners trading as Henry W. T. Mali & Company, filed in aid of an action at law brought by the plaintiff against said defendants and others to recover treble damages for the alleged violation of sections 8 and 72 of Title 15 of the United States Code (15 USCA secs. 8, 72). From a decree ordering discovery as to all matters embraced in interrogatories annexed to the bill, the defendants appeal.

Reversed and remanded.

SWAN, Circuit Judge: Upon the filing of the bill of discovery the defendants moved to dismiss on three grounds: for lack of equity; because discovery was sought in aid of an action for treble damages; and because discovery would prove matters which, according to the allegations of the complaint in the action at law, constitute a crime. This motion was denied by Judge Woolsey upon the authority of *Baush Mach. Tool Co. v. Aluminum Co.*, 63 F. (2d) 778 (C. C. A. 2), certiorari denied, 289 U. S. 739, without passing upon the propriety of the interrogatories sought to be propounded. The defendants then filed an answer of which all but three paragraphs were stricken, on plaintiff's motion, by Judge Knox who instructed the defendants as to the procedure to be followed in answering the bill and objecting to the interrogatories. The defendants were granted fifteen days, expiring on January 28, 1934, within which to file an amended answer. So much of the original answer as had not been stricken out admitted that the plaintiff was a New York corporation and the defendants were partners with a principal place of business in New York City (paragraph 1), and alleged only that a bill of discovery does not lie in aid of an action to recover treble damages which are in the nature of a penalty (paragraph 39), and that there was no equity in the bill (paragraph 43). In May 1934, no amended answer having been filed, the plaintiff moved for an order adjudging the defendants in default, precluding them from filing objections to the interrogatories, and requiring them to answer the same forthwith. A decree to this effect, entered by Judge Patterson, is the decree appealed from. Pending the appeal, enforcement of the decree was suspended.

The appeal challenges not only the decree of Judge Patterson but also the interlocutory orders of Judge Woolsey and Judge Knox. The appellants' first contention is that the action at law, being for treble damages, is a suit to recover damages in the nature of a penalty, in aid of which no bill of discovery will lie; hence their motion to dismiss should have been granted. In support of this position they cite numerous authorities.* But the question has been recently determined by this court adversely to the appellants' contention. *Baush Machine Tool Co. v. Aluminum Company*, 63 F. 2d 778, cert. denied 289 U. S. 739. There a bill of discovery was allowed in aid of an action at law under the anti-trust acts. We do not regard the question as now open for reconsideration.

* See *Jones v. Jones*, 22 Q. B. D. 425; *Hobbs & Co. v. Hudson*, 25 Q. B. D. 232; *Boteler v. Allington*, 3 Atk. 453, 457; *Harrison v. Southcote*, 2 Ves. 389, 394; Hare, Discovery, 1st Am. Ed., 131; Daniell, Chancery Pleading & Practice, 6th Am. Ed. 387, 1557; Story, Equity Pleading, 10th ed., sec. 576. In the federal courts the question has usually arisen in connection with patent and trademark litigation, and divergent views have been expressed. For cases disallowing interrogatories where treble damages are claimed, see *F. Spiedel Co. v. N. Barstow Co.*, 232 F. 617 (D. R. I.); *Wilson v. Union Tool Company* 275 F. 624 (S. D. Cal.); *Blackmore v. Collins*, 286 F. 629 (E. D. Mich.); for cases reaching the opposite result, see *Grasselli Chemical Co. v. Nat. Aniline & Chem. Co.*, 282 F. 379 (S. D. N. Y.); *Woodbury v. Andrew Jergens Co.*, 16 F. (2d) 130 (E. D. N. Y.); *Taylor v. Ford Motor Co.*, 2 F. (2d) 473 (N. D. Ill.); *Beacon Folding Mach. Co. v. Rotary Mach. Co.*, 17 F. (2d) 934 (D. Mass.). The two cases last mentioned suggest distinctions between the patent cases, where trebling the damages is discretionary with the court, and cases where a statute compulsorily trebles compensatory damages.

The appellants next complain of the order of Judge Knox striking out all but three paragraphs of their answer. The answer denied the plaintiff's right to discovery, combined defenses to the action at law and the bill of discovery, and included objections to the interrogatories annexed to the bill. It was verbose, redundant and replete with argumentative matter. Without taking up the separate paragraphs of the answer, more than one hundred in number, it will suffice to say that it clearly violated Equity Rule 30 in not setting out "in short and simple terms" the defense to each claim asserted by the bill. For this reason alone, and without regard to others which might be advanced, we think it was within the trial court's discretion to require an amended answer.

Judge Knox instructed the defendants as to the procedure to be followed in answering the bill and objecting to the interrogatories. In so doing he proceeded upon the assumption that Equity Rule 58 applies to discovery in aid of an action at law as well as to interrogatories filed in suits for equitable relief. This the appellants emphatically deny. Their contention finds support in a statement in *Bradford v. Indiana Harbor Belt R. Co.*, 300 F. 78 (C. C. A. 7) but this conclusion, with due deference, we cannot accept. In *Sinclair Refining Co. v. Jenkins Co.*, 289 U. S. 689, 693, where discovery was sought in aid of an action at law, Equity Rule 58 was cited as applicable to the ancillary bill. In *Pressed Steel Car Co. v. Union Pac. R. Co.*, 241 F. 964 (S. D. N. Y.) the assumption is implicit throughout the opinion that Rule 58 governs the practice. Upon the procedure as outlined in that opinion, Judge Knox based his instructions to the appellants, quoting from page 966 thereof the following:

"The plaintiff will plead those facts which entitle him to a discovery from the defendant, and will annex such interrogatories as he wishes the defendant to answer. If the defendant does not dispute the plaintiff's right to some discovery, but objects to some or all of the actual interrogatories annexed to the bill, he will make those objections under rule 58, and bring them on for hearing before the judge. He is not subject to the rule that, by answering one, he must answer all. If, on the other hand, he disputes the plaintiff's right to any discovery, he will plead in an answer such facts as he deems apposite, and obtain from the court, under rule 58, an enlargement of his time to answer the interrogatories until the plaintiff's right to discovery is established."

Such procedure has our approval; it is simple and will result in an economy of time and effort by court and counsel.

The defendants were allowed to file an amended answer on or before January 28, 1934. They failed to do so and made no effort to obtain any extension of time. Upon the bill and so much of the answer as had not been stricken, the case came before Judge Patterson. The defenses interposed by the remnants of the answer, paragraphs 39 and 43, had already been ruled adversely to the defendants upon denial of their motion to dismiss the bill. Consequently Judge Patterson properly treated the bill as standing pro confesso. See Equity Rules 16, 29. Since no enlargement of the time to file objections to the interrogatories had been obtained and all objections to interrogatories had been stricken from the answer, he ruled that the defendants must answer all the interrogatories irrespective of the propriety of the discovery sought. In this we think he erred. It is well settled that when a decree pro confesso is rendered in the ordinary suit for equitable relief, the plaintiff will not as of course be accorded all the relief for which he has prayed but only such as is proper upon the face of the bill. *Thomas v. Wooster*, 114 U. S. 104, 113; *Clifton v. Tomb*, 21 F. (2d) 893, 897 (C. C. A. 4); *Rose v. Woodruff*, 4 Johns Ch. 546 (N. Y.) This principle should be equally applicable to a pro confesso decree on a bill for discovery under the simplified procedure permitted by Rule 58. As indicated in the preceding discussion of that procedure, objections to particular interrogatories will be postponed until the right to discovery has been established. Before expiration of the time to answer the bill, the defendants should have obtained an enlargement of their time to object to the interrogatories. Despite their failure to do this Judge Patterson might, in his discretion, have allowed objections to interrogatories to be filed when the case came before him for entry of a decree. If, however, he thought the defendants' obstinate refusal to follow the procedure outlined by Judge Knox should preclude their making of objections so late, we think that he was bound to consider on his own initiative the propriety of the interrogatories. In the *Pressed Steel Car Co.* case, 241 F. 964 (S. D. N. Y.), although the district court had stricken out the entire answer, its decree excluded as improper several of the interrogatories annexed to the bill. Similarly, in the *Sinclair Refining Co.* case, 62 F. (2d) 663, aff'd 289 U. S. 689, without answer or objections of record, the court considered the scope of the discovery to be awarded and denied much of that asked for. See also the *Baush* case, 60 F. (2d) 586 (D. Conn.), aff'd, 63 F. (2d) 778 (C. C. A. 2). Had consideration been given to the propriety of the discovery sought, it is extremely doubtful, for reasons about to be stated, whether answers to any of the interrogatories would have been ordered.

The pending action at law is predicated on alleged violations of section 72 (count one) and section 8 (count two) of Title 15 of the Code. Each of these sections defines a crime, the maximum punishment for which

may be a fine of $5,000, or imprisonment for one year, or both. Since it is to prove causes of action arising from the violation of these sections that the plaintiff seeks discovery, it is apparent that the evidence called for may tend to incriminate the defendants. A bill of discovery will not lie if the discovery will incriminate the defendant or subject him to a penalty or forfeiture. *Boyd v. United States,* 118 U. S. 616, 631; *Webb v. Samuels,* 227 F. 948 (S. D. N. Y.); *Taylor v. Bruen,* 2 Barb. Ch. 301; *Claridge v. Hoare,* 14 Ves. Jr. 59; Story, Equity Pleading, 10th Ed. sec. 575. This objection was taken in the defendants' motion to dismiss. This was a proper way to raise it. *Daisley v. Dun,* 98 F. 497 (D. Mass.); *Atterbury v. Knox & McKee,* 38 Ky. 282; Story, supra, sec. 575; Daniell, Chancery Pleading & Practice, 6th Am. ed. 563. But Judge Woolsey apparently did not pass upon this ground of dismissal; whether this was because he thought it was disposed of by the *Baush* case, or because he left it to be considered in connection with objections to the interrogatories does not appear. Since Judge Woolsey apparently had not considered the matter of incrimination, we think Judge Patterson should have done so before decreeing discovery. The *Baush* case clearly does not touch this question for there the defendant was a corporation, and a corporation has no privilege against self-incrimination. *Hale v. Henkel,* 201 U. S. 43, 74; *Wilson v. United States,* 221 U. S. 361, 382. But these defendants are individuals, and clearly have such a privilege, unless prosecution is barred by the applicable statutes of limitation or the immunity section of the anti-trust laws (15 USCA sec. 32).

The bill seeks discovery of matters up to the date of the filing of the complaint in the action at law, January 8, 1931. The first cause of action is for selling imported goods at less than their market value abroad, which is a crime under 15 USCA sec. 72; and in addition the acts by which it is charged this was accomplished include defrauding the customs by the entry of goods at false invoice values. 18 USCA sec. 126. For the latter offense the statute of limitations is apparently five years. R. S. sec. 1046; *United States v. Hirsch,* 100 U. S. 33. This would prevent prosecution for acts done prior to January 1930 and it could be argued that as to the earlier years the interrogatories should be answered. But the defendants are also liable to a charge of conspiring to defraud the United States (18 USCA sec. 88). The evidence as to the earlier years would be a constituent part of the proof of such a conspiracy and the defendants would continue criminally liable until the conspiracy was ended or they disassociated themselves from it. See *Heike v. United States,* 227 U. S. 131; *Patterson v. United States,* 222 F. 599 (C. C. A. 6); *Ware v. United States,* 154 F. 577 (C. C. A. 8); *United States v. Eccles,* 181 F. 906 (C. C. Ore.); *United States v. Swift,* 186 F. 1002 (N. D. Ill.). It would seem, therefore, that the interrogatories answers to which might establish the existence of such a conspiracy between 1922 and 1931, are a step in the proof of a possible conspiracy for which the defendants might still be prosecuted. A similar argument may be made with respect to the second cause of action based on a violation of 15 USCA sec. 8.

Turning to the question of the effect of the immunity statute (15 USCA sec. 32), it appears that this is expressly limited to "any proceeding, suit or prosecution under sections 1 to 27 inclusive of this chapter." Section 72, upon which the first cause of action is based, is not included. Even as to the second cause of action, it is highly doubtful whether section 32 would accord immunity. The section was originally a proviso in a statute appropriating money to be expended under the direction of the Attorney General for the employment of special counsel to conduct prosecutions for violations of the anti-trust laws. 32 Stat. 904. Since the body of the statute is concerned wtih proceedings brought by the Department of Justice, it would seem a natural construction to limit similarly the proviso. Moreover, it would be an amazing thing to allow a private suitor to confer immunity upon a defendant or other witness by calling him in a private action. The only cases which have passed upon the point have denied that the statute does mean this. *E. H. Rohde Leather Co. v. Duncan & Sons,* 15 F. (2d) 103 (W. D. Wash.); *United States v. Standard Sanitary Mfg. Co.,* 187 F. 232 (C. C. Pa.)

The foregoing discussion indicates the doubt we entertain whether any of the discovery sought can be had. We do not, however, finally decide these questions for they have not been argued upon the appeal, although raised by assignments of error attacking the order refusing to dismiss the bill and the scope of the discovery awarded by the final decree. If after argument before the district court it is decided that all the discovery sought is of an incriminatory character, that will dispose of the whole matter; if, however, some of the interrogatories can survive, then the district court should determine whether they are otherwise objectionable. Since questions of the

latter sort may never be reached and have never been considered upon the merits by the district court, it seems best not to decide them upon this appeal. The decree is reversed and the suit remanded for further proceedings.

[¶ 55,066] Jamaica Truck Tire Service, Inc. v. Sears Roebuck & Company, The Goodyear Tire & Rubber Company and The Goodyear Tire & Rubber Company, Inc.

United States District Court. Southern District of New York. L 58-100. February 7, 1935.

A motion to dismiss a complaint founded upon an alleged attempt to monopolize the automobile tire and casing trade is denied, overruling defendants' objections that plaintiff failed to allege its inability to purchase from competitors and failed to charge price raising by defendants, on the ground that the success of a conspiracy to bring about monopoly is not a prerequisite to condemnation of the unlawful plan.

OPINION

KNOX, D. J. Complainant here alleges three causes of action against defendants. The first is founded upon conduct that is said to be violation of Section 2 of the Sherman Anti-Trust Act. The second has to do with Section 1 of that statute, and the third sets up matters that are claimed to subject defendants to liability under Sections 2 and 3 of the Clayton Act.

The pleading is under attack in the following particulars:

(1) That it fails to state a cause of action against Sears, Roebuck & Company.

(2) In the event that the Court should fail so to conclude, the motions are

(a) that each alleged cause of action be separately stated;

(b) that paragraphs 13 and 50, together with a portion of paragraph 45 of the complaint, be stricken therefrom, and

(c) that complainant be required to file an amended pleading.

The questions thus presented were argued some months ago, and a decision thereon has been too long delayed. One reason for this is that I had indulged the hope, now found to be vain, that opportunity would be found to express my views at length, and in a manner somewhat responsive to the ability and care with which counsel have presented their arguments. However, the pressure of other official duties has been, and is such, that I am compelled to dispose of the motions in a summary manner.

Briefly, therefore, my conclusions are as follows:

(1) The motion to dismiss the complaint because of its failure to state valid causes of action must be denied.

Section 2 of the Sherman Act is directed at those who "monopolize, or attempt to monopolize, or (who) *combine or conspire* * * * to monopolize any part of the trade or commerce among the several States * * *" In order to give rise to a cause of action thereunder, it is not required that either the attempt to monopolize trade, or a conspiracy which has monopoly as its object, should be successful. Under Section 2 of the Act, plaintiff charges defendants with a conspiracy which contemplates that they shall have a monopoly in the automobile tire and casing trade. In support of such allegation, the complaint avers that defendants have engaged in a course of specified conduct which, conceivably, tends to bring about, if not wholly to accomplish, the result denounced by the statute.

If the proof upon the trial supports plaintiff's allegations, it will not be a defense that defendants have failed to realize such intentions of complete monopoly as they may have harbored. On the contrary, they will be called upon to respond in damages for such injury, if any, as has come to plaintiff, and which is properly attributable to their unlawful acts. The question as to whether defendants did, or did not, dominate the market in automobile tires in such way as to inflict actionable wrong upon plaintiff cannot be determined upon the pleadings. As presently framed, they are sufficient to indicate a monopolistic design upon the part of defendant that has imposed undue hardship upon the plaintiff, and it is entitled to undertake the production of proof that will establish its case. As I read the decisions, the percentage of dominance in a particular industry, which defendants in a Sherman Anti-Trust suit may control, is not always determinative of their liability for alleged violation of the Act.

In *Dueber Watch-Case Manufacturing Company v. Howard Watch and Clock Company*, 66 Fed. 637, which is cited in support of the motion to dismiss, the court observed that the defendants then before it represented but a small part of the watch case industry, that no interference with

interstate commerce was clearly shown. that the market for watches was practically unlimited, and a monopoly well nigh impossible, and finally, that commerce in watches was not a prime necessity to the public.

In the case at bar, an outstanding industry in which defendants control twenty-five per centum of the commerce in automobile tires is involved. The business of defendants has materially increased, and the number of outlets has been multiplied. Competitors have failed and gone out of business, and their misfortunes are charged to the price cutting, and other competitive acts that are the result of the conspiracy of the defendants. In consequence of all this, it is said that plaintiff has been directly and adversely affected.

In *Hood Rubber Company v. United States Rubber Company,* 229 Fed. 583, the complaint was dismissed as to six defendants that were engaged in the manufacture of shoe lasts and forms, but was sustained as to the United States Rubber Company. The dismissal that was had was rested upon the ground that the discharged defendants were not aware of the unlawful design of the rubber company. It was also said that none of them occupied a dominating position in the industry. While this consideration is entitled to weight on a motion such as the present, it cannot, in the face of the complaint, be decisive.

Furthermore, upon a motion to dismiss, the conclusions which various courts have reached after hearing all the evidence adduced upon the trial of anti-trust suits, are not especially helpful. It may well be that plaintiff, in this case, as was true in many of the litigations brought to my attention, will be unable to prove the case that has been alleged. It is, however, too early to speculate upon this possibility.

Defendant's argument that plaintiff has failed to plead inability to obtain supplies from tire manufacturers and distributors in competition with defendants, ignores, in part at least, that Goodyear dealers, by reason of their agency contracts, were prevented from purchasing tires from Goodyear competitors even though the Goodyear companies in conjunction with Sears, Roebuck & Company, were underselling such dealers.

It may also be added that the fact that defendants are not charged with raising the prices of automobile tires and tubes is not conclusive on plaintiff's right to a trial. As previously said, the success of a conspiracy to bring about monopoly is not a prerequisite to condemnation of the unlawful plan. And again, the conspiracy to monopolize, if one came into existence, may not, as yet, have reached the point in its execution that price raising is either feasible or desirable.

(2) Since I entertain the belief that plaintiff has stated a cause of action under Section 2 of the Sherman Act, I may hold, also, as the complaint is drawn, that it has stated a good cause of action under Section 1 of the Act. While the faults charged against defendants in the first two counts of the complaint might have been incorporated in one, I am not disposed to require that the two be consolidated. Whether undue restraint of trade, charged in one cause of action, resulted in the monopoly asserted by another is also a matter of proof. *Ballard Oil Corporation v. Mexican Petroleum Corporation,* 28 Fed. (2d) 91.

With regard to the contention of Sears, Roebuck & Company that the provisions of the Clayton Act do not subject the recipient, as distinguished from the giver, of a price discrimination, to liability, I may say that, assuming the accuracy of the premise, it does not follow that Sears, Roebuck & Company, under the present complaint, is to be exonerated. If it be that Sears, Roebuck & Company, in cooperation with the other defendants, did the things which plaintiff asserts, it may be held to accountability as a joint tort feasor.

(3) The motions to strike out paragraphs 13 and 50 of the complaint are denied.

The objection advanced to paragraph 45 is sustained, in so far as it relates to the following portion thereof:

"before the Federal Trade Commission Examiner concerning the Sears, Roebuck contracts hereinbefore set forth."

[¶ 55,067] United States of America v. Needle Trades Workers Industrial Union et al.

United States District Court, Southern District of New York. C. 95-925. February 8, 1935.

A conspiracy of members of a New York labor organization of fur dressers to prevent New York fur dealers from shipping skins to New Jersey fur dressers is held in violation of the Sherman Act although the skins are not sold, but are sent to the dressers merely for processing and remain the property of the dealers throughout.

Restraints of trade heretofore illegal under the Sherman Act have not been legalized by the National Recovery Act, and the Sherman Act has not been repealed by the passage of the National Recovery Act.

PATTERSON, D. J.: The indictment charges the defendants with violation of the Sherman Act. Its sufficiency is questioned by demurrer.

The allegations of the indictment, briefly summarized, are that raw skins are sent from various states to dealers in New York; that the dealers in New York then send the skins to dressers in New York and in New Jersey, who treat the skins and return them to the dealers; that the dealers then sell them to manufacturers in the various states; that there is thus a continuous flow of shipments from various states to New York, from New York to New Jersey, from New Jersey back to New York, and thence to other states. It is charged that the Needle Trades Workers Industrial Union, a labor organization with a fur department located in New York, and various officers and agents, have entered into a conspiracy intended to restrain the trade and commerce in skins among the several states; that the objects and effects of the conspiracy, among others, are to prevent dressers not employing union members from dressing skins, and to prevent dealers from shipping skins to any such dressers; that the means resorted to for carrying out the conspiracy include the hiring of thugs to threaten and assault dealers and dressers, the forcible detention of vehicles carrying skins to dealers and dressers, the destruction of skins in transit, the use of explosives in the factories of dealers and dressers, and other violent and unlawful measures directed against dealers and dressers alike.

By the Sherman Act (15 U. S. C. A., sec. 1), every conspiracy in restraint of trade or commerce among the several states is declared illegal, and every person engaging in any such conspiracy is guilty of a misdemeanor. It is not questioned that a combination to obstruct interstate commerce either for an unlawful end or by unlawful means is a criminal combination under the Anti-Trust Laws. Nor can it be questioned that a combination that resorts to the measures of violence and intimidation alleged in the indictment is an illegal combination. The point urged by the defendants is that the conspiracy charged in this indictment is not one in restraint of interstate trade or commerce, that on the contrary it is purely local both in purpose and effect.

The Supreme Court has laid down and applied the rule that in trade disputes a conspiracy is not under the ban of the Sherman Act unless the purpose is to obstruct interstate commerce or unless the effect, direct, immediate and substantial, is to bring about such obstruction. In the case of a local strike, therefore, where the object of the employees is to achieve better wages or shorter hours and the means adopted are to cause cessation of manufacturing or production, even by unlawful measures, there is no violation of the Sherman Act. It does not matter that one of the results of the stoppage of manufacture or production may be, and generally is, a reduction in the interstate movement of raw materials to the manufacturer and likewise in the interstate movement of the finished products from the manufacturer to his customers. That is no more than an indirect, incidental and remote effect. *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344; *United Leather Workers v. Herkert*, 265 U. S. 457; *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103.

See also *Industrial Association v. United States*, 268 U. S. 64. But where the direct intent of those unlawfully preventing manufacture is to restrain or control the supply moving in interstate commerce, as sometimes happens, their action is a violation of the Sherman Act. *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295. So also where the measures resorted to in the struggle include a secondary boycott or other pressure exerted on concerns in other states who buy the employer's products. In such instances there is said to be a direct frontal attack on the interstate trade in the article. *Loewe v. Lawlor*, 208 U. S. 274; *Duplex Printing Press Co. v. Deering*, 254 U. S. 443; *Bedford Cut Stone Co. v. Journeymen Stone Cutters Assn.*, 274 U. S. 37. The present case is to be judged according to the foregoing principles.

Had the defendants confined themselves to measures against the dressers in New Jersey or New York, the situation would be like that in the first *Coronado* case or the *United Leather Workers* case. But the indictment charges them with more. It is alleged that, in order to carry out their purposes in respect to the dressers and as part of a conspiracy to break up interstate commerce in skins, they undertook to prevent the dressers' customers, the dealers in New York, from shipping skins to the dressers in New Jersey who were obnoxious to them, and in the course of their combination assaulted the dealers, with whom they had no immediate controversy, and destroyed property of the dealers. If these allegations are true, we have a case

of a direct, substantial and intentional interference with interstate commerce, which is the same as saying that there is a violation of the Sherman Act.

A second point pressed by the defendants is that the movement of skins from New York to New Jersey is not interstate commerce. Significance is claimed for the fact that the skins were not sold, that they were sent to the dressers merely for processing and remained the property of the dealers throughout. The point is without merit. Goods shipped from one state to another, to be improved or treated in the latter state and then returned, are in interstate commerce as effectually as if there were a passage of title as an incident of transportation.

It is finally urged that the enactment of the National Industrial Recovery Act has changed the situation, that restraints of trade theretofore illegal have now been legalized. The court is not required to consider this point at large. The Sherman Act was certainly not repealed when the National Industrial Recovery Act was passed. If a conspiracy of the kind alleged in this indictment has been approved in any of the Codes adopted under the later act, my attention has not been called to it.

The demurrer will be overruled.

[¶ 55,068] Federal Trade Commission v. Inecto, Inc.

United States Circuit Court of Appeals for the Second Circuit. No. 12811. Filed February 18, 1935.

An order of the Federal Trade Commission is affirmed, and respondent is ordered to cease representing that a hair dye is harmless when such is not the fact, to cease using the word "Notox" in designating a hair dye, and to cease advertising testimonials or indorsements as unsolicited when such is not the fact.

Affirming a Federal Trade Commission order to cease and desist

At a Stated Term of the United States Circuit Court of Appeals, held in and for the Second Circuit, at the Court Rooms in the Post Office Building in the City of New York, on the 18th day of February, one thousand nine hundred and thirty five.

Present: HON. LEARNED HAND, THOMAS W. SWAN, AUGUSTUS N. HAND, Circuit Judges.

Final Decree

This cause having come on for hearing, and heretofore and pursuant to the provisions of Section 5 of the Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes" (38 Stat. 717, 719), the Federal Trade Commission having filed herein its application for affirmance and enforcement of its order to cease and desist issued against the respondent, Inecto, Inc., in a proceeding before said Commission under said Act of Congress; and said Commission having certified and filed in this Court, with such application, a transcript of the entire record in said proceeding, including the pleadings, the evidence taken and the report, findings as to the facts and said order of the Commission; and said application having been duly served upon respondent and due notice of the filing of said transcript and application having been given respondent; and this Court having jurisdiction of the proceeding and of the questions determined herein, pursuant to the provisions of said Act of Congress; and the parties hereto having, on the 14th day of February, 1935, entered into a stipulation, which has been filed in this cause, whereby it has been stipulated by and between the parties hereto that there may be entered in this cause by consent of the parties, without further notice, hearing or further intervening procedure, an order and final decree in the form annexed to such stipulation, and in which stipulation the parties hereto have further stipulated that under date of August 16, 1932, respondent filed its certificate of compliance with the petitioner in which it reported that it was then complying with petitioner's cease and desist order of June 20, 1932, in all respects except as to the use of the word "Notox", which petitioner, under date of September 20, 1932, accepted except as to the word "Notox"; and in which stipulation it is recited that respondent states that up to December 4, 1934, it did not comply with the aforesaid order so far as such order related to the word "Notox", but that, as it has now, as a matter of business policy, substituted the word "Inecto" as the sole

designation of the product heretofore known under the names "Inecto Rapid Notox", "Inecto Rapid", "Inecto Notox", "Notox" and "Inecto", it has no objection to the entry of said decree in the form thereto annexed; and respondent appearing herein generally by its attorneys and consenting to the entry of this order and final decree in this cause without further notice, hearing or further intervening procedure: Now, on consideration whereof and on motion of the petitioner, it is, by the Court, ordered, adjudged and decreed as follows:

First. That the said order to cease and desist of the Federal Trade Commission, issued June 20, 1932, be and the same is hereby affirmed.

Second. That, in the course of the sale or distribution in interstate commerce of the hair dye or hair coloring product heretofore sold by respondent under the designation "Inecto Rapid Notox" — also referred to as "Notox", "Inecto" or "Inecto Rapid"—or of any other hair coloring product of substantially the same composition, the respondent Inecto, Inc., its officers, directors, agents, representatives, servants and employees cease and desist:

(a) From directly or indirectly causing to be used or made any representations, statements or assertions, in advertisements, trade promotional literature or in any other manner, to the effect that the said hair dye or other hair coloring product of substantially the same composition is safe or harmless to use, or is non-toxic or non-poisonous, or does not contain any toxic, poisonous or deleterious ingredients or properties.

(b) From directly or indirectly using or causing to be used the word "Notox" as, or in, the designation of said hair dye or of said other hair coloring product upon the commercial containers thereof; and from designating, describing or representing any of the said products with such word "Notox" in advertising matter or trade promotional literature used in promoting the sale or use thereof.

Third. That respondent Inecto, Inc., its officers, directors, agents, representatives, servants and employees cease and desist:

(1) From directly or indirectly causing a hair dye or hair coloring product of any other composition, name or description to be represented, advertised or described—when sold or distributed in interstate commerce—by any word, phrase, statements, representations or assertions, used in the course of such sale or distribution, to the effect that such hair dye or hair coloring product is non-toxic, or non-poisonous, or safe, or harmless, or contains no toxic, poisonous or deleterious ingredient or properties, if and when such is not true in fact.

(2) From directly or indirectly causing to be advertised or otherwise used, in the course of the sale or distribution in interstate commerce of said so-called "Inecto Rapid Notox" hair dye or of any other kind of hair dye or hair coloring product, any testimonials or indorsements by users or consumers thereof which imply—in the circumstances of such use—or which have the capacity and tendency to lead the public to believe, that such testimonials or indorsements are genuine or are unsolicited indorsements or testimonials concerning such product, or are letters or indorsements of the same by, or which have been received by respondent from, users or consumers thereof, if or when, however, such is not true in fact.

Fourth. That nothing in this decree, however, shall be construed as prohibiting the respondent from representing, with respect to the product heretofore sold under the name "Notox", that such product may be used with reasonable assurance of safety by those who are in good health and have no scratch or abrasion on the scalp and show no unfavorable reaction to the "behind-the-ear" test for toxic reaction or skin irritation and have no idiosyncrasy or susceptibility to dyes of this character, provided that in connection with such statement respondent shall also set forth in distinct, unequivocal, prominent and conspicuous language, a notice cautioning and warning the public of the fact that the product is harmful and injurious in its effects upon various persons and that, before using, the "behind-the-ear" test for toxic reaction and skin irritation should be made in determining whether it might be safe for the individual to use the product on her hair. (By "'behind-the-ear' test" is meant a test approved as adequate by competent and reputable medical authority).

[¶ 55,069] Nathan I. Lipson v. Socony-Vacuum Corporation, and Same v. Standard Oil Company of New York, Inc.

United States Circuit Court of Appeals for the First Circuit. Nos. 2960, 2961. March 9, 1935.

Plaintiff is permitted to amend his declaration to show that the transactions are in interstate commerce when he claims that gasoline is sold and delivered in tank car lots by the defendants to retailers in Massachusetts in the same tank cars in which it is shipped into Massachusetts from the refineries, and only in case the purchaser shall agree to deal solely in the defendant's products, and that by refusing to sell in tank car lots at tank car prices unless the purchaser shall so agree, competition in interstate commerce may thereby be substantially lessened between defendants and their competitors, or a monopoly may be created in interstate commerce.

Vacating the judgment of the U. S. District Court of Massachusetts

Appeals from the District Court of the United States for the District of Massachusetts.

Before Bingham, Wilson and Morton, JJ.

Wilson, J. These cases come to this court on appeal from a judgment for the defendant in each case, the District Court having sustained demurrers to the plaintiff's declarations. All allegations of fact in the declarations on which the right of action depends are practically the same in both cases. The cases were argued together and may be disposed of in one opinion.

The actions were brought under Sections 2, 3, and 4 of the Clayton Act. Section 2 declares it to be unlawful for any person engaged in commerce, in the course of such commerce, to discriminate in price between different purchasers of commodities where the effect of such discrimination is to substantially lessen competition or tends to create a monopoly in any line of commerce. Discrimination in price between purchasers on account of quantity of goods sold or because of difference in cost of selling or transporting is permitted; and the provision of the section does not prevent a dealer from selecting his own customers in bona fide transactions and not in restraint of trade.

Section 3 prohibits any person in the course of such commerce from fixing any price on any merchandise or commodity on condition or with the understanding that the purchaser will not deal or use any such merchandise or commodity of a competitor of the seller where the effect of such agreement "may be to substantially lessen competition or tends to create a monopoly in any line of commerce."

Section 4 provides that any violator of the above sections, or of any provision of the anti-trust laws shall be liable to any person injured in his business thereby in threefold damages suffered by him.

The grounds of the demurrer were

(1) "that the plaintiff's declaration does not allege that the transaction complained of involved commerce between the several states."

"2. That the declaration does not state a cause of action under the statutes of the United States entitling the plaintiff to the relief prayed for."

"3. That the declaration is vague and indefinite in that it does not set forth the facts upon which the alleged illegal discrimination is based and does not set forth the dates upon which the illegal acts are alleged to have been committed."

The material allegations of fact, omitting those descriptive of the parties, are in substance as follows. The business of the defendant, Socony-Vacuum Corporation, is the production, refining and marketing of petroleum and petroleum products, the principal item of which is gasoline, and involves the shipment and trans-shipment of petroleum and petroleum products in commerce among the several states. The business of the defendant, Standard Oil Company of New York, Inc., is that of selling agent for the products of the Socony-Vacuum Corporation for the northeastern region of the United States. The business of the plaintiff is that of selling gasoline and petroleum products at retail in Boston.

Gasoline for the most part is produced in the United States at refineries operated by companies engaged in all branches of the petroleum industry, or by companies subsidiary thereto, or affiliated therewith. Gasoline is almost invariably sold under a trade name or brand, in bulk, both at wholesale and retail, and is distributed at retail principally through service or filling stations. The defendant, Socony-Vacuum Corporation, either directly or through an affiliate, markets its own production of gasoline at wholesale, and is also frequently engaged in retail marketing as well.

We now quote in full the paragraphs of the declarations on which the claim of unlawful discrimination is based:

"7. Gasoline is sold in bulk both at wholesale and retail and, except in rare instances, not in containers. By reason thereof its distribution requires transportation and storage facilities specifically constructed for that purpose. From refineries gasoline is distributed to the principal marketing centers in tank steamers and tank cars, *and there stored or trans-shipped by tank truck or tank wagon.* (Italics supplied.)

"8. Gasoline is distributed in wholesale quantities either in *tank cars for trans-shipment by the purchaser,* or in tank trucks or tank wagons to storage tanks at the purchaser's premises. Sales for delivery in tank cars are described as upon the tank car market; sales for delivery in tank trucks or tank wagons are described as upon the tank wagon market. Tank car prices are customarily lower than tank wagon prices by a substantial margin." (Italics supplied.)

"10. By reason of the fact that the marketing of gasoline requires special storage and transportation facilities, no company can sell in any territory where it does not have such facilities. Some companies extend their marketing activities throughout a large number of state, others market in a single state or in a few states.

"11. The defendant is, and Standard Oil Company of New York was, for many years engaged in selling gasoline throughout the northeastern region at wholesale to operators of service or filling stations, making delivery *both from tank car to trucks of the retailer, and by tank truck or tank wagon to the storage tanks at the station.* The one is, and the other was, engaged, also, in selling other petroleum products and in maintaining and operating in the same territory service and filling stations for the sale of gasoline and other products at retail to consumers. (Italics supplied.)

"12. Prior to the decision of the Supreme Court of the United States in *The United States v. Standard Oil Company of New Jersey and others* in 1911, Standard Oil Company of New York had a substantial monopoly of commerce in petroleum products, including gasoline, in the northeastern region. Thereafter, until the merger in 1931 it continued to be the largest single factor in commerce in petroleum products in that territory, and by reason thereof and of its prestige and the strategic location of its wholesale and retail stations continued to dominate that commerce. The merger with Vacuum Oil Company has tended to increase that control and dominance in Socony-Vacuum Corporation and the defendant over such commerce. The effect of the merger was to destroy the competition between the companies so combined."

"14. The plaintiff has for a number of years purchased 'Socony' gasoline and other petroleum products from Standard Oil Company of New York and from the defendant, and resold the same at retail at a filling station operated by him on Blue Hill Avenue in the Mattapan District of said Boston, and at other places in said Boston, in competition with filling stations operated by said Standard companies and with others independently operated.

"15. The defendant has discriminated in the prices charged by it for gasoline between the plaintiff and other purchasers for resale in the same territory and in competition with the plaintiff in the sale of gasoline at retail.

"16. The defendant has sold gasoline at wholesale to certain retailers making deliveries in tank cars at tank car prices, but it has refused to sell to the plaintiff, except by delivery by tank truck at tank wagon prices, unless he would agree that he would not deal in the gasoline and other commodities of competitors of the defendant. The plaintiff is and has been equipped to take delivery in tank cars and has frequently requested an opportunity to purchase gasoline from the defendant on that basis.

"17. The defendant has sold gasoline to other retailers for resale, and has fixed a price therefor substantially less than that charged the plaintiff, upon an agreement by the purchasers that they would not deal in the gasoline and petroleum products of competitors of the defendant.

"18. The effect of such discrimination in the price of gasoline between the plaintiff and other purchasers for resale was, by reason of the circumstances hereinabove related, to substantially lessen competition between the defendant and other refiners and wholesalers of gasoline.

"19. The effect of an agreement by the plaintiff not to deal in the gasoline and other commodities of competitors of the defendant would have been, by reason of the circumstances hereinabove related, to substantially lessen competition between the defendant and other refiners and wholesalers of gasoline.

"20. The effect of sales by the defendant upon an agreement by the purchasers that they would not deal in the gasoline and petroleum products of competitors of said companies, was, by reason of the circumstances hereinabove related, to substantially lessen competition between the defendant and other refiners and wholesalers of gasoline in the northeastern region, so called.

"21. The effect upon the plaintiff of said discrimination between him and other purchasers, and of the other practices of the defendant was to substantially lessen his competition in gasoline and other petroleum products with the stations operated by the defendant and by others in the same competitive territory, to impair his ability to compete, and to diminish his profits."

The issue on demurrer is whether the plaintiff has set forth in his declarations a sufficient cause of action against these defendants under the Clayton Act. The District Court ruled that he had not. It is conceded that the defendant in each action is engaged in interstate commerce. It is settled that the word "commerce" in each section of the Clayton Act refers to interstate commerce. The question then is, has the plaintiff alleged sufficient facts and with substantial certainty which would as a matter of law warrant a finding that the defendant in each case has made sales in interstate commerce in which it has discriminated against the plaintiff in a manner which may substantially lessen competition in interstate commerce, or which tends to create a monopoly in any line of interstate commerce.

The declaration in each case is loosely drawn, and while the Massachusetts Practice Act does not require facts to be stated with the exactitude and certainty required at common law, it does require the necessary substantive facts to be stated "concisely and with substantial certainty." The only facts alleged with substantial certainty are: that the defendant, Socony-Vacuum Corporation, from its refineries distributes gasoline to the principal market centers in the northeastern region of the United States in tank steamers and in tank cars, and there stores it for trans-shipment in tank trucks or tank wagons to retail service stations; and in such territory the Standard Oil Company of New York, Inc., acts as its selling agent; that from its storage facilities the gasoline is distributed in wholesale quantities in tanks cars for trans-

shipment by the purchaser; or in tank trucks or tank wagons to storage tanks on the retailer's premises, and that the defendants have refused to sell to the plaintiff in tank cars at tank car prices, unless the plaintiff would agree to deal solely in the products of the defendants.

There is no allegation in paragraphs 7, 8 or 11 that either of the defendants deliver to local retailers in tank cars, but only that they deliver in wholesale lots in tank cars for trans-shipment by purchaser. On the contrary, in paragraph 11 it is alleged that they make delivery to operators of filling stations, both from tank cars to trucks of the retailer, or by tank trucks or tank wagons to the storage tanks at the filling stations.

It is alleged, however, in paragraph 16 that the defendants have sold at wholesale to certain retailers, making deliveries in tank cars at tank car prices; but there is no allegation that such gasoline was delivered in the same tank cars in which it was shipped to Massachusetts from the refineries of the Socony-Vacuum Corporation, and were not filled from its storage tanks in Boston; nor is there any allegation that the plaintiff could not have obtained tank car lots on the same terms as they were sold to other retailers. Unless it is true that the gasoline is delivered in the same tank cars in which it is shipped into the state, and cannot be said to have become a part of the general mass of commodities within the state, the transactions were intrastate.

The facts on which the decision of the Supreme Court in *United Shoe Machinery Corporation et al. v. United States,* 258 U. S. 451; *Standard Fashion Co. v. Magrane-Houston Co.,* 258 U. S. 346; *Binderup v. Pathe Exchange, Inc., et al.,* 263 U. S. 291; *Bedford Cut Stone Co. et al. v. Journeymen Stone Cutters Ass'n of North America et al.,* 274 U. S. 37; and *Local 167, International Brotherhood of Teamsters, etc., et al., v. United States,* 291 U. S. 293, are not found in this case. With the exception of the *Standard Fashion case* and the *United Shoe Machinery case,* they were all brought under the Sherman Act.

In the *Standard Fashion case,* the agreement restricting sales of other products than those of the Standard Fashion Co. was made in New York, and was a part of the contract of sale to the purchasers,—obviously an interstate transaction. The same, or a similar situation in effect, was found to exist in the *United Shoe Machinery case.* In the *Binderup-Pathe Exchange, Inc.;* the *Bedford Cut Stone, Local 167, International Brotherhood cases,* and the case of *Swift & Co. v. United States,* 196 U. S. 375, it was found that there was a conspiracy or combination to restrain interstate commerce.

Here, according to the allegation in paragraph 7, gasoline is shipped from the defendant's refineries to Boston, not for delivery to any particular customer, but to be stored for sale to the public, or to anyone who wants to buy upon its terms. There is no allegation that contracts of sale with local dealers are made at the refineries, or outside of Massachusetts, before shipment to Boston, or with intent to make special contracts with any particular local dealers. If any such facts exist, that tank cars are shipped from refineries to Massachusetts and are there sold and delivered to retailers in what might be termed the original package, they are not set forth in the declarations with substantial certainty.

Paragraph 15 does not allege discrimination in interstate commerce, and mere sweeping allegations in the language of the statute are not sufficient to put a defendant upon trial; nor does it appear from paragraph 15 alone that the discriminations therein alleged, even if in the course of interstate commerce, may not be those expressly permitted under Section 2 of the Act. *Pierce Oil Corp. v. City of Hope,* 248 U. S. 498, 500; *Southern Railway Company v. King,* 217 U. S. 524, 536; *Witherell & Dobbins Co. v. United Shoe Machinery Co.,* 267 Fed. 950.

From the allegations in paragraphs 16 and 17 the inference is unwarranted, we think, that any competitor of the plaintiff has been able to obtain gasoline in tank cars at tank car prices for retail sale, unless he was dealing only in the products of the Socony-Vacuum Corporation or would agree to do so. On the contrary, the only reasonable inference that can be drawn from facts set forth in these two paragraphs is that the plaintiff has been treated the same as all other customers of the defendants, viz.: if they agreed to deal solely in products of the defendants, they could purchase gasoline in tank cars at tank car prices, or at a less price than if delivered in tank trucks or tank wagons. In other words, there is no averment of any facts with substantial certainty which warrants a conclusion that the plaintiff individually is being discriminated against at all.

The effect of such discrimination, it is averred in paragraphs 18, 19 and 20, was, by reason of the circumstances above related, to substantially lessen competition between the said Standard Oil Companies and other refiners. The only "circumstances above related" on which "such discrimination" is based, and which are stated with any degree of certainty, are contained

in paragraphs 16 and 17, in which it is averred that the defendants have sold to other customers in tank car lots at tank car prices, and have refused to sell to the plaintiff in tank cars and at tank car prices, unless he would agree to deal only in the products of the defendants; and that the defendants have sold to other retail customers at a less price than to the plaintiff, but upon the condition that they would not deal in the products of other companies. The plaintiff, therefore, must rely on the facts alleged in paragraphs 16 and 17 as the basis of his claim of discrimination.

The plaintiff, however, has merely alleged in general terms in paragraphs 18, 19, 20 and 21 that the "effect" of the alleged discrimination and agreements described in paragraphs 16 and 17 was, or would be, to lessen competition between the defendants and their competitors; but whether in interstate commerce does not appear. Such averments, as the Supreme Court said in *Southern Railway Company v. King,* 217 U. S. 524, 536, "are mere conclusions"; and "If it be regarded as a conclusion of law upon the point which this court must decide, it is not admitted on the demurrer. If it be taken to allege that facts exist that lead to that conclusion, it stands no better." *Pierce Oil Corp. v. City of Hope, supra,* at p. 500.

The Act was not intended to reach every remote lessening of competition, but only such acts as would probably substantially lessen competition, or disclose an actual tendency to create a monopoly in interstate commerce. *Standard Fashion Co. v. Magrane-Houston Co., supra,* p. 357; *Pearsall Butter Co. v. Federal Trade Commission,* 292 Fed 720.

The defendants are not dealing in a public necessity. They have the right in intrastate commerce, unless prohibited by the state, to sell or not to sell to any person and at any price, or upon any condition they see fit to impose, or in interstate commerce, so long as the probable effect of such sales will not substantially lessen competition in interstate transactions, or tend to create a monopoly in any line of interstate commerce.

The allegations in the declarations upon which the plaintiff relies to show sales or agreements in the course of interstate commerce, or of any acts of the defendants that may substantially lessen competition, or which may tend to create a monopoly in the sale of gasoline in interstate commerce, are too vague, indefinite and insufficient to warrant such a finding as a matter of law; *Baran v. Goodyear Tire & Rubber Co. et al.,* 256 Fed. 571, 574; *Whitwell v. Continental Tobacco Co. et al.,* 125 Fed. 454. The only conclusion which can be reasonably drawn from the facts set forth in the declarations is that interstate commerce ended when the gasoline is received by defendants in Massachusetts for storage, and that sales and deliveries from storage thereafter made in Massachusetts to retail customers, are sales in intrastate commerce. *Quincy Oil Company v. Sylvester et al.,* 238 Mass. 95; *H. P. Hood & Sons v. Commonwealth,* 235 Mass. 572, 577.

If, however, the plaintiff claims that gasoline is sold and delivered in tank car lots by the defendants to retailers in Massachusetts in the same tank cars in which it is shipped into Massachusetts from the refineries, and only in case the purchaser shall agree to deal solely in the defendant's products, and that by refusing to sell in tank car lots at tank car prices unless the purchaser shall so agree, competition in interstate commerce may thereby be substantially lessened between the defendants and their competitors, or that it tends to create a monopoly in interstate commerce, we think he should be permitted to amend his declarations.

The judgment of the District Court in each case is vacated, provided the plaintiff files an amendment to his declarations within fifteen days from the date when the mandate is handed down; otherwise the judgment of the District Court in each case is affirmed with costs.

[¶ 55,070] Gotham Sportswear, Inc. v. "John" Kolkin, individually and as manager of Knitgoods Workers Union, etc., et al.

United States District Court, Southern Dist. of N. Y., March 18, 1935.

A civil suit under the Federal Anti-Trust Acts, if brought in a state court may be removed to the federal court. On reaching the federal court the suit will then be dismissed on motion of either party because the jurisdictional infirmity originally present adheres to the suit even after it has been removed to the proper court.

Philip E. Rosenblum, for plaintiff. *Louis B. Boudin,* for defendants.

PATTERSON, D. J.: The situation in this case was discussed at length in the opinion in the ancillary suit, *Kolkin v. Gotham Sportswear, Inc.,* filed on February 26, 1935.

Suit was brought in the state court to enjoin the commission of acts in restraint of interstate commerce. The case was one actually, though not nominally, under the Anti-Trust Acts. It was held that the defendants might remove the suit to this court, and that on exercise of such right of removal they were entitled to enjoin the plaintiff from proceeding further in the state court.

The present motion is by the plaintiff for leave to discontinue the suit. I am of opinion that the motion must be granted.

A civil suit under the Federal Anti-Trust Acts, either for treble damages or for injunction, may not be maintained in a state court. If brought in such a court, the defendant may have it removed to the federal court. The suit, on reaching the federal court, will be dismissed, the reason being that the jurisdictional infirmity originally present in the suit adheres to it even when the suit has been removed to the proper court. *General Investment Co. v. Lake Shore, etc. R. Co.*, 260 U. S. 261, 286-288. This case then would be dismissed on the defendants' motion, and by the same token the plaintiff should have leave to discontinue. Further proceedings in it would be futile.

In opposing the motion the defendants call attention to *Young v. Southern Pacific Co.*, 25 Fed. (2nd) 630 (C. C. A. 2), and like cases. These cases are distinguishable. They hold that a plaintiff in a removed case will under some circumstances be denied leave to discontinue if his avowed purpose is to bring a new suit in the state court with variations in the complaint so as to eliminate removability. But in none of those cases was it true that the suit was one subject to be dismissed in any event for lack of jurisdiction.

The motion for discontinuance will be granted.

[¶ 55,071] United States of America v. Republic Steel Corporation, The Corrigan, McKinney Steel Company, The Newton Steel Company, The N. & G. Taylor Company, McKinney Steel Holding Company, and The Cleveland-Cliffs Iron Company.

District Court of the United States, Northern District of Ohio, Eastern Division. In Equity No. 5152. May 2, 1935.

A suit to enjoin consummation of a merger agreement, involving acquisitions of capital stock of iron and steel companies by companies engaged in the same industry, is dismissed on the grounds that a mere lessening of competition is not prohibited, and that the stock acquisition is for the purpose of acquiring needed supplies and facilities and will not be injurious to the public.

This suit was brought February 7, 1935, under sections 7 and 15 of the Clayton Act (sections 18 and 25, Title 15, U. S. C. A.) to enjoin consummation of a merger agreement entered into August 27, 1934, by officers of Republic Steel Corporation and The Corrigan, McKinney Steel Company, subject to approval of stockholders. The contract is alleged to involve acquisitions of capital stock of defendants engaged in the iron and steel industry by various of the defendants engaged in the same industry, contrary to certain provisions of section 7.

Hearing upon the order to show cause why a temporary injunction should not issue was continued by stipulation until trial of the case on the merits, and it was agreed that in the meantime no steps would be taken to transfer stock or assets under the merger.

The government rests its case solely on that portion of section 7 which provides that:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, * * *."

No claim is made that the proofs establish acquisitions of stock in violation of other provisions of the section found in the remainder of the sentence, viz.,—

"* * * or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

For convenience, the defendants will be hereinafter designated as follows: Republic Steel Corporation as "Republic"; The Corrigan, McKinney Steel Company as "Corrigan"; The Newton Steel Company as "Newton"; The N. & G. Taylor Company as "Taylor"; McKinney Steel Holding Company as "Holding Company"; and The Cleveland-Cliffs Iron Company as "Cleveland-Cliffs."

Republic is a New Jersey corporation, organized in 1930. Its principal office is in Youngstown, Ohio. Republic is the third in size of the steel companies in the United States and produces and sells in

interstate commerce large quantities of pig iron, semi-finished steel, merchant bars, reinforcing bars and tube rounds, hot and cold rolled sheets, and tin plate. Its principal steel plants are located in Ohio, Pennsylvania, New York and Illinois. It owns and operates iron mines, coal mines, coke ovens, blast furnaces and finishing plants, and produces an almost complete line of finished steel products. Its ingot capacity is 5,013,000 gross tons, or about 7.2 per cent of that of the entire industry. Republic's capital structure consists in round figures of $4,400,000 par amount of preferred stock of subsidiary companies, guaranteed by it; $59,500,000 par amount of its own preferred stock, and 2,000,000 shares of no par common stock. It has assets of approximately $270,000,000 and indebtedness of about $61,000,000. In 1933, its annual sales were $80,000,000 of the total sales for the industry of approximately $1,200,000,000. Its total losses for the years 1930, 1931, 1932 and 1933, were approximately $28,000,000. Republic does not have sufficient raw materials for its needs in the manufacture of pig iron. It is therefore a purchaser of large quantities of iron ore and coal.

Corrigan is an Ohio corporation, organized in 1916, with principal office in Cleveland, Ohio, where it owns and operates its only steel finishing plant. It is twelfth in size of the steel companies in the United States and produces and sells in interstate commerce large quantities of pig iron, semi-finished steel and merchant bars. It has large reserves of iron ore in Michigan and Minnesota and of coal in Kentucky. Its most important product is semi-finished steel. Its ingot capacity is 1,040,000 gross tons or about 1.5 per cent of that of the entire industry. Its capital stock consists of 1,396,445 shares, par value $1.00 each, of which 1,120,086 are voting and 276,359 are non-voting. Its principal stockholder is Holding Company. It has assets of approximately $54,000,000. In 1933, its annual sales, including subsidiaries, were $20,800,000. For some years its facilities for producing finished steel have been deficient.

Newton is an Ohio corporation, with its principal office in Youngstown, Ohio. It has cold rolled sheet producing plants at Monroe, Michigan, and Newton Falls, Ohio. The latter has been operated for only a brief period since June, 1931. Newton's capital stock consists of 26,065 preferred shares, of which Corrigan owns 20.138 or 77.9 per cent., and 261,550 common shares, of which Corrigan owns 212,389, or 81.20 per cent. Corrigan acquired its stock in Newton in 1932 when Newton was heavily indebted to it for purchases of semi-finished steel. The acquisition was for the purpose of preserving Newton as a customer for semi-finished steel. Corrigan has since been compelled to make large advances to Newton to keep it in operation and as of December 31, 1934, Newton owed Corrigan $1,995,000, secured by pledge of $1,000,000 principal amount of Newton's 7% bonds and $556,000 face amount of assigned accounts receivable. All of the bonds of such issue, aggregating $4,000,000 in principal amount and which are secured by a mortgage on Newton's entire plant and properties, matured January 1, 1935, and are now in default. Newton has gross assets at book value of $12,434,000. Its current assets on December 31, 1934, amounted to $1,496,000 and its current and overdue liabilities amounted to $5,430,000. In the years 1930 to 1933, Newton's losses were as follows: 1930, $100,000; 1931, $891,000; 1932, $999,000; 1933, $1,027,000.

The mills of both Republic and Newton are what are known in the industry as old-fashioned hand mills, a type being currently superseded by new so-called "continuous" mills, which make sheets in larger volume and at reduced cost. The automobile trade is increasingly demanding wider sheets. Republic cannot make cold rolled sheets wider than 62 inches, whereas nearly 10% of Newton's cold rolled sheet business in 1933 and more than 20% in 1934 was in sheets wider than 62 inches. There are in the United States at least ten continuous sheet mills in operation and at least one other is now under construction. One of these can produce more than 50,000 gross tons of sheets per month.

Taylor is a Maryland corporation, with its principal office in Cumberland, Maryland. Its only plant consists of a tin plate mill at that place. It has gross assets of $823,000 at book value. Its capital stock consists of 3,000 shares of first preferred stock, of which Corrigan owns 100%; 2,911.63 shares of second preferred stock, of which Corrigan owns 878.74 or 30.08%; and 3,500 shares of no par common stock, all owned by Corrigan. For the fiscal year ending April 30, 1934, Taylor's loss was $159,000. Corrigan's acquisition of Taylor stock occurred in 1929, in connection with the adjustment of a bad debt incurred in the purchase of semi-finished steel from Corrigan. Corrigan's investment in Taylor was made for the purpose of preserving Taylor as a customer for semi-finished steel. Since the acquisition of Taylor stock, Corrigan has from time to time made advances to Taylor to enable it to carry on business.

Holding Company is a holding corporation organized under the laws of Delaware, with its principal office in Cleveland, Ohio. It owns 48.113% of the total voting and non-voting common stock of Corrigan (including 55.02% of the Corrigan voting

common stock and 20.13% of the Corrigan non-voting common stock).

Cleveland-Cliffs is an Ohio corporation, with its principal office in Cleveland, Ohio. It owns and operates iron ore mines in Minnesota and Michigan and sells substantial quantities of iron ore, coal and charcoal pig iron. It owns 7.832% of the total voting and non-voting common stock of Corrigan (including 1.31% of the Corrigan voting common stock and 34.25% of the Corrigan non-voting common stock). Cleveland-Cliffs owns all the common shares of Holding Company. Holding Company has outstanding 72,500 shares of 6% cumulative preferred stock, of which Cleveland-Cliffs owns 38 shares. Dividends on this preferred stock are unpaid, and have accumulated, as of March 31, 1935, to the extent of $18.00 per share. The preferred stock is retireable by call at the option of the company at $105.00 per share plus accrued dividends.

By the merger agreement, Corrigan agrees to sell and convey to Republic all of its business, property, assets and goodwill, including the controlling stocks of Newton and Taylor now held by Corrigan; to distribute Republic securities received therefor pro rata among its stockholders; to dissolve and go out of business within thirty days after consummation of the purchase agreement but not earlier than twenty-one days after the closing date. In consideration thereof, Republic agrees to pay to Corrigan $15,361,000 principal amount of a new issue of bonds to be known as Purchase Money First Mortgage and Collateral Trust Bonds, secured by first lien on the property purchased, 27,929 shares of a new issue of Republic's prior preference stock and 698,223 shares of Republic's common stock. Under the agreement Corrigan will distribute pro rata among its stockholders the acquired securities, the holder of each share of Corrigan stock to receive $11.00 principal amount of Republic bonds, $2.00 par value of Republic prior preference stock, and one-half share of Republic common stock. Because of the present proceeding, the contract of August 27, 1934, has not been finally approved by the stockholders of the two companies. However, the holders of more than two-thirds of the stock of each class of each company have signified their approval of the transaction.

Consummation of the merger agreement will result in acquisition of Republic stock by Corrigan as part consideration for its assets; acquisition by Cleveland-Cliffs and Holding Company of Republic stock as their respective distributive shares on the liquidation of Corrigan; and acquisition by Republic of Newton and Taylor stock as part of the assets of Corrigan purchased by Republic. Corrigan receives Republic stock not as owner but as an intermediary or agent for the benefit of and for distribution to stockholders of Corrigan.

The record discloses that competition now exists between Republic and Corrigan in the sale of pig iron, semi-finished steel, and merchant bars. There is also competition between Republic and Newton in the sale of hot and cold rolled sheets, and between Republic and Taylor in the sale of tin plate and black plate.

Ingot capacities of the leading steel companies of the United States and the percentage of those capacities to the entire industry is shown by Exhibit T, as follows:

Name of Company	*Ingot Capacity*			*Percentage to Industry*
1. United States Steel Corp.	27,342,000	Gross	Tons	39.2%
2. Bethlehem Steel Corp.	9,360,000	"	"	13.4%
3. Republic Steel Corp.	5,013,000	"	"	7.2%
4. Jones and Laughlin Steel Corp.	3,671,000	"	"	5.3%
5. Youngstown Sheet & Tube Co.	3,120,000	"	"	4.5%
6. American Rolling Mill Co.	2,233,000	"	"	3.2%
7. National Steel Corp.	2,120,000	"	"	3.0%
8. Inland Steel Co.	2,006,000	"	"	2.9%
9. Wheeling Steel Corp.	1,500,000	"	"	2.1%
10. All other Steel Companies	13,381,000	"	"	19.2%
	69,746,000			100.00%

Completion of the merger will not affect the relative position of the Republic Steel Corporation in the industry. The proposed merger appears to be warranted by sound economic considerations and the number and size of competing units as shown by Exhibit T disclose that the rival competing units outside the merger are of sufficient strength and activity to insure continuance of vigorous competitive conditions as to all commodities produced by the merging companies.

The record is voluminous but in the view which the Court takes of the issues involved, the foregoing statement is adequate. The fundamental and controlling differences relate to the proper construction of the provisions of section 7 relied upon by the government and to the deductions and inferences which may be fairly drawn from the evidence.

It is the claim of the government that substantial competition now exists among the several corporations whose stock would be acquired and the corporations making the acquisitions, and that the effect of these stock acquisitions may be to substantially lessen competition within the meaning of that portion of the Clayton Act here invoked. As indicated, the government predi-

cates its suit solely upon the first of the three standards of effect of stock acquisitions which are within the condemnation of the section, and insists that to be entitled to the relief sought it is necessary to show merely that the effect may be to substantially lessen competition between the corporations acquiring the stock and the corporations whose stock is acquired. It contends that if there is shown to now exist any substantial competition between Republic and Corrigan or others of the defendants, and that that competition would be eliminated or substantially lessened as the result of the stock acquisition, the merger is prohibited by section 7. In short, it contends that because Corrigan contracts to dissolve within thirty days (thereby entirely eliminating it from the field of competition), the sole proper inquiry in this case is whether or not there now exists substantial competition between the corporations proposing to merge. It argues that by the clause relied upon construed in the light of the authorities, Congress has in effect declared that substantial lessening of competition and public injury are synonymous and urges that Congress did not intend to submit the general question of public injury to the courts.

On the other hand, defendants insist that section 7 does not forbid mere acquisitions of assets and that therefore the acquisition for distribution to its shareholders by Corrigan of Republic stock, and the acquisitions by Republic of Newton and Taylor stock, being incidental to a transaction whereby assets are acquired, are exempt from its provisions. They also urge, upon the authority of *International Shoe Company v. Federal Trade Commission,* 280 U. S. 291, that the Clayton Act does not forbid mere acquisition by one corporation of stock of a competitor even though it results in some lessening of competition; that the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree, and that this means to such a degree as will injuriously affect the public. Defendants rely principally upon the following cases to sustain their contentions: *International Shoe Co. v. Federal Trade Commission, supra; Temple Anthracite Coal Co. v. Federal Trade Commission,* 51 F. (2d) 656; *V. Vivaudou, Inc., v. Federal Trade Commission,* 54 F. (2d) 273; *Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission,* 65 F. (2d) 336; and *Moody & Waters Co. v. Case-Moody Co.,* 354 Ill. 82.

The case turns upon the question of which of these conflicting views is correct. The undisputed facts and proper deductions therefrom entitle petitioner to the relief sought if the statutory provisions are to be construed as narrowly as contended by the government, and, as clearly, deny the right to remedial relief if the statute should be construed in conformity with defendants' contentions.

No authority is found whereby it is decided that that portion of section 7 relied upon by petitioner is applicable to contracts of merger regardless of the element of public interest. Cases involving other sections of the Act lead to the conclusion that it is an important if not the controlling element. In the case of *Standard Oil Co. v. Federal Trade Commission,* 282 F. 81, 86 (1922) (a proceeding under section 3), Judge Woolley stated the underlying principles of the Clayton Act in the following terms:

> "To make clear the principle upon which we shall examine the testimony and decide these cases, it may be well to observe that the Clayton Act, which is a part of the scheme of laws against unlawful restraints and monopolies, does not wait for its operation until monopolies have been created and restraints of trade established, but seeks to reach them in their incipiency and stop their growth. Yet, in thus avoiding an objectionable effect by removing the cause, the Congress did not intend the statute to reach every remote lessening of competition or every dim and uncertain tendency to monopoly. It intended rather that the Commission, and ultimately the courts, should inquire not whether a given practice may possibly lessen competition or possibly create a monopoly, but whether it probably lessens competition — and lessens it substantially — and whether it actually tends to create a monopoly. *Standard Fashion Co. v. Magrane-Houston Co.,* 258 U. S. * * *, 42 Sup. Ct. 360, 66 L. Ed. * * * Though differing somewhat from other laws, as we have indicated, the Clayton Act, nevertheless, deals with matters within the realm of monopoly. Therefore in determining whether given acts amount to unfair methods of competition within the meaning of the Federal Trade Commission Act, or substantially lessen competition and tend to create a monopoly within the meaning of the Clayton Act, the only standard of legality with which we are acquainted is the standard established by the Sherman Act in the words 'restrain of trade or commerce' and 'monopolize, or attempt to monopolize,' and by the courts in construing the Sherman Act with reference to acts 'which operate to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade,' and 'restrict the common liberty to engage therein'."

In the case of *Federal Trade Commission v. Sinclair Refining Co.,* 261 U. S. 463, 476 (1923) (also a proceeding under section 3), in referring to the general purposes of the Sherman Act and the Clayton Act, it was said:

> "The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs."

In the case of *V. Vivaudou, Inc. v. Federal Trade Commission,* 54 F. (2d) 273, 275 (1931), the test of "prejudice of the public interest" was applied in a proceeding under section 7 of the Clayton Act. After referring with approval to the *Sinclair* case, *supra,* and

the *Standard Oil* case, *supra,* Judge Manton said:

"Unless there be a monopoly or tendency toward monopoly, we would not be warranted in concluding that the public had an interest as referred to in the statute."

The same doctrine was recognized and applied by the Circuit Court of Appeals of the Third Circuit in the case of *Temple Anthracite Coal Co. v. Federal Trade Commission,* 51 F. (2d) 656 (1931), (a proceeding under section 7 of the Clayton Act).

In the case of *Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission,* 65 F. (2d) 336 (1933), the Circuit Court of Appeals of the Second Circuit applied the same test in a proceeding under section 7 of the Clayton Act but found that the public interest was affected by the transaction. The holding in this case was reversed in *Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission,* 291 U. S. 587 (1934), but upon other grounds.

In the case of *Moody & Waters Co. v. Case-Moody Corporation,* 354 Ill. 82, 96 (1933), it was said with reference to section 7 of the Illinois Corporation Act (modeled after section 7 of the Clayton Act):

"We are of the opinion that the reasonable construction of section 7 of the Corporation act is that the lessening of competition between the corporations involved in the transaction must result in injuriously affecting the public or the trade generally to bring the transaction within the inhibition of that section. To construe the act otherwise would be to prohibit entirely the acquisition of the stock of one corporation by another doing a like business, notwithstanding the provisions of the Corporation act specifically empowering such a transaction when within the limits prescribed. That this is the correct construction is also evidenced by paragraph 2 of section 66 of the Corporation code, which declares it unlawful for two or more corporations to merge or consolidate where such merger would be 'illegally to regulate or control the price of, or illegally to limit the quantity of, or illegally to establish a monopoly in any article.' Construing these sections of the Corporation act together, section 7 must be construed to condemn contracts between corporations whereby a combination is effected, the one holding the stock of the other, and resulting in so lessening competition between them as to unduly and unreasonably regulate or control prices or production or stifle competition or create a monopoly in the trade or business in which they were engaged, whereby the public is injuriously affected. We are of the opinion that the consolidation before us did not violate the public policy of this State as expressed in section 7 of the Corporation act."

Each of the foregoing cases which was decided subsequent to 1930 recognized and applied the test as prescribed by the Supreme Court in the case of *International Shoe Company v. Federal Trade Commission,* 280 U. S. 291, 298 (1930), as follows:

"Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree, *Standard Fashion Co. v. Magrane-Houston Co.,* 258 U. S. 346, 357; that is to say, to such a degree as will injuriously affect the public."

In the judgment of the Court, the case of *Standard Fashion Co. v. Magrane-Houston Co., supra,* (1921) which was a proceeding under section 3 of the Clayton Act, furnishes no support for the contention of petitioner in this case. In that case both the Circuit Court of Appeals and the District Court had found that the contract under consideration was within the prohibitions of the Clayton Act as one which substantially lessened competition and tended to create a monopoly.

Careful analysis of the foregoing and of other cases brings conviction that the courts have been unwilling to adopt a construction of the language used in section 7 which warrants an injunction against acquisition of stock in another corporation by one engaged in interstate commerce without affirmative showing of a probable effect to restrain commerce, create a monopoly or other injurious effect upon public interest. When a statute has been construed by the highest courts having jurisdiction to pass on it, such construction is as much a part of the statute as if plainly written into it originally. (See *Douglass v. County of Pike,* 101 U. S. 677.)

But even if the interpretation of the language of section 7 were before the Court without such authoritative construction, the result would not be different. The essential difference between lawful and unlawful acquisition of stock under the first sentence of section 7 lies in the *effect* of the transaction. The mere acquisition by one corporation of stock of another is not prohibited. The mere size of an organization, or the fact alone that a number of organizations have combined for the purpose of bettering the condition of the industry where the effect will probably not be to substantially lessen competition between the corporation whose stock is acquired and the corporation making the acquisition is not condemned. The use of the word "substantial" implies a basis for comparison. The idea expressed varies greatly with the context and environment in which it is found. It may import negation of things merely illusive, seeming or imaginary, or, on the other hand, may exclude only that which does not fundamentally and materially influence a result. Justice Holmes in the case of *Towne v. Eisner,* 245 U. S. 418, 425, said:

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

The use of the word in this statute was not casual. It was inserted only after much debate and deliberation. Objections by members of Congress to its inclusion in section 7 of the Clayton Act upon the ground that it would permit courts to in-

terpolate into the section qualifications similar to those ultimately adopted in the construction of the Sherman Act, were without avail. (See 51 Cong. Rec. 15,856-7, 16,047.) The difference between "lessening competition" and "substantially lessening competition" was the subject of earnest debate on the floor of the Senate. One objector said:

"The Supreme Court said that the restraint of trade must be 'unreasonable.' We say it must be 'substantial.' Unless the word 'substantial' means as much as the word 'unreasonable,' it means nothing. In my opinion the word is of broader significance and the injury done to our trust legislation by its interpolation is greater than was accomplished by the Supreme Court when it manufactured and imported into the statutes of Congress the term 'unreasonable.'"

It was then clearly recognized that inclusion of the word would, in cases brought under the act, necessitate evidence of things difficult to prove. It was known that the Sherman Act had been finally construed in 1911 by the Supreme Court in the cases of *Standard Oil Co. v. United States,* 221 U. S. 1, and *United States v. American Tobacco Co.,* 221 U. S. 106, as prohibiting only such contracts and combinations as amount to unreasonable or undue restraint of trade. Thenceforth, the test applied in cases under that Act was whether the public is or may be injured by excessive prices or whether competitors large or small are or may be injured by unfair practices. In the *International Shoe Company* case, *supra,* the Supreme Court approved the same test in cases arising under section 7 of the Clayton Act. When the legislative history of the Act is considered the conclusion reached seems beyond escape.

However inadequate or out-moded they may seem to be in the stress of the present economic situation, we must not overlook the fact that the dominating purpose of our anti-trust laws is to avoid undue concentration of commercial power; to preserve the principle of free, fair and open competition; to keep the door of opportunity open to small business; and to protect the consumer so that he can purchase his commodities at competitive prices. No purpose to forbid all mergers appears.

Courts may take cognizance of the fact that the agencies of the government charged with enforcement of the Clayton law have during the twenty years since it became effective apparently applied no different construction. Official and semi-official reports reflect that which is likewise a matter of common knowledge, viz., that during the time the Clayton Act has been in force combinations, mergers and consolidations have been consummated to a far greater extent that ever before, and frequently in the manner contemplated by the agreement here under consideration.

The act was interpreted by the Federal Trade Commission not long after its enactment to permit the purchase of the physical assets of a competitor by a manufacturer engaged in interstate commerce. (1 Federal Trade Commission Decisions, 541.) This administrative construction was given weight by the Attorney General in 1922 in considering the legality of the merger of various steel companies, including the Bethlehem Steel Corporation, under a plan whereby property of the Lackawanna Steel Company was to be conveyed by the latter company to the former in return for shares of stock to be distributed among shareholders. (33 Op. Atty. Gen. 225, 241). These interpretations and the trend toward mergers are in no sense controlling. The results, however, are not without importance in considering probability of injurious effects. It is certain that the anti-trust laws have failed to restrict the merger movement. Concentration of industry is no longer a future consideration as it was largely in 1890 when the Sherman Act became a law and to a considerable extent in 1914 when the Clayton Act was made effective. It has become an accomplished fact. The result of combinations and mergers may be and not uncommonly is to save overhead, increase mass production, reduce prices, and improve the product. Where these beneficial results are used fairly and are passed on to the consuming public and to employees, it cannot be considered that, when construed in the light of the *International Shoe* case, they are within the prohibitions of section 7. The elimination in such cases of the competition between the merging corporations is, in reality, a step in the strengthening of competition between the units vitalized thereby and the general industry. Therefore, instead of probability of injury to the public resulting from consummation of such merger, the interest of the public will be enhanced.

The foregoing observations warrant the conclusion that in proceedings under those provisions of section 7 of the Clayton Act here relied on, the burden rests on petitioner to prove that the effect of the stock acquisitions will probably be injurious to the public, and that it is not sufficient merely to show lessening of competition. This conclusion results from the consideration of the fundamental purposes of the statute, its construction by the courts, its contemporaneous interpretation by the agencies charged with its enforcement, and its legislative history importing weight to the inclusion of the word "substantial." It also gives weight to the competitive situation existing in the industry, as well as to changing economic conditions, and recognizes that determination of the issue of

injury to the public may vary with these elements.

The record is devoid of proof that consummation of the merger contract would be in any sense inimical to the interests of the public. While the evidence justifies the conclusion that competition is to some degree eliminated as to certain products, that competition may with propriety be designated as *de minimis* when compared with the competition in the industry as a whole, and as being insufficient to affect the public interest when considered in its relation to the total sales in the competitive areas included within the several states where the business of the merging companies is chiefly conducted. There is no evidence that the contemplated merger was entered upon with the purpose of lessening competition or of exercising control over competitive conditions in the steel industry. The practical impossibility of that accomplishment is so definitely disclosed that no such aim can fairly be implied. Attempted control of competition in an industry where overproduction has for several years been clearly apparent and in which intense competition has eliminated many of the weaker units to the extent that two now control over fifty-two per cent of the capacity of the industry and nine control over eighty per cent thereof would be futile. The capacity of the industry to produce is greatly in excess of present or even normal demands in every important iron and steel product. In the year 1929, the industry operated at only 89% of capacity and since that time has at no time operated in excess of 40% of capacity. Competition in the steel industry generally will be enhanced rather than lessened as the result of the merger.

There is nothing from which it may be found that the purpose of the merger is to increase the price of any iron or steel product, to create a monopoly, to achieve a mere increase in size, or to ultimately bring about further mergers. The apparent purpose on the part of Republic is to acquire additional and needed supplies of iron ore and coal and additional facilities supplementing its own, for the manufacture of pig iron and semi-finished steel, and to bring about a reduction in costs in manufacture and distribution. Corrigan's purpose is to unite its stockholders with a corporation having an excess of finishing facilities, thereby obviating necessity for further capital expenditures in construction or acquisition of finishing plants. The net result will be better balanced facilities making possible manufacture at lowered costs.

Denial of the relief prayed is compelled by petitioner's failure to prove sufficiently substantial lessening of competition to warrant a finding of probable injury to the public as a result of consummation of the merger. The evidence drawn from the wording of the statute combined with the judicial, administrative and practical interpretation thereof, necessitates the result reached in this case.

The foregoing opinion is adopted by the court as its findings of fact and conclusions of law and is hereby made a part of the record.

A decree of dismissal, in conformity with the foregoing opinion, may be submitted for signature.

FRED M. RAYMOND, United States District Judge, Western District of Michigan, sitting by designation in the Northern District of Ohio.

[¶ 55,072] A. L. A. Schechter Poultry Corporation, Schechter Live Poultry Markets, Joseph Schechter, Martin Schechter, Alex Schechter, and Aaron Schechter, Petitioners, v. The United States of America. No. 854.

The United States of America, Petitioner, v. A. L. A. Schechter Poultry Corporation, Martin Schechter, Alex Schechter, and Aaron Schechter. No. 864.

Supreme Court of the United States. Nos. 854 and 864. October Term, 1934. Decided May 27, 1935.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The emergency declared in Section 1 of the National Recovery Act does not justify remedies lying outside the sphere of constitutional authority, for extraordinary conditions do not create or enlarge constitutional power.

Section 3 of the National Recovery Act is held to be an unconstitutional delegation of legislative power to the President in that it does not supply standards or prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. The Court states: "Instead of prescribing rules of conduct, it [Section 3 of the Act] authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

When defendant slaughterhouse operators purchased poultry at a market or railroad terminal, and trucked it to their slaughterhouse for local disposition, the interstate transactions in relation to that poultry are held to be ended. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce. The poultry handled by defendants at their slaughterhouse markets is held not in a "current" or "flow" of interstate commerce and thus not subject to congressional regulation.

In determining how far the Federal Government may go in controlling intrastate transactions upon the ground that they "affect" interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. Where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power.

The attempt "through the provisions of the Code to fix the hours and wages of employees of defendants in their intrastate business" was held to be an invalid exercise of Federal power.

Reversing in part and affirming in part the decision of the United States Circuit Court of Appeals, Second Circuit. No. 854 reversed. No. 864 affirmed.

Mr. Chief Justice Hughes delivered the opinion of the Court.

Petitioners in No. 854 were convicted in the District Court of the United States for the Eastern District of New York on eighteen counts of an indictment charging violations of what is known as the "Live Poultry Code,"[1] and on an additional count for conspiracy to commit such violations.[2] By demurrer to the indictment and appropriate motions on the trial, the defendants contended (1) that the Code had been adopted pursuant to an unconstitutional delegation by Congress of legislative power; (2) that it attempted to regulate intrastate transactions which lay outside the authority of Congress; and (3) that in certain provisions it was repugnant to the due process clause of the Fifth Amendment.

The Circuit Court of Appeals sustained the conviction on the conspiracy count and on sixteen counts for violation of the Code, but reversed the conviction on two counts which charged violation of requirements as to minimum wages and maximum hours

[1] The full title of the Code is "Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York."

[2] The indictment contained 60 counts, of which 27 counts were dismissed by the trial court, and on 14 counts the defendants were acquitted.

of labor, as these were not deemed to be within the congressional power of regulation. On the respective applications of the defendants (No. 854) and of the Government (No. 864) this Court granted writs of certiorari, April 15, 1935.

New York City is the largest live-poultry market in the United States. Ninety-six per cent of the live poultry there marketed comes from other States. Three-fourths of this amount arrives by rail and is consigned to commission men or receivers. Most of these freight shipments (about 75 per cent) come in at the Manhattan Terminal of the New York Central Railroad, and the remainder at one of the four terminals in New Jersey serving New York City. The commission men transact by far the greater part of the business on a commission basis, representing the shippers, as agents, and remitting to them the proceeds of sale, less commissions, freight and handling charges. Otherwise, they buy for their own account. They sell to slaughterhouse operators who are also called market-men.

The defendants are slaughterhouse operators of the latter class. A. L. A. Schechter Poultry Corporation and Schechter Live Poultry Market are corporations conducting wholesale poultry slaughterhouse markets in Brooklyn, New York City. Joseph Schechter operated the latter corporation and also guaranteed the credits of the former corporation which was operated by Martin, Alex and Aaron Schechter. Defendants ordinarily purchase their live poultry from commission men at the West Washington Market in New York City or at the railroad terminals serving the City, but occasionally they purchase from commission men in Philadelphia. They buy the poultry for slaughter and resale. After the poultry is trucked to their slaughterhouse markets in Brooklyn, it is there sold, usually within twenty-four hours, to retail poultry dealers and butchers who sell directly to consumers. The poultry purchased from defendants is immediately slaughtered, prior to delivery, by shochtim in defendants' employ. Defendants do not sell poultry in interstate commerce.

The "Live Poultry Code" was promulgated under section 3 of the National Industrial Recovery Act.[3] That section—the pertinent provisions of which are set forth in the margin [4]—authorizes the President to approve 'codes of fair competition." Such a code may be approved for a trade or industry, upon application by one or more trade or industrial associations or groups, if the President finds (1) that such associations or groups "impose no inequitable restrictions on admission to membership therein and are truly representative," and (2) that such codes are not designed "to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy" of Title I of the Act. Such codes "shall not per-

[3] Act of June 16, 1933, c. 90, 48 Stat. 195, 196; 15 U. S. C. 703.

[4] "Codes of Fair Competition.

"Sec. 3. (a) Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: *Provided*, That such code or codes shall not permit monopolies or monopolistic practices: *Provided further*, That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared.

"(b) After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended; but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended.

"(c) The several district courts of the United States are hereby invested with jurisdictions to prevent and restrain violations of any code of fair competition approved under this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

"(d) Upon his own motion, or if complaint is made to the President that abuses inimical to the public interest and contrary to the policy herein declared are prevalent in any trade or industry or subdivision thereof, and if no code of fair competition therefor has theretofore been approved by the President, the President, after such public notice and hearing as he shall specify, may prescribe and approve a code of fair competition for such trade or industry or subdivision thereof, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of this section.

* * * * * *

"(f) When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense, and each day such violation continues shall be deemed a separate offense."

mit monopolies or monopolistic practices." As a condition of his approval, the President may "impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code as the President in his discretion deems necessary to effectuate the policy herein declared." Where such a code has not been approved, the President may prescribe one, either on his own motion or on complaint. Violation of any provision of a code (so approved or prescribed) "in any transaction in or affecting interstate or foreign commerce" is made a misdemeanor punishable by a fine of not moer than $500 for each offense, and each day the violation continues is to be deemed a separate offense.

The "Live Poultry Code" was approved by the President on April 13, 1934. Its divisions indicate its nature and scope. The Code has eight articles entitled (1) purposes, (2) definitions, (3) hours, (4) wages, (5) general labor provisions, (6) administration, (7) trade practice provisions, and (8) general.

The declared purpose is "To effect the policies of title I of the National Industrial Recovery Act." The Code is established as "a code for fair competition for the live poultry industry of the metropolitan area in and about the City of New York." That area is described as embracing the five boroughs of New York City, the counties of Rockland, Westchester, Nassau and Suffolk in the State of New York, the counties of Hudson and Bergen in the State of New Jersey, and the county of Fairfield in the State of Connecticut.

The "industry" is defined as including "every person engaged in the business of selling, purchasing for resale, transporting, or handling and/or slaughtering live poultry, from the time such poultry comes into the New York metropolitan area to the time it is first sold in slaughtered form," and such "related branches" as may from time to time be included by amendment. Employers are styled "members of the industry," and the term employee is defined to embrace "any and all persons engaged in the industry, however compensated," except "members."

The Code fixes the number of hours for work-days. It provides that no employee, with certain exceptions, shall be permitted to work in excess of forty (40) hours in any one week, and that no employee, save as stated, "shall be paid in any pay period less than at the rate of fifty (50) cents per hour." The article containing "general labor provisions" prohibits the employment of any person under sixteen years of age, and declares that employees shall have the right of "collective bargaining," and freedom of choice with respect to labor organizations, in the terms of section 7(a) of the Act. The minimum number of employees, who shall be employed by slaughterhouse operators, is fixed, the number being graduated according to the average volume of weekly sales.

Provision is made for administration through an "industry advisory committee," to be selected by trade associations and members of the industry, and a "code supervisor" to be apponted, with the approval of the committee, by agreement between the Secretary of Agriculture and the Administrator for Industrial Recovery. The expenses of administration are to be borne by the members of the industry proportionately upon the basis of volume of business, or such other factors as the advisory committee may deem equitable, "subject to the disapproval of the Secretary and/or Administrator."

The seventh article, containing "trade practice provisions," prohibits various practices which are said to constitute "unfair methods of competition." The final article provides for verified reports, such as the Secretary or Administrator may require, "(1) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and (2) for the determination by the Secretary or Administrator of the extent to which the declared policy of the act is being effectuated by this code." The members of the industry are also required to keep books and records which "will clearly reflect all financial transactions of their respective businesses and the financial condition thereof," and to submit weekly reports showing the range of daily prices and volume of sales" for each kind of produce.

The President approved the Code by an executive order in which he found that the application for his approval had been duly made in accordance with the provisions of Title I of the National Industrial Recovery Act, that there had been due notice and hearings, that the Code constituted "a code of fair competition" as contemplated by the Act and complied with its pertinent provisions, including clauses (1) and (2) of subsection (a) of section 3 of Title I; and that the Code would tend "to effectuate the policy of Congress as declared in section

1 of Title I."[5] The executive order also recited that the Secretary of Agriculture and the Administrator of the National Industrial Recovery Act had rendered separate reports as to the provisions within their respective jurisdictions. The Secretary of Agriculture reported that the provisions of the Code "establishing standards of fair competition (a) are regulations of transactions in or affecting the current of interstate and/or foreign commerce and (b) are reasonable," and also that the Code would tend to effectuate the policy declared in Title I of the Act, as set forth in section 1. The report of the Administrator for Industrial Recovery dealt with wages, hours of labor and other labor provisions.[6]

Of the eighteen counts of the indictment upon which the defendants were convicted, aside from the count for conspiracy, two counts charged violation of the minimum wage and maximum hour provisions of the Code, and ten counts were for violation of the requirement (found in the "trade practice provisions") of "straight killing." This requirement was really one of "straight" selling. The term "straight killing" was defined in the Code as "the practice of requiring persons purchasing poultry for resale to accept the run of any half coop, coop, or coops, as purchased by slaughterhouse operators, except for culls."[7] The charges in the ten counts, respectively, were that the defendants in selling to retail dealers and butchers had permitted "selections of individual chickens taken from particular coops and half coops."

Of the other six counts, one charged the sale to a butcher of an unfit chicken; two counts charged the making of sales without having the poultry inspected or approved in accordance with regulations or ordinances of the City of New York; two counts charged the making of false reports or the failure to make reports relating to the range of daily prices and volume of sales for certain periods; and the remaining count was for sales to slaughterers or dealers who were without licenses required by the ordinances and regulations of the City of New York.

First. Two preliminary points are stressed by the Government with respect to the appropriate approach to the important questions presented. We are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged.

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[5] The Executive Order is as follows:

"EXECUTIVE ORDER.

"Approval of Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York.

"*Whereas,* the Secretary of Agriculture and the Administrator of the National Industrial Recovery Act having rendered their separate reports and recommendations and findings on the provisions of said code, coming within their respective jurisdictions, as set forth in the Executive Order No. 6182 of June 26, 1933, as supplemented by Executive Order No. 6207 of July 21, 1933, and Executive Order No. 6345 of October 20, 1933, as amended by Executive Order No. 6551 of January 8, 1934;

"*Now, therefore,* I, Franklin D. Roosevelt, President of the United States, pursuant to the authority vested in me by title I of the National Industrial Recovery Act, approved June 16, 1933, and otherwise, do hereby find that:

"1. An application has been duly made, pursuant to and in full compliance with the provisions of title I of the National Industrial Recovery Act, approved June 16, 1933, for my approval of a code of fair competition for the live poultry industry in the metropolitan area in and about the City of New York; and

"2. Due notice and opportunity for hearings to interested parties have been given pursuant to the provisions of the act and regulations thereunder; and,

"3. Hearings have been held upon said code, pursuant to such notice and pursuant to the pertinent provisions of the act and regulations thereunder; and

"4. Said code of fair competition constitutes a code of fair competition, as contemplated by the act and complies in all respects with the pertinent provisions of the act, including clauses (1) and (2) of subsection (a) of section 3 of title I of the act; and

"5. It appears, after due consideration, that said code of fair competition will tend to effectuate the policy of Congress as declared in section 1 of title I of the act.

"*Now, therefore,* I, Franklin D. Roosevelt, President of the United States, pursuant to the authority vested in me by title I of the National Industrial Recovery Act, approved June 16, 1933, and otherwise, do hereby approve said Code of Fair Competition for the Live Poultry Industry in the Metropolitan Area in and about the City of New York.

"FRANKLIN D. ROOSEVELT,
"President of the United States."

"The White House,
April 13, 1934."

[6] The Administrator for Industrial Recovery stated in his report that the Code had been sponsored by trade associations representing about 350 wholesale firms, 150 retail shops, and 21 commission agencies; that these associations represented about 90 per cent of the live poultry industry by numbers and volume of business; and that the industry as defined in the Code supplied the consuming public with practically all the live poultry coming into the metropolitan area from forty-one States and transacted on aggregate annual business of approximately ninety million dollars. He further said that about 1610 employees were engaged in the industry; that it had suffered severely on account of the prevailing economic conditions and because of unfair methods of competition and the abuses that had developed as a result of the "uncontrolled methods of doing business"; and that these conditions had reduced the number of employees by approximately 40 per cent. He added that the report of the Research and Planning Division indicated that the Code would bring about an increase in wages of about 20 per cent in this industry and an increase in employment of 19.2 per cent.

[7] The prohibition in the Code (Art. VII, Sec. 14) was as follows: "*Straight Killing.*—The use, in the wholesale slaughtering of poultry, of any method of slaughtering other than 'straight killing' or killing on the basis of official grade. Purchasers may, however, make selection of a half coop, coop, or coops, but shall not have the right to make any selection of particular birds."

Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power.[8] The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment,—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The further point is urged that the national crisis demanded a broad and intensive cooperative effort by those engaged in trade and industry, and that this necessary cooperation was sought to be fostered by permitting them to initiate the adoption of codes. But the statutory plan is not simply one for voluntarly effort. It does not seek merely to endow voluntary trade or industrial associations or groups with privileges or immunities. It involves the coercive exercise of the law-making power. The codes of fair competition which the statute attempts to authorize are codes of laws. If valid, they place all persons within their reach under the obligation of positive law, binding equally those who assent and those who do not assent. Violations of the provisions of the codes are punishable as crimes.

Second. The question of the delegation of legislative power. We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question. *Panama Refining Company v. Ryan*, 293 U. S. 388. The Constitution provides that "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Art. I, sec. 1. And the Congress is authorized "To make all laws which shall be necessary and proper for carrying into execution" its general powers, Art. I, sec. 8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly. We pointed out in the *Panama Company* case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained. *Id.*, p. 421.

Accordingly, we look to the statute to see whether Congress has overstepped these limitations,—whether Congress in authorizing "codes of fair competition" has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others.

The aspect in which the question is now presented is distinct from that which was before us in the case of the *Panama Company.* There, the subject of the statutory prohibition was defined. National Industrial Recovery Act, sec. 9 (c). That subject was the transportation in interstate and foreign commerce of petroleum and petroleum products which are produced or withdrawn from storage in excess of the amount permitted by state authority. The question was with respect to the range of discretion given to the President in prohibiting that transportation. *Id.*, pp. 414, 415, 430. As to the "codes of fair competition," under section 3 of the Act, the question is more fundamental. It is whether there is any adequate definition of the subject to which the codes are to be addressed.

What is meant by "fair competition" as the term is used in the Act? Does it refer to a category established in the law, and is the authority to make codes limited accordingly? Or is it used as a convenient designation for whatever set of laws the formulators of a code for a particular trade or industry may propose and the President may approve (subject to certain restrictions), or the President may himself prescribe, as being wise and beneficent provisions for the government of the trade or industry in order to accomplish the broad purposes of rehabilitation, correction

[8] See *Ex parte Milligan*, 4 Wall. 2, 120, 121; *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398, 426.

and expansion which are stated in the first section of Title I?[9]

"The Act does not define "fair competition." "Unfair competition," as known to the common law, is a limited concept. Primarily, and strictly, it relates to the palming off of one's goods as those of a rival trader. *Goodyear Manufacturing Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 604; *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 140; *Hanover Milling Co. v. Metcalf*, 240 U. S. 403, 413. In recent years, its scope has been extended. It has been held to apply to misappropriation as well as misrepresentation, to the selling of another's goods as one's own,—to misappropriation of what equitably belongs to a competitor. *International News Service v. Associated Press*, 248 U. S. 215, 241, 242. Unfairness in competition has been predicated of acts which lie outside the ordinary course of business and are tainted by fraud, or coercion, or conduct otherwise prohibited by law.[10] *Id.*, p. 258. But it is evident that in its widest range, "unfair competition," as it has been understood in the law, does not reach the objectives of the codes which are authorized by the National Industrial Recovery Act. The codes may, indeed, cover conduct which existing law condemns, but they are not limited to conduct of that sort. The Government does not contend that the Act contemplates such a limitation. It would be opposed both to the declared purposes of the Act and to its administrative construction.

The Federal Trade Commission Act (section 5)[11] introduced the expression "unfair methods of competition," which were declared to be unlawful. That was an expression new in the law. Debate apparently convinced the sponsors of the legislation that the words "unfair competition," in the light of their meaning at common law, were too narrow. We have said that the substituted phrase has a broader meaning, that it does not admit of precise definition, its scope being left to judicial determination as controversies arise. *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 648, 649; *Federal Trade Commission v. Keppel*, 291 U. S. 304, 310-312. What are "unfair methods of competition" are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest. *Federal Trade Commission v. Beech-Nut Co.*, 257 U. S. 441, 453; *Federal Trade Commission v. Klesner*, 280 U. S. 19, 27, 28; *Federal Trade Commission v. Raladam Co., supra; Federal Trade Commission v. Keppel, supra; Federal Trade Commission v. Algoma Co.*, 291 U. S. 67, 73. To make this possible, Congress set up a special procedure. A Commission, a quasi-judicial body, was created. Provision was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the Commission is taken within its statutory authority. *Federal Trade Commission v. Raladam Co., supra; Federal Trade Commission v. Klesner, supra.*[12]

In providing for codes, the National Industrial Recovery Act dispenses with this administrative procedure and with any administrative procedure of an analogous character. But the difference between the code plan of the Recovery Act and the scheme of the Federal Trade Commission Act lies not only in procedure but in subject matter. We cannot regard the "fair competition" of the codes as antithetical to the "unfair methods of competition" of the Federal Trade Commission Act. The "fair competition" of the codes has a much broader range and a new significance. The Recovery Act provides that it shall not be construed to impair the powers of the Federal Trade Commission, but, when a code is approved, its

[9] That section, under the heading "Declaration of Policy," is as follows: "Section 1. A national emergency productive of wide-spread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

[10] See cases collected in Nims on Unfair Competition and Trade-Marks, Chap. I, sec. 4, p. 19, and Chap. XIX.

[11] Act of September 26, 1914, c. 311, 38 Stat. 717, 719; 720.

[12] The Tariff Act of 1930 (sec. 337, 46 Stat. 703), like the Tariff Act of 1922 (sec. 316, 42 Stat. 943), employs the expressions "unfair methods of competition" and "unfair acts" in the importation of articles into the United States, and in their sale, "the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States." Provision is made for investigation and findings by the Tariff Commission, for appeals upon questions of law to the United States Court of Customs and Patent Appeals, and for ultimate action by the President when the existence of any "such unfair method or act" is established to his satisfaction.

provisions are to be the "standards of fair competition" for the trade or industry concerned, and any violation of such standards in any transaction in or affecting interstate or foreign commerce is to be deemed "an unfair method of competition" within the meaning of the Federal Trade Commission Act. Sec. 3 (b).

For a statement of the authorized objectives and content of the "codes of fair competition" we are referred repeatedly to the "Declaration of Policy" in section one of Title I of the Recovery Act. Thus, the approval of a code by the President is conditioned on his finding that it "will tend to effectuate the policy of this title." Sec. 3 (a). The President is authorized to impose such conditions "for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code as the President in his discretion deems necessary to effectuate the policy herein declared." *Id.* The "policy herein declared" is manifestly that set forth in section one. That delaration embraces a broad range of objectives. Among them we find the elimination of "unfair competitive practices." But even if this clause were to be taken to relate to practices which fall under the ban of existing law, either common law or statute, it is still only one of the authorized aims described in section one. It is there declared to be "the policy of Congress"—

"to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources." [13]

Under section 3, whatever "may tend to effectuate" these general purposes may be included in the "codes of fair competition." We think the conclusion is inescapable that the authority sought to be conferred by section 3 was not merely to deal with "unfair competitive practices" which offend against existing law, and could be the subject of judicial condemnation without further legislation, or to create administrative machinery for the application of established principles of law to particular instances of violation. Rather, the purpose is clearly disclosed to authorize new and controlling prohibitions through codes of laws which would embrace what the formulators would propose, and what the President would approve, or prescribe, as wise and beneficent measures for the government of trades and industries in order to bring about their rehabilitation, correction and development, according to the general declaration of policy in section one. Codes of laws of this sort are styled "codes of fair competition."

We find no real controversy upon this point and we must determine the validity of the Code in question in this aspect. As the Government candidly says in its brief: "The words 'policy of this title' clearly refer to the 'policy' which Congress declared in the section entitled "Declaration of Policy"—Section 1. All of the policies there set forth point toward a single goal—the rehabilitation of industry and the industrial recovery which unquestionably was the major policy of Congress in adopting the National Industrial Recovery Act." And that this is the controlling purpose of the Code now before us appears both from its repeated declarations to that effect and from the scope of its requirements. It will be observed that its provisions as to the hours and wages of employees and its "general labor provisions" were placed in separate articles, and these were not included in the article on "trade practice provisions" declaring what should be deemed to constitute "unfair methods of competition." The Secretary of Agriculture thus stated the objectives of the Live Poultry Code in his report to the President, which was recited in the executive order of approval:

"That said code will tend to effectuate the declared policy of title I of the National Industrial Recovery Act as set forth in section 1 of said act in that the terms and provisions of such code tend to: (a) Remove obstructions to the free flow of interstate and foreign commerce which tried to diminish the amount thereof; (b) to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups; (c) to eliminate unfair competitive practices; (d) to promote the fullest possible utilization of the present productive capacity of industries; (e) to avoid undue restriction of production (ex-

[13] See Note 9.

cept as may be temporarily required); (f) to increase the consumption of industrial and agricultural products by increasing purchasing power; and (g) otherwise to rehabilitate industry and to conserve natural resources."

The Government urges that the codes will "consist of rules of competition deemed fair for each industry by representative members of that industry—by the persons most vitally concerned and most familiar with its problems." Instances are cited in which Congress has availed itself of such assistance; as *e. g.*, in the exercise of its authority over the public domain, with respect to the recognition of local customs or rules of miners as to mining claims,[14] or in matters of a more or less technical nature, as in designating the standard height of drawbars.[15] But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And, could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section one of title I? The answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.

The question, then, turns upon the authority which section 3 of the Recovery Act vests in the President to approve or prescribe. If the codes have standing as penal statutes, this must be due to the effect of the executive action. But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry. See *Panama Refining Company v. Ryan, supra*, and cases there reviewed.

Accordingly we turn to the Recovery Act to ascertain what limits have been set to the exercise of the President's discretion. *First*, the President, as a condition of approval, is required to find that the trade or industrial associations or groups which propose a code, "impose no inequitable restrictions on admission to membership" and are "truly representative." That condition, however, relates only to the status of the initiators of the new laws and not to the permissible scope of such laws. *Second*, the President is required to find that the code is not "designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them." And to this is added a proviso that the code "shall not permit monopolies or monopolistic practices." But these restrictions leave virtually untouched the field of policy envisaged by section one, and, in that wide field of legislative possibilities, the proponents of a code, refraining from monopolistic designs, may roam at will and the President may approve or disapprove their proposals as he may see fit. That is the precise effect of the further finding that the President is to make—that the code "will tend to effectuate the policy of this title." While this is called a finding, it is really but a statement of an opinion as to the general effect upon the promotion of trade or industry of a scheme of laws. These are the only findings which Congress has made essential in order to put into operation a legislative code having the aims described in the "Declaration of Policy."

Nor is the breadth of the President's discretion left to the necessary implications of this limited requirement as to his findings. As already noted, the President in approving a code may impose his own conditions, adding to or taking from what is proposed, as "in his discretion" he thinks necessary "to effectuate the policy" declared by the Act. Of course, he has no less liberty when he prescribes a code on his own motion or on complaint, and he is free to prescribe one if a code has not been approved. The Act provides for the creation by the President of administrative agencies to assist him, but the action or reports of such agencies, or of his other assistants,—their recommendations and findings in relation to the making of codes—have no sanction beyond the will of the President, who may accept, modify or reject them as he pleases. Such recommendations or findings in no way limit the authority which section 3 undertakes to vest in the President with no other conditions than those there specified. And this authority relates to a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country.

Such a sweeping delegation of legislative power finds no support in the decisions

[14] Act of July 26, 1866, c. 262, 14 Stat. 251; *Jackson v. Roby*, 109 U. S. 440, 441; *Erhardt v. Boaro*, 113 U. S. 527, 535; *Butte City Water Co. v. Baker*, 196 U. S. 119, 126.

[15] Act of March 2, 1893, c. 196, 27 Stat. 531; *St. Louis & Iron Mountain Railway Co. v. Taylor*, 210 U. S. 281, 286.

upon which the Government especially relies. By the Interstate Commerce Act, Congress has itself provided a code of laws regulating the activities of the common carriers subject to the Act, in order to assure the performance of their services upon just and reasonable terms, with adequate facilities and without unjust discrimination. Congress from time to time has elaborated its requirements, as needs have been disclosed. To facilitate the application of the standards prescribed by the Act, Congress has provided an expert body. That administrative agency, in dealing with particular cases, is required to act upon notice and hearing, and its orders must be supported by findings of fact which in turn are sustained by evidence. *Interstate Commerce Commission v. Louisville & Nashville Railroad Company*, 227 U. S. 88; *Florida v. United States*, 282 U. S. 194; *United States v. Baltimore & Ohio Railroad Company*, 293 U. S. 454. When the Commission is authorized to issue, for the construction, extension or abandonment of lines, a certificate of "public convenience and necessity," or to permit the acquisition by one carrier of the control of another if that is found to be "in the public interest," we have pointed out that these provisions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for the service of common carriers and can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation. *New York Central Securities Company v. United States*, 287 U. S. 12, 24, 25; *Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co.*, 270 U. S. 266, 273; *Chesapeake & Ohio Railway Co. v. United States*, 283 U. S. 35, 42.

Similarly, we have held that the Radio Act of 1927 [16] established standards to govern radio communications and, in view of the limited number of available broadcasting frequencies, Congress authorized allocation and licenses. The Federal Radio Commission was created as the licensing authority, in order to secure a reasonable equality of opportunity in radio transmission and reception. The authority of the Commission to grant licenses "as public convenience, interest or necessity requires" was limited by the nature of radio communications, and by the scope, character and quality of the services to be rendered and the relative advantages to be derived through distribution of facilities. These standards established by Congress were to be enforced upon hearing, and evidence, by an administrative body acting under statutory restrictions adapted to the particular activity. *Radio Commission v. Nelson Brothers Co.*, 289 U. S. 266.

In *Hampton & Company v. United States*, 276 U. S. 394, the question related to the "flexible tariff provision" of the Tariff Act of 1922.[17] We held that Congress had described its plan "to secure by law the imposition of customs duties on articles of imported merchandise which should equal the difference between the cost of producing in a foreign country the articles in question and laying them down for sale in the United States, and the cost of producing and selling like or similar articles in the United States." As the differences in cost might vary from time to time, provision was made for the investigation and determination of these differences by the executive branch so as to make "the adjustments necessary to conform the duties to the standard underlying that policy and plan." *Id.*, pp. 404, 405. The Court found the same principle to be applicable in fixing customs duties as that which permitted Congress to exercise its rate-making power in interstate commerce, "by declaring the rule which shall prevail in the legislative fixing of rates" and then remitting "the fixing of such rates" in accordance with its provisions "to a rate-making body." *Id.*, p. 409. The Court fully recognized the limitations upon the delegation of legislative power. *Id., pp.* 408-411.

To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.

Second. The question of the application of the provisions of the Live Poultry Code to intrastate transactions. Although the validity of the codes (apart from the question of delegation) rests upon the commerce

[16] Act of February 23, 1927, c. 169, 4 Stat. 1162, as amended by the Act of March 28, 1928, c. 263, 45 Stat. 373.

[17] Act of September 21, 1922, c. 356, Title III, sec. 315, 42 Stat. 858, 941.

clause of the Constitution, Section 3(a) is not in terms limited to interstate and foreign commerce. From the generality of its terms, and from the argument of the Government at the bar, it would appear that section 3(a) was designed to authorize codes without that limitation. But under section 3(f) penalties are confined to violations of a code provision "in any transaction in or affecting interstate or foreign commerce." This aspect of the case presents the question whether the particular provisions of the Live Poultry Code, which the defendants were convicted for violating and for having conspired to violate, were within the regulating power of Congress.

These provisions relate to the hours and wages of those employed by defendants in their slaughterhouses in Brooklyn and to the sales there made to retail dealers and butchers.

(1) Were these transaction *"in"* interstate commerce? Much is made of the fact that almost all the poultry coming to New York is sent there from other States. But the code provisions, as here applied, do not concern the transportation of the poultry from other States to New York, or the transactions of the commission men or others to whom it is consigned, or the sales made by such consignees to defendants. When defnedants had made their purchases, whether at the West Washington Market in New York City or at the railroad terminals serving the City, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended. Defendants held the poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers who in turn sold directly to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce. *Brown v. Houston,* 114 U. S. 622, 632, 633; *Public Utilities Commission v. Landon,* 249 U. S. 236, 245; *Industrial Association v. United States,* 268 U. S. 64, 78, 79; *Atlantic Coast Line v. Standard Oil Co.,* 275 U. S. 257, 267.

The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a *"current"* or *"flow"* of interstate commerce and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other States. Hence, decisions which deal with a stream of interstate commerce—where goods come to rest within a State temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here. See *Swift & Company v. United States,* 196 U. S. 375, 387, 388; *Lemke v. Farmers Grain Company,* 258 U. S. 50, 55; *Stafford v. Wallace,* 258 U. S. 495, 519; *Chicago Board of Trade v. Olsen,* 262 U. S. 1, 35; *Tagg, Bros. & Moorhead v. United States,* 280 U. S. 420, 439.

(2) Did the defendants' transactions directly *"affect"* interstate commerce so as to be subject to federal regulations? The power of Congress extends not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury. It matters not that the injury may be due to the conduct of those engaged in intrastate operations. Thus, Congress may protect the safety of those employed in interstate transportation "no matter what may be the source of the dangers which threaten it." *Southern Railway Company v. United States,* 222 U. S. 20, 27. We said in *Second Employers' Liability Cases,* 223 U. S. 1, 51, that it is the "effect upon interstate commerce," not "the source of the injury," which is "the criterion of congressional power." We have held that, in dealing with common carriers engaged in both interstate and intrastate commerce, the dominant authority of Congress necessarily embraces the right to control their intrastate operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to secure the freedom of that traffic from interference or unjust discrimination and to promote the efficiency of the interstate service *The Shreveport Case,* 234 U. S. 342, 351, 352; *Wisconsin Railroad Commission v. Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563, 588. And combinations and conspiracies to restrain interstate commerce, or to monopolize any part of it, are none the less within the reach of the Anti-Trust Act because the conspirators seek to attain their end by means of intrastate activities. *Coronado Coal Company v. United Mine Workers,* 268 U. S. 295, 310; *Bedford Company v. Stonecutters Association,* 274 U. S. 37, 46.

We recently had occasion, in *Local 167 v. United States,* 291 U. S. 293, to apply this

principle in connection with the live poultry industry. That was a suit to enjoin a conspiracy to restrain and monopolize interstate commerce in violation of the Anti-Trust Act. It was shown that marketmen, teamsters and slaughterers (shochtim) had conspired to burden the free movement of live poultry into the metropolitan area in and about New York City. Marketmen had organized an association, had allocated retailers among themselves, and had agreed to increase prices. To accomplish their objects, large amounts of money were raised by levies upon poultry sold, men were hired to obstruct the business of dealers who resisted, wholesalers and retailers were spied upon and by violence and other forms of intimidation were prevented from freely purchasing live poultry. Teamsters refused to handle poultry for recalcitrant marketmen and members of the shochtim union refused to slaughter. In view of the proof of that conspiracy, we said that it was unnecessary to decide when interstate commerce ended and when intrastate commerce began. We found that the proved interference by the conspirators "with the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted" operated "substantially and directly to restrain and burden the untrammeled shipment and movement of the poultry" while unquestionably it was in interstate commerce. The intrastate acts of the conspirators were included in the injunction because that was found to be necessary for the protection of interstate commerce against the attempted and illegal restraint. *Id.*, p. 297, 299, 300.

The instant case is not of that sort. This is not prosecution for a conspiracy to restrain or monopolize interstate commerce in violation of the Anti-Trust Act. Defendants have been convicted, not upon direct charges of injury to interstate commerce or of interference with persons engaged in that commerce, but of violations of certain provisions of the Live Poultry Code and of conspiracy to commit these violations. Interstate commerce is brought in only upon the charge that violations of these provisions—as to hours and wages of employees and local sales—*"affected"* interstate commerce.

In determining how far the federal government may go in controlling intrastate transactions upon the ground that they "affect" interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustated by the railroad cases we have cited, as *e. g.*, the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control. As we said in the *Minnesota Rate Cases,* 230 U. S. 352, 410: "In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. The development of local resources and the extension of local facilities may have a very important effect upon communities less favored and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the State enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the state." See, also, *Kidd v. Pearson,* 128 U. S. 1, 21; *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 259, 260.

The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. *Coronado Coal Company v. United Mine Workers,* 268 U. S. 295, 310. But where that intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statute, notwithstanding its broad provisions. This principle has frequently been applied in litigation growing out of labor disputes. *United Mine Workers v. Coronado Coal Company,* 259 U. S. 344, 410, 411; *United Leather Workers v. Herkert,* 265 U. S. 457, 464-467; *Industrial*

Association v. United States, 268 U. S. 64, 82; *Levering & Garrigues Co. v. Morrin,* 289 U. S. 103, 107, 108. In the case last cited we quoted with approval the rule that had been stated and applied in *Industrial Association v. United States, supra,* after review of the decisions, as follows: "The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

While these decisions related to the application of the federal statute, and not to its constitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government. We must consider the provisions here in question in the light of this distinction.

The question of chief importance relates to the provisions of the Code as to the hours and wages of those employed in defendants' slaughterhouse markets. It is plain that these requirements are imposed in order to govern the details of defendants' management of their local business. The persons employed in slaughtering and selling in local trade are not employed in interstate commerce. Their hours and wages have no direct relation to interstate commerce. The question of how many hours these employees should work and what they should be paid differs in no essential respect from similar questions in other local businesses which handle commodities brought into a State and there dealt in as a part of its internal commerce. This appears from an examination of the considerations urged by the Government with respect to conditions in the poultry trade. Thus, the Government argues that hours and wages affect prices; that slaughterhouse men sell at a small margin above operating costs; that labor represents 50 to 60 per cent of these costs; that a slaughterhouse operator paying lower wages or reducing his cost by exacting long hours of work, translates his saving into lower prices; that this results in demands for a cheaper grade of goods; and that the cutting of prices brings about a demoralization of the price structure. Similar conditions may be adduced in relation to other businesses. The argument of the Government proves too much. If the federal government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion and not of power.

The Government also makes the point that efforts to enact state legislation establishing high labor standards have been impeded by the belief that unless similar action is taken generally, commerce will be diverted from the States adopting such standards, and that this fear of diversion has led to demands for federal legislation on the subject of wages and hours. The apparent implications is that the federal authority under the commerce clause should be deemed to extend to the establishment of rules to govern wages and hours in intrastate trade and industry generally throughout the country, thus overriding the authority of the States to deal with domestic problems arising from labor conditions in their internal commerce.

It is not the province of the Court to consider the economic advantage or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it. Our growth and edvelopment have called for wide use of the commerce power of the federal government in its control over the expanded activities of interstate commerce, and in protecting that commerce from burdens, interferences, and conspiracies to restrain and monopolize it. But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State. The same answer must be made to the contention that is based upon the serious economic situation which led to the passage of the Recovery Act,—the fall in prices, the decline in wages and employment, and the curtailment of the market for commodities. Stress is laid upon the great importance of maintaining wage distributions which would provide the necessary stimulus in

starting "the cumulative forces making for expanding commercial activity." Without in any way disparaging this motive, it is enough to say that the recuperative efforts of the federal government must be made in a manner consistent with the authority granted by the Constitution.

We are of the opinion that the attempt through the provisions of the Code to fix the hours and wages of employees of defendants in their intrastate business was not a valid exercise of federal power.

The other violations for which defendants were convicted related to the making of local sales. Ten counts, for violation of the provision as to "straight killing," were for permitting customers to make "selections of individual chickens taken from particular coops and half coops." Whether or not this practice is good or bad for the local trade, its effect, if any, upon interstate commerce was only indirect. The same may be said of violations of the Code by intrastate transactions consisting of the sale "of an unfit chicken" and of sales which were not in accord with the ordinances of the City of New York. The requirement of reports as to prices and volumes of defendants' sales was incident to the effort to control their intrastate business.

In view of these conclusions, we find it unnecessary to discuss other questions which have been raised as to the validity of certain provisions of the Code under the due process clause of the Fifth Amendment.

On both the grounds we have discussed, the attempted delegation of legislative power, and the attempted regulation of intrastate transaction which affect interstate commerce only indirectly, we hold the code provisions here in question to be invalid and that the judgment of conviction must be reversed.

No. 854—reversed.
No. 864—affirmed.

Mr. Justice CARDOZO, concurring.

The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant, if I may borrow my own words in an earlier opinion. *Panama Refining Co. v. Ryan*, 293 U. S. 388, 440.

This court has held that delegation may be unlawful though the act to be performed is definite and single, if the necessity, time and occasion of performance have been left in the end to the discretion of the delegate. *Panama Refining Co. v. Ryan, supra.* I thought that ruling went too far. I pointed out in an opinion that there had been "no grant to the Executive of any roving commission to inquire into evils and then, upon discovering them, do anything he pleases." 293 U. S. at 435. Choice though within limits, had been given him "as to the occasion, but none whatever as to the means." *Ibid.* Here, in the case before us, is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils and upon discovery correct them.

I have said that there is no standard, definite or even appropriate, to which legislation must conform. Let me make my meaning more precise. If codes of fair competition are codes eliminating "unfair" methods of competition ascertained upon inquiry to prevail in one industry or another, there is no unlawful delegation of legislative functions when the President is directed to inquire into such practices and denounce them when discovered. For many years a like power has been committed to the Federal Trade Commission with the approval of this court in a long series of decisions. Cf. *Federal Trade Commission v. Keppel & Bro.*, 291 U. S. 304, 312; *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 648; *Federal Trade Commission v. Gratz*, 253 U. S. 421. Delegation in such circumstances is born of the necessities of the occasion. The industries of the country are too many and diverse to make it possible for Congress, in respect of matters such as these, to legislate directly with adequate appreciation of varying conditions. Nor is the substance of the power changed because the President may act at the instance of trade or industrial associations having special knowledge of the facts. Their function is strictly advisory; it is the *imprimatur* of the President that begets the quality of law. *Doty v. Love*, 294 U. S. —. When the task that is set before one is that of cleaning house, it is prudent as well as usual to take counsel of the dwellers.

But there is another conception of codes of fair competition, their significance and function, which leads to very different consequences, though it is not that is struggling now for recognition and acceptance. By this other conception a code is not to be restricted to the elimination of business practices that would be characterized by general acceptation as oppressive or unfair. It is to include whatever ordinances may be desirable or helpful for the well-being or prosperity of the industry affected. In that view, the function of its adoption is not merely negative, but positive; the planning of improvements as well as the extirpation of abuses. What is fair, as thus conceived, is not something to be contrasted with what

is unfair or fraudulent or tricky. The extension becomes as wide as the field of industrial regulation. If that conception shall prevail, anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot. No such plenitude of power is susceptible of transfer. The statute, however, aims at nothing less, as one can learn both from its terms and from the administrative practice under it. Nothing less is aimed at by the code now submitted to our scrutiny.

The code does not confine itself to the suppression of methods of competition that would be classified as unfair according to accepted business standards or accepted norms of ethics. It sets up a comprehensive body of rules to promote the welfare of the industry, if not the welfare of the nation, without reference to standards, ethical or commercial, that could be known or predicted in advance of its adoption. One of the new rules, the source of ten counts in the indictment is aimed at an established practice, not unethical or oppressive, the practice of selective buying. Many others could be instanced as open to the same objection if the sections of the code were to be examined one by one. The process of dissection will not be traced in all its details. Enough at this time to state what it reveals. Even if the statute itself had fixed the meaning of fair competition by way of contrast with practices that are oppressive or unfair, the code outruns the bounds of the authority conferred. What is excessive is not sporadic or superficial. It is deep-seated and pervasive. The licit and illicit sections are so combined and welded as to be incapable of severance without destructive mutilation.

But there is another objection, far-reaching and incurrable, aside from any defect of unlawful delegation.

If this code had been adopted by Congress itself, and not by the President on the advice of an industrial association, it would even then be void unless authority to adopt it is included in the grant of power "to regulate commerce with foreign nations and among the several states." United States Constitution, Art. I, Sec. 8, Clause 3. I find no authority in that grant for the regulation of wages and hours of labor in the intrastate transactions that make up the defendants' business. As to this feature of the case little can be added to the opinion of the court. There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely to recording instruments at the center. A society such as ours "is an elastic medium which transmits all tremors through its territory; the only question is of their size." Per Learned Hand, J., in the court below. The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. Cf. *Board of Trade v. Olsen,* 262 U. S. 1. There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system.

To take from this code the provisions as to wages and the hours of labor is to destroy it altogether. If a trade or an industry is so predominantly local as to be exempt from regulation by the Congress in respect of matters such as these, there can be no "code" for it at all. This is clear from the provisions of §7a of the Act with its explicit disclosure of the statutory scheme. Wages and the hours of labor are essential features of the plan, its very bone and sinew. There is no opportunity in such circumstances for the severance of the infected parts in the hope of saving the remainder. A code collapses utterly with bone and sinew gone.

I am authorized to state that Mr. Justice STONE joins in this opinion.

[¶ 55,073] Federal Trade Commission v. Maisel Trading Post, Inc.

United States Circuit Court of Appeals, Tenth Circuit. No. 976. May 1, 1935.

Application for the Enforcement of an Order of the Federal Trade Commission.

An order of the Federal Trade Commission forbidding the advertising of jewelry as "Indian-made" without specifying that it has been partly made by machine is modified and affirmed.

Before LEWIS and McDERMOTT, Circuit Judges, and KENNEDY, District Judge. KENNEDY, District Judge, delivered the opinion of the court.

This proceeding was instituted by the Federal Trade Commission under the Federal Trade Commission Act, as set out in 15 USCA 45. The proceeding was originally commenced by a complaint filed in May, 1932, in which the Commission charged in substance that the respondent while engaged in interstate commerce, by the use

of misleading and deceptive terms in connection with the sale of certain types of Indian jewelry, indulged in unfair methods of competition which were prejudicial and injurious to the public, involving practices which tended to divert trade from and otherwise prejudice and injure respondent's competitors. The respondent joined issue by answer and a hearing was had before a trial examiner of the Commission resulting in findings adverse to the respondent and an order directing the respondent to desist from its unfair practices and directing it in connection with its advertisements, catalogues, labels, stamps, etc., to add certain descriptive terms with reference to the jewelry advertised and handled for sale by the respondent. The respondent refused to comply with the terms of the order and in accordance with the statute above cited, the Commission before this court seeks a decree enforcing its order upon the respondent.

In approaching a discussion of the matter at hand, we observe that the respondent at the outset has a very substantial burden to carry. This grows out of the very nature of the Act itself, indicated in two particulars: (1) The Commission itself institutes the proceeding and as the complainant, becomes the prosecutor of the charges contained in the complaint, before itself as the judicial determination body; and (2) the Act provides that "the findings of the Commission as to facts, if supported by testimony, shall be conclusive." However, we take the Act as we find it and as it has been construed by the highest court in attempting to solve the problems presented by the record.

There are three elements to be considered in determining the validity of the Commission's order. In *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212, the rule is laid down definitely at page 216 in the following language:

"To sustain the orders of the Commission, three requisites must exist: (1) that the methods used are unfair; (2) that they are methods of competition in interstate commerce; and (3) that a proceeding by the commission to prevent the use of methods appears to be in the interest of the public."

The second element above mentioned, involving interstate commerce, appears to be eliminated in the case at bar for the reason that the respondent admits that its trade is carried on in interstate commerce. The other two elements remain for consideration, to wit: Whether the methods used are unfair and if so, whether the public has an interest in those methods.

The first question revolves around the point of determining whether the terms "Indian" and "Indian-made" in connection with jewelry advertised and sold by the respondent implies a distinct meaning and if this is determined in the affirmative, then as to whether the general public is deceived or misled in the use of these terms. The terms "Indian" and "Indian-made" are words in common use and their significance in a restricted sense with the setting here furnished, must result if at all, from a secondary meaning which has become attached to them.

The principal of attaching a secondary meaning to a common word or phrase is well established by the courts. *Elgin Nat'l. Watch Co. v. Illinois Watch Co.*, 179 U. S. 665; *Herring-Hall-Marvin Safe Co. v. Hall's Safe Co.*, 208 U. S. 554; *Waterman Co. v. Modern Pen Co.*, 235 U. S. 88; *Macey v. Colorado Clothing Co.*, 68 F. (2d) 690 (C.C. A. 10). No doubt this doctrine in connection with trademarks and tradenames has been somewhat extended under the administration of the Federal Trade Commission Act.

In examining the record upon this first point there appears to be substantial evidence to sustain the theory of the Commission, that the terms "Indian" and "Indian-made" carry the significance in the public mind when used in connection with jewelry, that such jewelry has been made by Indians by hand exclusively or with the aid of primitive tools, as distinguished from its manufacture with the use of modern machinery which lessens the time of labor of the Indian in accomplishing his ultimate aim in turning out jewelry products. In scanning the record it becomes apparent that the evidence when considered broadly, is made up of the testimony of anthropologists and Indian traders, the latter of whom are associated together in a voluntary organization for their own protection with their pecuniary interests strongly manifested against the trade practices of the respondent. The scope of the testimony as to its source is therefor somewhat restricted, but otherwise there seems to be no impeachment of it. The use of the terms or either of them in connection with jewelry advertised for sale would constitute an unfair method of competition, if such jewelry were not manufactured in consonance with the generally understood meaning of the terms. With the rule in mind that the evidence of the Commission as to facts, if supported by testimony, shall be conclusive, its findings upon this point manifestly cannot be disturbed.

Upon the second point, as to whether or not the public generally has an interest in the purchase of Indian jewelry as to its method of manufacture, there is some conflict in the testimony. Witnesses for the Commission offered extended testimony toward proof of the theory that the con-

stantly increasing tourist traffic is of a friendly and kindly disposition toward the Indian tribes of the Southwestern portion of the United States as well as having an interest in the traditions of their early and continuous practice in the art of making jewelry from silver. They further testified that this interest is based largely upon the desire to purchase jewelry made by the Indians, with the same methods as used by their forefathers, and when it becomes known by the prospective purchaser that it is not manufactured with the use of primitive tools and methods, the purchaser loses interest and refuses to purchase.

On the other hand, the respondent has submitted evidence tending to show that the great rank and file of prospective purchasers of Indian jewelry are chiefly concerned in ascertaining the fact as to whether or not the article has been made by Indians, independent of what kind of tools or machinery may have been employed in the process of manufacture. In the mental processes of the ordinary individual, the use of machinery by the Indian to shorten his labor as being an element which enters into the saleability of the article which he produces, is somewhat hazy and suggests an approach to the psychic. It would logically seem that the great body of purchasers would be concerned with the genuineness of the materials of which the article is manufactured, coupled with the fact that it is actually made by those belonging to the Indian tribes. Again, we are confronted with the somewhat anomalous situation of the Government establishing Indian schools so that its ward may perfect himself in the arts and sciences to more efficiently compete with his white brother through the use of modern methods and machinery; while the practical operation of the Commission's order would seem to penalize the Indian silversmith in a sense, by compelling him to stick to the primitive, laborious and time-consuming methods of his ancestors. Yet under the broad scope of the Act making the findings of fact of the Commission conclusive, coupled with the extensive and substantial testimony that the general public, interested in the purchase of Indian-made articles recognizes a difference in the desirability between those articles manufactured by primitive methods and those manufactured with the aid of modern machinery, it would be difficult, if not impossible, for a reviewing court to say that those findings are not sustained.

It remains to consider the order of the Commission in the attempt to eliminate the unfair practices and methods in competition. This order in its entirety reads as follows:

"This proceeding having been considered by the Federal Trade Commission upon the pleadings, the evidence received, and the oral and written argument, and the Commission having made its findings as to the facts and the conclusion that respondent, Maisel Trading Post, Inc., has violated the provisions of an act of Congress, approved September 26, 1914, entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes'.

"It is now ordered that respondent, its agents, representatives, and employees, shall cease and desist from designating, describing, or offering any of its silver jewelry products, made partly by machinery, for sale in interstate commerce by label, stamp, catalogue, advertisement, or otherwise, as 'Indian' or 'Indian-made', either with or without the addition of the word 'jewelry' or the addition of a word or words for the class of article, as 'bracelet', 'ring', 'concha belt', or the like, unless the label, stamp, catalogue, or advertising shall clearly and expressly state, in immediate context with the said descriptive terms in conspicuous lettering at least three-quarters as high and three-quarters as wide as the lettering of said descriptive terms, either that the jewelry so designated, described or offered—

"(a) Has been rolled by machine, or

"(b) Has been pressed by machine, or

"(c) Has been partly ornamented by machine, or

"(d) That there has been used in its production a combination of rolling, pressing, and/or partial ornamentation by machine, as may have been respectively the method of the manufacture of respondent's various products as designated, described, or offered for sale: *Provided, however,* That the use of hand tools or non-mechanical equipment of whatsoever kind in production, and further that the use of buffing wheels for the polishing of fully fashioned pieces of jewelry, shall not preclude the use by respondent of the terms 'Indian' or 'Indian-made' for any hand-made product, without the making of any explanatory statement.

"It is further ordered that respondent shall, within sixty (60) days after the service upon it of a copy of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with and conformed to the order to cease and desist hereinabove set forth."

The record discloses that the Indian is not a producer of silver from its deposits in the earth nor has he ever indulged in any refining process. In his original operations as a silversmith the elementary basis of the manufactured article was the silver Mexican peso, which after being softened by a heat process, with the use of a primitive charcoal fire, was pounded into the required shape by the use of a hammer, likewise the product of the white man. Male and female dies or matrices of various types of the Indian's own manufacture, were used in making the desired impressions. The article was usually manufactured in the Indian's own hogan or home. The product was of an extraordinary solid, heavy type, which was used almost exclusively by the Indians themselves for personal adornment. As the public began to take more interest in Indian jewelry it was found that there was no great demand for this heavy type of jewelry, and in seeking to attract the commercial trade the process of making a much lighter article was developed. The plan of using the Mexican peso as the basic element was largely eliminated through the difficulty in

securing this coin and its otherwise undesirability, and a plan was adopted of using refined silver in so-called "slugs" which were secured through various and sundry commercial white dealers. The slugs consisted of refined silver rolled by machinery at a factory to a thickness of one-eighth to one-quarter of an inch and then cut into one to two inch squares, which were likewise pounded into the desired shape. With the passing of the primitive charcoal method of heating, came the modern blow-torch which was much more effective and rapid in the annealing process and the silver slug when annealed was then pounded into the thickness and shape desired. The primitive tools used by the Indian for adorning the article were again discarded in favor of the dies and matrices of any required design manufactured by the white man. The Indian bracelet and ring is usually adorned with the predominating choice Indian stone of the Southwest, the turquoise. The Indian has never mined this precious stone and except in rare instances has he ever prepared and polished it for use in connection with a bracelet or ring. The stone is purchased in quantities from dealers ready for attachment to the bracelet or ring. After the article was made into the desired shape the ornaments were attached, such filings were made as seemed necessary and the finished article after being oxidized, was first polished by hand, which operation was later superseded by the use of the more modern instrument of white-man manufacture, the buffing wheel. Such was the method in vogue for the manufacture of Indian jewelry up to the time when the machines of which the petitioner complains were brought into the picture. The respondent installed modern machinery for rolling silver to the desired thickness and cutting the sheets so rolled or those which were purchased from dealers, by stamping into desired forms. Dies of various kinds and types were likewise operated by machinery. The remaining process was the same as before. Respondent employed a substantial number of Indians in connection with the manufacturing plant in the rear of his retail establishment at Albuquerque. No attempt was made upon the part of the respondent to conceal the method by which the manufacture of the articles was taking place. Visitors and customers were permitted to go and were even conducted through the manufacturing plant. The only functions of the proprietor and his white employees with the system of manufacture were in keeping the Indians' time and in giving them orders for an article in connection with a demand for the same, but allowing him to use his own fancy and ingenuity of design. By the use of machinery in rolling and stamping or pressing, the saving of time in the manufacture of one bracelet over the method of pounding the silver into the desired shape, is approximately one hour and thirty-five minutes.

The complaint of the Commission as demonstrated by its findings and order, is substantially confined to the elimination, except with notice to the public, of the pounding process for which the rolling and pressing machines have been substituted, together with the operation of the dies or matrices by machine. As a corollary to this proposition it must follow that the adjudged deceit of the public is on account of the Indian not having spent the one hour and thirty-five minutes additional time in pounding the basic silver into the desired shape and thickness. It seems to be the theory of several of the witnesses testifying in behalf of the Commission, principally the anthropologists, that through the pounding process the Indian has put something of himself into the article which he manufactures. The testimony of no Indian supports this theory and it is a fair conjecture that so far as the Indian is concerned, the shortest route to the desired remuneration is his chief objective. Nevertheless, the theory of the anthropologists must be sustained, if supported by substantial evidence.

It will be noted that the findings and order of the Commission attempt to straighten out the situation by requiring the display of Indian jewelry for sale by label, stamp, catalogue, advertisement, or otherwise, to specify that a machine has been used in rolling, pressing, or ornamenting the Indian-made article, but it is silent as to the use of rolled silver in the initial slugs and the modern blow-torch in the annealing process, and specifically permits the use of hand tools however manufactured as well as the buffing wheel. There appears to be nothing in the order which requires the representation that the manufacturing operation must be performed exclusively by Indians.

We believe that the Commission has been arbitrary in selecting for partial consideration the methods of machine use entering into the manufacture of Indian-made jewelry, in that it specifically eliminates certain machines without notice given of their use and exempts other equally modern machines in regard to which no notice is required. This is not in a true sense a safeguard to the purchasing public. If the public is entitled to be advised along the line of distinguishing articles made through primitive methods and those manufactured through more modern methods, the field should be covered throughly. While we

believe in a technical sense that the evidence is sufficient to support and sustain the order of the Commission in its general purpose and intent, yet surely it should be modified in such a way as to show, through label, stamp, catalogue, or advertisement, that the process of manufacture is performed by Indians and to specify the steps in which there is a use of modern machinery as distinguished from the primitive methods. This may be accomplished by extending the specifications which must be included in the catalogue, label, stamp, or advertisement, or such other device as may be used. By the order of the Commission obviously a standard for the commercial handling of jewelry made by Indians of the Southwestern United States is set up. It must in the nature of things be a rule which binds not only the respondent, but other Indian traders and dealers, as well as the Indian himself if he deals with the public. The plan to be proposed will operate with fairness and equality upon the Indian, the respondent, other traders, and the public, so that it may be known exactly what type of article, as to the process of manufacture, is being offered for sale. In this way those who desire to purchase Indian jewelry manufactured by primitive methods can be fully advised by the advertised inducement that perhaps the Indian silversmith has become modernized in his methods and may avoid his handiwork if it does not appeal to their æsthetic tastes.

The order of the Commission should accordingly be modified.

Beginning with the second paragraph of the Commission's order, it will be modified so as to read as follows:

"It is now ordered that respondents, its agents, representatives, and employees, shall cease and desist from designating, describing, or offering any of its silver jewelry products, made partly by machinery, for sale in interstate commerce by label, stamp, catalogue, advertisement, or otherwise, as 'Indian' or 'Indian-made,' either with or without the addition of the word 'jewelry' or the addition of a word or words for the class of article, as 'bracelet', 'ring', 'concha belt', or the like, unless the label, stamp, catalogue or advertising shall clearly and expressly state, in immediate context with the said descriptive terms in conspicuous lettering at least three-quarters as high and three-quarters as wide as the lettering of said descriptive terms, that the jewelry so designated, described or offered—

(a) Has been made by Indians.

(b) Has been manufactured from silver slugs made from machine-rolled silver.

(c) Has been manufactured from machine-rolled sheet silver.

(d) Has been ornamented with turquois (or other stones) not made by Indians.

(e) In the manufacture, a rolling machine has been used.

(f) In the manufacture, a pressing machine has been used.

(g) In the manufacture, dies or matrices made by white men have been used.

(h) In the manufacture, dies or matrices made by white men and propelled by machines have been used.

(i) In the manufacture, a buffing wheel for polishing has been used.

That only so many of the specifications above enumerated shall be set forth as to correctly state the process of manufacture of the article."

A decree will issue in due course affirming the order of the Commission as so modified, each party to pay its own costs.

[¶ 55,074] Samuel F. Rathbun, as Executor of the Estate of William E. Humphrey, Deceased. v. The United States.

Supreme Court of the United States. No. 667.—October Term, 1934. Decided May 27, 1935.

On Certificate from the Court of Claims.

The provisions of section 1 of the Federal Trade Commission Act, stating that "any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office," are held to prevent the President from removing a commissioner except upon one or more of the causes named.

Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office. The power of the President alone to make the removal is confined to purely executive officers. No removal can be made of an officer quasi-legislative and quasi-judicial during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

The provisions of section 1 of the Federal Trade Commission Act restricting the President's power of removal of Federal Trade Commissioners to removal upon specified causes only is a valid limitation under the Constitution.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

Plaintiff brought suit in the Court of Claims against the United States to recover a sum of money alleged to be due the deceased for salary as a Federal Trade Commissioner from October 8, 1933, when the President undertook to remove him

from office, to the time of his death on February 14, 1934. The court below has certified to this court two questions (Act of February 13, 1925, § 3 (a), c. 229, 43 Stat. 936, 939, 28 U. S. C. § 288), in respect of the power of the President to make the removal. The material facts which give rise to the questions are as follows:

William E. Humphrey, the decedent, on December 10, 1931, was nominated by President Hoover to succeed himself as a member of the Federal Trade Commission, and was confirmed by the United States Senate. He was duly commissioned for a term of seven years expiring September 25, 1938; and, after taking the required oath of office, entered upon his duties. On July 25, 1933, President Roosevelt addressed a letter to the commissioner asking for his resignation, on the ground "that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection," but disclaiming any reflection upon the commissioner personally or upon his services. The commissioner replied, asking time to consult his friends. After some further correspondence upon the subject, the President on August 31, 1933, wrote the commissioner expressing the hope that the resignation would be forthcoming and saying:

"You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence."

The commissioner declined to resign; and on October 7, 1933, the President wrote him:

"Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission."

Humphrey never acquiesced in this action, but continued thereafter to insist that he was still a member of the commission, entitled to perform its duties and receive the compensation provided by law at the rate of $10,000 per annum upon these other facts set forth in the certificate, which we deem it unnecessary to recite, the following questions are certified:

"1. Do the provisions of section 1 of the Federal Trade Commission Act, stating that 'any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office,' restrict or limit the power of the President to remove a commissioner except upon one or more of the causes named?

"If the foregoing question is answered in the affirmative, then—

"2. If the power of the President to remove a commissioner is restricted or limited as shown by the foregoing interrogatory and the answer made thereto, is such a restriction or limitation valid under the Constitution of the United States?"

The Federal Trade Commission Act, c. 311, 38 Stat. 717; 15 U. S. C. § 41, 42, creates a commission of five members to be appointed by the President by and with the advice and consent of the Senate, and § 1 provides:

"Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. . . ."

Sec. 5 of the act in part provides:

"That unfair methods of competition in commerce are hereby declared unlawful.

"The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce."

In exercising this power, the commission must issue a complaint stating its charges and giving notice of hearing upon a day to be fixed. A person, partnership, or corporation proceeded against is given the right to appear at the time and place fixed and show cause why an order to cease and desist should not be issued. There is provision for intervention by other interested. If the commission finds the method of competition is one prohibited by the act, it is directed to make a report in writing stating its findings as to the facts, and to issue and cause to be served a cease and desist order. If the order is disobeyed, the commission may apply to the appropriate circuit court of appeals for its enforcement. The party subject to the order may seek and obtain a review in the circuit court of appeals in a manner provided by the act.

Sec. 6, among other things, gives the commission wide powers of investigation in respect of certain corporations subject to the act, and in respect of other matters, upon which it must report to Congress with recommendations. Many such investigations have been made, and some have served as the basis of congressional legislation.

Sec. 7 provides:

"That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions

may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require."

First. The question first to be considered is whether, by the provisions of § 1 of the Federal Trade Commission Act already quoted, the President's power is limited to removal for the specific causes enumerated therein. The negative contention of the government is based principally upon the decision of this court in *Shurtleff v. United States,* 189 U. S. 311. That case involved the power of the President to remove a general appraiser of merchandise appointed under the Act of June 10, 1890, 26 Stat. 131. Sec. 12 of the act provided for the appointment by the President, by and with the advice and consent of the Senate, of nine general appraisers of merchandise, who "may be removed from office at any time by the President, for inefficiency, neglect of duty, or malfeasance in office." The President removed Shurtleff without assigning any cause therefor. The Court of Claims dismissed plaintiff's petition to recover salary, upholding the President's power to remove for causes other than those stated. In this court Shurtleff relied upon the maxim *expressio unius est exclusio alterius;* but this court held that, while the rule expressed in the maxim was a very proper one and founded upon justifiable reasoning in many instances, it "should not be accorded controlling weight when to do so would involve the alteration of the universal practice of the government for over a century and the consequent curtailment of the powers of the executive in such an unusual manner." What the court meant by this expression appears from a reading of the opinion. That opinion—after saying that no term of office was fixed by the act and that, with the exception of judicial officers provided for by the Constitution, no civil officer had ever held office by life tenure since the foundation of the government—points out that to construe the statute as contended for by Shurtleff would give the appraiser the right to hold office during his life or until found guilty of some act specified in the statute, the result of which would be a complete revolution in respect of the general tenure of office, effected by implication with regard to that particular office only.

"We think it quite inadmissible," the court said (p. 316, 318), "to attribute an intention on the part of Congress to make such an extraordinary change in the usual rule governing the tenure of office, and one which is to be applied to this particular office only, without stating such intention in plain and explicit language, instead of leaving it to be implied from doubtful inferences. . . . We cannot bring ourselves to the belief that Congress ever intended this result while omitting to use language which would put that intention beyond doubt."

These circumstances, which led the court to reject the maxim as inapplicable, are exceptional. In the face of the unbroken precedent against life tenure, except in the case of the judiciary, the conclusion that Congress intended that, among all other civil officers, appraisers alone should be selected to hold office for life was so extreme as to forbid, in the opinion of the court, any ruling which would produce that result if it reasonably could be avoided. The situation here presented is plainly and wholly different. The statute fixes a term of office, in accordance with many precedents. The first commissioners appointed are to continue in office for terms of three, four, five, six, and seven years, respectively; and their successors are to be appointed for terms of seven years—any commissioner being subject to removal by the President for inefficiency, neglect of duty, or malfeasance in office. The words of the act are definite and unambiguous.

The government says the phrase "continue in office" is of no legal significance and, moreover, applies only to the first commissioners. We think it has significance. It may be that, literally, its application is restricted as suggested; but it, nevertheless, lends support to a view contrary to that of the government as to the meaning of the entire requirement in respect of tenure; for it is not easy to suppose that Congress intended to secure the first commissioners against removal except for the causes specified and deny like security to their successors. Putting this phrase aside, however, the fixing of a definite term subject to removal for cause, unless there be some countervailing provision or circumstance indicating the contrary, which here we are unable to find, is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause. But if the intention of Congress that no removal should be made during the specified term except for one or more of the enumerated causes were not clear upon the face of the statute, as we think it is, it would be made clear by a consideration of the character of the commission and the legislative history which accompanied and preceded the passage of the act.

The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts "appointed by law and informed by ex-

perience." *Illinois Cent. &c. R. R. v. Inter. Com. Comm.*, 206 U. S. 441, 454; *Standard Oil Co. v. United States*, 283 U. S. 235, 238-239.

The legislative reports in both houses of Congress clearly reflect the view that a fixed term was necessary to the effective and fair administration of the law. In the report to the Senate (No. 597, 63rd Cong., 2d Sess., pp. 10-11) the Senate Committee on Interstate Commerce, in support of the bill which afterwards became the act in question, after referring to the provision fixing the term of office at seven years, so arranged that the membership would not be subject to complete change at any one time, said:

"The work of this commission will be of a most exacting and difficult character, demanding persons who have experience in the problems to be met—that is, a proper knowledge of both the public requirements and the practical affairs of industry. It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience."

The report declares that one advantage which the commission possessed over the Bureau of Corporations (an executive subdivision in the Department of Commerce which was abolished by the act) lay in the fact of its independence, and that it was essential that the commission should not be open to the suspicion of partisan direction. The report quotes (p. 22) a statement to the committee by Senator Newlands, who reported the bill, that the tribunal should be of high character and "independent of any department of the government. . . . a board or commission of dignity, permanence, and ability, independent of executive authority, except in its selection, and independent in character."

The debates in both houses demonstrate that the prevailing view was that the commission was not to be "subject to anybody in the government but . . . only to the people of the United States"; free from "political domination or control" or the "probability or possibility of such a thing"; to be "separate and apart from any existing department of the government—not subject to the orders of the President."

More to the same effect appears in the debates, which were long and thorough and contain nothing to the contrary. While the general rule precludes the use of these debates to explain the meaning of the words of the statute, they may be considered as reflecting light upon its general purposes and the evils which it sought to remedy. *Fed. Trade Comm. v. Raladam Co.*, 283 U. S. 643, 650.

Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes, it is clear the Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

We conclude that the intent of the act is to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here; and we pass to the second question.

Second. To support its contention that the removal provision of § 1, as we have just construed it, is an unconstitutional interference with the executive power of the President, the government's chief reliance is *Myers v. United States*, 272 U. S. 52. That case has been so recently decided, and the prevailing and dissenting opinions so fully review the general subject of the power of executive removal, that further discussion would add little of value to the wealth of material there collected. These opinions examine at length the historical, legislative and judicial data bearing upon the question, beginning with what is called "the decision of 1789" in the first Congress and coming down almost to the day when the opinions were delivered. They occupy 243 pages of the volume in which they are printed. Nevertheless, the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of *stare decisis*. In so far as they are out of harmony with the views here set forth, these expressions are disapproved. A like situation was presented in the case of *Cohens v. Virginia*, 6 Wheat. 264, 399, in respect of certain general expressions in the opinion in *Marbury v. Madison*, 1 Cranch 137. Chief Justice Marshall, who delivered the opinion in the *Marbury* case, speaking again for the court in the *Cohens* case, said:

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions

are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

And he added that these general expressions in the case of *Marbury v. Madison* were to be understood with the limitations put upon them by the opinion in the *Cohens* case. See, also, *Carroll v. Lessee of Carroll et al.*, 16 How. 275, 286-287; *O'Donoghue v. United States*, 289 U. S. 516, 550.

The office of a postmaster is so essentially unlike the office now involved that the decision in the *Myers* case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside *dicta*, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther;—much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of "unfair methods of competition"—that is to say in filling in and administering the details embodied by that general standard—the commission acts in part quasi-legislatively and in part quasi-judicially. In making investigations and reports thereon for the information of Congress under § 6, in aid of the legislative power, it acts as a legislative agency. Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.*

If Congress is without authority to prescribe causes for removal of members of the trade commission and limit executive power of removal accordingly, that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution. The Solicitor General, at the bar, apparently recognizing this to be true, with commendable candor, agreed that his view in respect of the removability of members of the Federal Trade Commission necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious question whether not only the members of these quasi-legislative and quasi-judicial bodies, but the judges of the legislative Court of Claims, exercising judicial power (*Williams v. United States*, 289 U. S. 553, 565-567), continue in office only at the pleasure of the President.

We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential

* The provision of § 6 (d) of the act which authorizes the President to direct an investigation and report by the commission in relation to alleged violations of the anti-trust acts, is so obviously collateral to the main design of the act as not to detract from the force of this general statement as to the character of that body.

co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers." Andrews, The Works of James Wilson (1896), vol. 1, p. 367. And Mr. Justice Story in the first volume of his work on the Constitution, 4th ed., § 530, citing No. 48 of the Federalist, said that neither of the departments in reference to each other "ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers." And see *O'Donaghue v. United States, supra,* at p. 530-531.

The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.

In the light of the question now under consideration, we have reexamined the precedents referred to in the *Myers* case, and find nothing in them to justify a conclusion contrary to that which we have reached. The so-called "decision of 1789" had relation to a bill proposed by Mr. Madison to establish an executive Department of Foreign Affairs. The bill provided that the principal officer was "to be removable from office by the President of the United States." This clause was changed to read "whenever the principal officer shall be removed from office by the President of the United States" certain things should follow, thereby, in connection with the debates, recognizing and confirming, as the court thought in the *Myers* case, the sole power of the President in the matter. We shall not discuss the subject further, since it is so fully covered by the opinions in the *Myers* case, except to say that the office under consideration by Congress was not only purely executive, but the officer one who was responsible to the President, and to him alone, in a very definite sense. A reading of the debates shows that the President's illimitable power of removal was not considered in respect of other than executive officers. And it is pertinent to observe that when, at a later time, the tenure of office for the Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature but partook of the judiciary quality as well, a different rule in respect of executive removal might well apply. 1 Annals of Congress, cols. 611-612.

In *Marbury v. Madison, supra,* p. 162, 165-166, it is made clear that Chief Justice Marshall was of opinion that a justice of the peace for the District of Columbia was not removable at the will of the President; and that there was a distinction between such an officer and officers appointed to aid the President in the performance of his constitutional duties. In the latter case, the distinction he saw was that "their acts are his acts" and his will, therefore, controls; and by way of illustration, he adverted to the act establishing the department of Foreign Affairs, which was the subject of the "decision of 1789."

The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

To the extent that, between the decision in the *Myers* case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.

In accordance with the foregoing, the questions submitted are answered.

Question No. 1, Yes.

Question No. 2, Yes.

Mr. Justice McREYNOLDS agrees that both questions should be answered in the affirmative. A separate opinion in *Myers v. United States,* 272 U. S. 178, states his views concerning the power of the President to remove appointees.

[¶ 55,075] E. Griffiths Hughes, Inc. v. Federal Trade Commission.

United States Circuit Court of Appeals for the Second Circuit. Decided June 3, 1935.

The Federal Trade Commission's order to cease and desist representing that "Kruschen Salts" will reduce excessive fat, that "Radox Bath Salts" have therapeutic value in a bath, that the salts release great quantities of oxygen, that their use has the effect of treatments at spas, that they stimulate the body, and that they are imported from England, is affirmed.

The finding of the Commission, after conflicting evidence, is binding upon the courts.

The trial examiner's discretionary ruling, refusing certain medical evidence upon the finding that the tests were not scientifically conducted or controlled and that the evidence thereto was entitled to but little weight, offers no justification for reversal.

Affirming an order of the Federal Trade Commission, Complaint No. 1966.

Before: MANTON, SWAN and CHASE, Circuit Judges.

Petition to review an order of the Federal Trade Commission. E. Griffiths Hughes, Inc., files the petition. Order affirmed.

Albert Edward Mavers, Esq. Attorney for Petitioner. W. T. Kelley, Esq., Chief Counsel, Federal Trade Commission. Martin A. Morrison, Esq., Asst. Chief Counsel. Harry D. Michael, Esq., Trial Attorney. James W. Nichol, Esq., Special Attorney, Attorneys for Respondent.

Per Curiam

The order here sought to be reviewed directs the petitioner, in the distribution in interstate commerce of "Kruschen Salts" and "Radox Bath Salts", to cease and desist from representing, directly or indirectly (1) that "Kruschen Salts" constitutes a cure or remedy for obesity or that it will of itself reduce excessive fat; (2) that "Radox Bath Salts" has therapeutic value when used in a bath; that it releases great quantities of oxygen when so used, and that its use at home combines the properties of world famous Spas or produces the effect of treatment at such places; that it stimulates or energizes the body; or that it is imported from England.

As to the Kruschen Salts and its qualities as a cure or remedy for obesity or that it will reduce excess fats, there was a conflict of evidence before the Commission. The evidence sufficiently supports the finding that it would not reduce fat or act as a remedy for obesity. While there was testimony of physcians in general practice, who testified to good results in reducing fat, the Commission did not accept such testimony but, on the contrary, accepted that offered on behalf of the Commission. This finding, having evidence to support it, is binding upon the courts. *Fed. Trade Commission v. Algoma Lumber Company*, 291 U. S. 67, 73; *Fed. Trade Comm. v. Balme*, 23 Fed. 2d. 615, 619 (C. C. A. 2); *Harriet Hubbard Ayer, Inc. v. Fed. Trade Comm.*, 15 Fed. 2d, 274 (C. C. A. 2).

There was testimony of competition, in interstate commerce, of the Kruschen Salts with products of other manufacturers having a saline laxative. The evidence sufficiently supported the finding of the Commission. The list of products so in competition was sufficiently large in number to justify the order entered. Petitioner used the same advertising as to reduction of excess fats while in competition with products sold by competitors.

The public had an interest because of false advertising and misstatements as to the qualities and results of the use of these salts. Such practice may be restrained. *Fed. Trade Comm. v. Winsted Hosiery Co.*, 258 U. S. 483, 493; *Fed. Trade Comm. v. Raladam Co.*, 283 U. S. 643. Such unfair methods of competition justify the order entered when the public has an interest in its prevention.

The order against the Radox Bath Salts is supported by evidence showing misrepresentations contained in magazine advertisements. There was testimony that no medical effect is to be derived from the use of this preparation in a bath. It is shown that when put in water a small amount of oxygen is released, but there was no warrant for the exaggerated statement that "it radiats great quantities of oxygen", or the implication that it has therapeutic effect and that the use of Radox at home would produce results equal to treatment at spas. The latter statement was found to be erroneous, since treatment at spas contemplated dieting, purgation, exercise, and a regulatory routine of existence in addition to the baths. The implication that Radox is imported from England was like-

wise found to be erroneous. It is prepared and packaged in this country. All bath salts were found to be in competition. This evidence is sufficient to support the findings.

Complaint is made of the refusal of the trial examiner to admit certain medical evidence offered. The Commission found that the tests made were "not scientifically conducted or controlled", and that the evidence in regard thereto was entitled to but little weight. This evidence was offered at a hearing for the receipt of surrebuttal evidence held October 27, 1932. The tests were made in June, 1922, after the completion of the Commission's original case, which was closed April 15, 1932, and after three separate hearings had been held for the receipt of petitioner's evidence. The petitioner had ample time to plan its defense and offer evidence, and to make these tests prior to the first date when the petitioner started to introduce its testimony. The examiner's discretionary ruling as made, offers no justification for reversal.

Petitioner's methods have been found to be unfair in that its representations in regard to its products are misstatements of fact and are misleading. The products are sold in interstate commerce and in competition with the products of other manufacturers. Selling by the use of false and misleading statements necessarily injures or tends to injure petitioner's competitors. *Fed. Trade Comm. v. Winsted Hosiery Co., supra; Fed. Trade Comm. v. Artloom Corp.*, 69 Fed. 2d, 36. Such injury to competitors or tendency to injure, fully establishes the public interest. Therefore, there was jurisdiction under § 5 of the Federal Trade Commission Act.

Order affirmed.

[¶ 55,076] J. G. Dodson and Mrs. C. M. Dodson, co-partners trading as The Ironized Yeast Company v. Federal Trade Commission.

United States Circuit Court of Appeals, Sixth Circuit. No. 6886. June 3, 1935.

Petition to review an order of the Federal Trade Commission.

An order of the Federal Trade Commission forbidding misrepresentations of the curative powers of ironized yeast is affirmed.

Affirming an order of the Federal Trade Commission, Complaint No. 1972.

Order

Before MOORMAN, HICKS and SIMONS, Circuit Judges.

It appearing to the court, upon a consideration of the record in this proceeding, that the findings of fact made by the respondent, Federal Trade Commission, are amply supported by evidence, and that they are legally sufficient to authorize the respondent to issue the order to cease and desist here complained of;

It is ordered that the order of the respondent be and the same is hereby affirmed.

CHAS. H. MOORMAN.

[¶ 55,077] Walter H. Johnson Candy Company v. Federal Trade Commission.

United States Circuit Court of Appeals for the Seventh Circuit. Decided June 29, 1935. No. 5406.

Petition for Review of Order of the Federal Trade Commission.

The Court affirms an order of the Federal Trade Commission forbidding the sale of candy in "lottery, prize or draw packages," which encourages gambling among children, holding that a trader may not, by pursuing a dishonest practice, force his competitors to choose between its adoption or the loss of their trade.

Affirming Federal Trade Commission Complaint No. 1817.

Before ALSCHULER, SPARKS, and FITZHENRY, *Circuit Judges.*

FITZHENRY, *Circuit Judge.* This matter comes before the Court on a petition for review filed by the Walter H. Johnson Candy Company from an order issued by the Federal Trade Commission to cease and desist certain practices held to constitute an unfair method of competition.

The Commission found that petitioner was engaged in the manufacture and sale of candy in interstate commerce; that among the candies manufactured by it are certain boxes of candy known as lottery, prize or draw packages which are so assembled and packed as to be resold to the purchasing

public, principally children, by lot or chance; that this constitutes a lottery or gaming device; that many competitors of petitioner regard such method of sale as morally bad and encouraging gambling among children and therefore refuse to sell candy so packed and assembled and are thereby put to a disadvantage in competing. The Commission held the use of such methods by petitioner to be injurious to the public and to competitors and that it has resulted in the diversion of trade to petitioner and is a restraint upon, and a detriment to, the freedom of fair and legitimate competition in the candy industry On the basis of these findings of fact, it issued the order to cease and desist which this court is asked to vacate in these proceedings.

It is contended by petitioner that the order which it challenges rests upon a record from which much of the evidence offered by petitioner was improperly excluded. The evidence excluded consisted, in large part, of the testimony of parents, educators, etc., that these confections were purchased extensively by religious denominational schools for resale to children and that they had a wholesome rather than a deleterious effect upon the moral development of the children. Other evidence which was excluded was the testimony of manufacturers of candy that they had no objection, moral or otherwise, to manufacturing and selling this candy.

The Commission properly excluded this evidence as irrelevant to the issues before it. Several manufacturers had testified that they felt the practice of selling these candies to be unscrupulous and that they could not descend to such a practice and were therefore put to an unfair disadvantage in their business. That not all manufacturers believed the practice to be dishonest or that these manufacturers were mistaken in their beliefs was clearly immaterial and irrelevant. The very recent case of *Federal Trade Commission v. Keppel & Bro.*, 291 U. S. 304, involved facts strikingly similar to those here. The court there said:

"* * * a trader may not, by pursuing a dishonest practice, force his competitors to choose between its adoption or the loss of their trade. A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought to involve the kind of unfairness at which the statute was aimed."

In support of this contention it cites the cases of *Federal Trade Comm'n v. Winsted Hosiery Co.*, 258 U. S. 483, and *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67.

Nor could the evidence have properly been admitted as proof that the proceeding was not brought in "the interest of the public." In the *Keppel* case, *supra*, the Supreme Court held in respect to this same practice of sale and manufacture that it was of the sort which the common law and criminal statutes have long deemed contrary to public policy. The court said:

"For these reasons a large share of the industry holds out against the device, despite ensuing loss in trade, or bows reluctantly to what it brands unscrupulous. It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the method is not 'unfair'."

In another part of the same opinion the court said:

"If the practice is unfair within the meaning of the act, it is equally clear that the present proceeding, aimed at suppressing it, is brought, as Sec. 5 of the act requires, 'to the interest of the public'."

The other points raised by petitioner in its brief and upon oral argument have been carefully considered and this court finds that the questions raised were decided adversely to petitioner in the *Keppel* case, *supra*.

The order of the Commission is affirmed

[¶ 55,078] Armand Company, Inc., et al. v. Federal Trade Commission.

United States Circuit Court of Appeals for the Second Circuit. Decided July 1, 1935.

Petition to review an order of the Federal Trade Commission directed against The Armand Company, which files the petition. Order affirmed.

An order of the Federal Trade Commission, directing respondent cosmetic manufacturer and its dealers to cease entering into agreements establishing and maintaining resale prices to be charged by dealers and retailers, is affirmed.

Affirming Federal Trade Commission Complaint No. 1329.

Before: MANTON, SWAN and CHASE, Circuit Judges.

W. T. Kelley, Esq., Chief Counsel, Federal Trade Commission; Martin A. Morrison, Esq., Asst. Chief Counsel; James W. Nichol, Esq.; Attorneys for Respondent.

Charles Wesley Dunn, Esq., Counsel for Petitioners.

MANTON, Circuit Judge.—This petition seeks a review of an order of the Federal Trade Commission directing petitioners to cease and desist from (1) entering into or procuring, either directly or indirectly, from wholesale or retail dealers, contracts, agreements, understandings, promises or assurances that respondent's product, or any of them, are to be resold by such wholesale or retail dealers at prices specified or fixed by petitioner; (2) entering into or procuring either directly or indirectly from wholesale dealers contracts, understandings, promises or assurances that petitioner's products are not to be resold by such wholesalers to price-cutting retail dealers.

The complaint was filed against the petitioner, an Iowa corporation, and others, June 27, 1925, charging the maintenance of resale prices for its products fixed at arbitrary levels through the medium of expressed or implied agreements. Sec. 5, Trade Commission Act, 38 Stat. 719. After extensive hearings and consideration, the order appealed from was entered, January 27, 1933, reciting a finding that the petitioner was engaged in interstate commerce and that its practices were to the prejudice and injury of wholesale and retail dealers and the public and are unfair methods of competition in commerce.

If the evidence supports the finding of the Commission as to the facts, they must be accepted by us. *Fed. Trade Comm. v. Algoma Lumber Co.*, 291 U. S. 67, 73. *Federal Trade Commission v. Balme*, 23 Fed. 2, 615 (C. C. A. 2); *Harriet Hubbard Ayres, Inc. v. Fed. Trade Comm.*, 15 Fed. 2, 274. We are not merely to weigh the evidence to see if we would reach the same conclusion as did the Commission. *Fed. Trade Comm. v. Pacific States Paper Trade Asso.*, 273 U. S. 52; *Eastern States Retail Lumber Dealers' Asso. v. United States*, 234 U. S. 600.

Petitioner's business is manufacturing and selling toilet articles and cosmetics. It sells its products to wholesale and retail dealers throughout the United States and by the use of various means of advertising has built up a large and substantial demand for its products by the public.

In November, 1919, petitioner adopted a plan or policy of suggesting to dealers who purchased its products, the resale prices therefor, and at that time made its first public announcement of its policy in writing, and caused such to be published and circulated among the wholesale and retail druggists of the United States. Since that time its policy has been expressed orally as well as in writing through its representatives who communicated the conditions of its policy in regard to resale of its product by word of mouth. Petitioner's policy, reduced to writing and circulated, has been unchanged since 1919, and states that the petitioner, in the interest of fairness and justice to all concerned, suggests fair resale prices for its products and declines to sell to dealers who effect any other unfair trade practices in the merchandising of its products. As an evidence of the petitioner's appreciation of a purchaser's "continued and active interest" in the merchandising of petitioner's products, its policy was found declared to be to include certain free goods as a "generous dividend." Another feature of petitioner's merchandising policy was to have the resale of its products confined to the wholesale and retail drug trade, at least as far as such confinement was possible. At all times the petitioner has made it at least an unwritten part of its merchandising policy, to suggest to wholesale dealers that they do not sell petitioner's products to department stores.

Beginning with the year 1920, petitioner requested all dealers who wished to buy its products—the request being made either directly or through petitioner's salesmen—to make a written and signed "declaration of intention" as to the manner in which it was proposed to resell petitioner's products, and all dealers received a model form of declaration of intention, which was required to be signed by the dealers and returned to the petitioner. This form stated that it was the purpose of the dealer who signed it to observe the fair resale prices suggested by the petitioner for its products, and that the declaration of intention was made freely and voluntarily and was not to be understood as either an express or implied obligation or agreement on the part of the dealer. It was further declared that the intention to observe petitioner's suggested resale prices was in recognition of petitioner's right to refuse to sell to dealers who did not charge petitioner's suggested retail prices. The declaration of intention was further stated to be that the dealer would sell petitioner's products only within the dealer's own store and that the dealer would not sell the products to any other dealer. By a circular letter in 1920, petitioner's salesmen were instructed that they might lawfully inquire, prior to sale, whether a dealer intended to resell at the prices suggested by the petitioner and that they might suggest to a dealer that he write a declaration of intention to that effect according

to the form sent. The salesmen were likewise directed not to make "any agreement with the dealers as to the resale prices."

Since the first publication in 1919 of its merchandising policy, the petitioner has from time to time republished it to the wholesale and retail dealers, informing them that the petitioner declined to sell its products to dealers who did not charge petitioner's suggested retail prices. It has also been the practice of the petitioner to inform dealers that upon receipt of a satisfactory declaration of their intention as to the prices at which they would sell petitioner's products, petitioner would give "prompt and interested attention to their orders."

In 1922, the petitioner discontinued its practice of obtaining signed declarations of intention from its dealers, and in April 1923, dealers were informed that declarations of intention signed by them would be considered null and void. But mere discontinuance of unfair competitive methods, however, is no defense. *Fed. Trade Commission v. Wallace,* 75 Fed. 2, 733, 738; *Butterick Co. v. Federal Trade Commission,* 4 Fed. 2, 910; *Fox Film Corp. v. Fed. Trade Comm.,* 296 Fed. 356; *Guarantee Veterinary Co. v. Fed. Trade Comm.,* 285 Fed. 853. And the discontinuance of this practice did not bring about a discontinuance of its policy as to resale prices. The record is replete with evidence that although declarations of intention were no longer obtained or required, agreements or understandings were entered into between the petitioner and certain dealers whereby dealers, in consideration of the sale by petitioner of its products to said dealers, agreed to refuse to resell petitioner's products to retail stores which did not, upon resale, charge the retail prices suggested by the petitioner. Secret instructions were given to salesmen to follow this plan as late as September, 1923. And as late as September, 1927, petitioner's president reiterated the same method. In 1923, the petitioner entered into an agreement with a drug company of Seattle, Wash., whereby the drug company agreed not to sell petitioner's product to retail dealers who resold the products at a price less than that suggested by the petitioner. In pursuance of this agreement, and in cooperation with the petitioner, the drug company has kept a list of those retail dealers in its sales territory who are known to be price cutters, and it has consistently refused since entering into that agreement, to sell petitioner's products to such dealers because they were price cutters. In 1924, a similar agreement was entered into with a firm in Louisville, Ky. whereby the latter agreed to resell the petitioner's products at the prices suggested by the petitioner in consideration of the fact that petitioner would thereafter sell its goods to the drug company. Other agreements were made by the petitioner with other firms throughout the country for the years after 1922, the details of which it is unnecessary to state here.

Agreements with these firms, and others, indicated clearly a desire to have a tacit or oral agreement for the fixing of prices on resale or price maintenance. At petitioner's suggestion it caused those wholesale dealers, to whom it sold its products, to police their territory through their salesmen so as to discover what retail dealers were selling petitioner's products below the prices fixed by the petitioner, and thereby prevent any such retailers from obtaining goods from the petitioner. "Salesmen" were taught and trained in the petitioner's merchandising policy, and their specific duty was to instruct dealers, both wholesale and retail, in that policy. Through salesmen and by circularized literature, the entire drug trade has been plainly informed by the petitioner that any dealer who failed to sell at petitioner's suggested retail prices would be unable to obtain petitioner's products in the future. Wholesale dealers were informed that they would be unable to purchase petitioner's products if they resold them to any retail dealer who failed to resell at petitioner's suggested prices. In many instances such price cutters were refused sales and were dropped from petitioner's list of customers, but later reinstated upon satisfying the petitioner of their willingness to comply with petitioner's policy, and that thereafter they would maintain prices.

It was found as a fact by the Commission that the chief objective of petitioner's merchandising policy was the maintenance of the wholesale and retail prices suggested by the petitioner for its products, and that the direct effect of petitioner's practices had been and now is to suppress competition among wholesalers and between retail dealers engaged in the distribution and sale of petitioner's products. The further effect was the constraint imposed upon wholesale and retail dealers in selling petitioner's products at prices fixed by the petitioner, and the preventing of sale by such dealers of petitioner's products at prices which such dealers desired, thereby depriving the ultimate purchaser of petitioner's products of that advantage of price which otherwise would be theirs in a natural and unobstructed flow of commerce under free competition.

The Commission concluded that the petitioner's practices were to the prejudice and injury of the public and constituted unfair methods of competition in commerce and a violation of Section 5 of the Trade Commission Act. The findings of the Commission are amply supported by the evidence. The evidence supports the finding that by agreements between petitioner and its dealers it maintained prices and prevented those who would not do so from securing petitioner's products.

Where a manufacturer tries to maintain the resale prices of his goods, by restrictions marked on the goods or otherwise communicated to the retailer, a violation of these restrictions does not create a cause of action in favor of the manufacturer either at common law or under the copyright or patent laws, and where resale prices are sought to be maintained by a system or policy of contracts, combinations, or co-operative efforts, such system or policy is illegal and in violation of the anti-trust laws. *Fed. Trade Comm. v. Beech-Nut Packing Co.*, 257 U. S. 441; *Fed. Trade Comm. v. Gratz*, 253 U. S. 421, 427; *United States v. Colgate & Co.*, 250 U. S. 300; *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373. Public interest may exist although the practice deemed unfair does not violate any private right. *Fed. Trade Comm. v. Klesner*, 280 U. S. 19; *Fed. Trade Comm. v. Beech-Nut Packing Co., supra; Fed. Trade Comm. v. Winsted Hosiery Co.*, 258 U. S. 483.

This petitioner dealt with 39,000 retail druggists out of a total of 56,000, and 247 wholesale druggists out of a total of 550. The wholesalers and retailers were in competition with each other in the sale of petitioner's products. This is a kind of competition between wholesalers and retailers of a product of a single manufacturer which was intended by the decisions of the courts to be free and open. The policy in question had a tendency to stifle competition and was unlawful.

Order affirmed.

[¶ 55,079] Federal Trade Commission v. Civil Service Training Bureau, Inc.

United States Circuit Court of Appeals, Sixth Circuit. Decided June 29, 1935.

Application for Enforcement of an Order of the Federal Trade Commission.

The sale and distribution in interstate transactions of courses of study is commerce among the states within the Federal Trade Commission Act.

Neither the Federal Trade Commission Act nor decisions thereunder require that unfair methods of competition must constitute practically a monopoly in the trade in order to fall within the prohibitions of the Act.

The order of the Federal Trade Commission prohibiting the use of the term "civil service" and the word "bureau" in the name of a correspondence school, and prohibiting untruthful representations as to the existence of Government jobs is affirmed.

The Commission is not authorized to issue a cease and desist order as to practices long discontinued, as to which there is no reason to apprehend renewal.

Modifying and affirming Federal Trade Commission Complaint No. 2117.

Before MOORMAN, SIMONS and ALLEN, Circuit Judges.

ALLEN, Circuit Judge. This is an application for the enforcement of a cease and desist order of the Federal Trade Commission issued under Section 5 of the Federal Trade Commission Act. Title 15, U. S ., Section 45. The respondent, a correspondence school, engaged in the sale and distribution of courses of study to prepare students for civil service examinations, makes three contentions in its answer:

(1) That the Commission was without jurisdiction for the reason that it was constituted for the purpose of dealing with cases involving the sale of commodities in interstate commerce, and that while the respondent conducted an interstate business, it was not dealing in commodities but was selling a service.

(2) That Section 5 of the Federal Trade Commission Act contemplates that the methods of unfair competition declared

unlawful must be such as to result in a practical monopoly in the trade, and that no such unfair competition has been shown to exist.

(3) That the evidence adduced before the Commission is insufficient to support the order.

The first contention is untenable. The Act applies to unfair methods of competition "in commerce," commerce being defined as including "commerce among the several States." Title 15, U. S. C., Section 44. In *International Textbook Co. v. Pigg*, 217 U. S. 91, 107, the court held that intercourse or communication between persons in different states by means of correspondence through the mails is commerce among the states within the meaning of the Constitution, especially where such intercourse and communication relate to regular continuous business and to the making of contracts and the transportation of books, papers, etc., pertaining to such business. That decision squarely involved the selling of service by a correspondence school in interstate transactions, and is controlling here.

The second contention is also without merit.

The jurisdiction of the Commission to issue a cease and desist order depends upon the existence of three prerequisites: (1) That the methods complained of are unfair; (2) that they are methods of competition in interstate commerce, and (3) that the proceeding by the Commission to prevent the use of the methods appears to be in the interest of the public. *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643; *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212, 216.

Neither the statute nor the decisions require that unfair methods of competition must constitute practically a monopoly in the trade in order to fall within the prohibitions of the Act.

With reference to the third contention, having in view the rule that the findings of the Commission are conclusive if supported by evidence (Federal Trade Commission Act, Section 5, Title 15, U. S. C., Section 45; *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483, 491; *Federal Trade Commission v. Algoma Lumber Company*, 291 U. S. 67, 73), we think the evidence sufficient to sustain the findings upon which are based paragraphs 1, 2, 3 and 5 of the Commission's order.[1]

As to paragraphs 1 and 3, the respondent admits that it still uses the words "Civil Service" and "Bureau" in its name. The Commission found in substance that the name of the respondent has a tendency to create, and has actually created, the belief that it represents or has an official connection with the United States Civil Service Commission, or that it is a bureau or agency of the United States Government.

The similarity of the name "Civil Service Training Bureau, Inc.," with that of the United States Civil Service Commission in itself operates to create the false impression that this private institution has a governmental connection. A number of witnesses testified in substance that the name made them think that the school was an adjunct of the Government. These facts justified the Commission in issuing that part of its order embodied in paragraphs 1 and 3.

The requirement of paragraph 2 of the order was based upon the Commission's finding that while the respondent claimed to offer instruction for the civil service, qualifying its students to take examinations fitting them for certain positions, no examinations for those positions were held Testimony was given to the effect that few, if any, civil service examinations were held in the lines in which respondent gave instruction, and hence applicants were misled. Numerous witnesses stated that no examination or examinations for which they had qualified had ever been held. This paragraph of the order was based on findings sustained by ample evidence.

[1] "It is ordered that respondent . . . cease and desist from the following practices, to wit:

"1. The use of the term 'civil service' and the word 'Bureau,' or either of them, in the name under which said business is conducted as aforesaid, or of any other word or expression therein which implies or suggests any connection with the Civil Service Commission or the United States Government, or the use of any such representation made in any other manner.

"2. Designating any course offered by any term other than by such a term as may correspond to some classification used by the United States Civil Service Commission at the time such course is offered and for which examinations are held by said Commission.

"3. Representing that respondent can assist its students in getting Government positions other than by assisting them in preparing for examinations.

"4. Representing the number of civil-service employees, the number of appointments made or to be made, the time, number or certainty of civil-service examinations, or the period of duration of civil-service jobs other than as such representations may represent the actual facts as they exist at the time such representations are made.

"5. The use of any advertisement which by its wording or by the heading under which it is placed, or otherwise, represents or implies that Government jobs are offered or are to be had or that persons are wanted to fill such jobs, or that the advertisement is that of the United States Government or of a representative or agent thereof.

"6. The use of any contract form which represents or implies that a Government job is guaranteed."

As to the requirement in paragraph 5, misleading and "blind" advertisements had been used, implying that there were Government jobs available, and that the respondent was an agent or representative of the Government. While this practice was modified, the answer shows that "blind" advertisements were still being used after the filing of the complaint. However, this part of the order should be modified so as to prohibit only untruthful representations as to the existence of Government jobs or that persons are wanted to fill such jobs. There may be times in the future when such representations can truthfully be made. With this modification, the facts adduced justify the issuance of paragraph 5 of the order.

With reference to paragraphs 4 and 6, the practices described in these paragraphs which were admitted to have been carried on formerly by the respondent were demonstrated by uncontroverted evidence to have been discontinued in 1932. The misrepresentations as to the number of civil service employees, the nature of the positions available, etc., were made by respondent's salesmen, aided in their interviews by an inaccurate booklet. Respondent suppressed the booklet and warned the salesmen not to use the information. A misleading guaranty of refund which had been employed in respondent's contract form was actually interpreted as constituting the guaranty of a Government job. This was altered, and these practices were discontinued by respondent prior to September 16, 1933, when the proceeding before the Commission was instituted. The Commission is not authorized to issue a cease and desist order as to practices long discontinued, and as to which there is no reason to apprehend renewal. *L. B. Silver Co. v. Federal Trade Commission*, 292 Fed. 752; cf. *United States v. U. S. Steel Corp.*, 251 U. S. 417, 445.

The order of the Commission is modified by the elimination of paragraphs 4 and 6, and paragraph 5 is modified so as to prohibit untruthful representations that Government jobs are offered or are to be had, or that persons are wanted to fill such jobs, and is otherwise affirmed. Paragraphs 1, 2 and 3 of the order are affirmed. The respondent, its officers, directors, agents, representatives, servants and employees are ordered to comply with the order of the Commission as modified and affirmed.

[¶ 55,080] The W. T. Rawleigh Company v. R. B. Jones, George R. Bentz, Oscar F. Long, et al.

In the Supreme Court of the State of New Mexico. Decided July 1, 1935.

Appeal from the District Court of Eddy County. McGhee, Judge.

The gist of Section 1 of the Sherman Act is making a contract or entering into a combination in restraint of trade, and where a manufacturer refuses to sell to dealers who do not maintain retail prices and keep to certain sales territories, and the dealers do maintain such prices and exclusive territories in fear of having their supply of goods cut off, there is no violation of the Sherman Act.

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Opinion

WATSON, J. The W. T. Rawleigh Company, an Illinois corporation, manufactures medicines, cosmetics, etc. and sells them throughout the United States. Its general sales plan is to recruit persons as retail distributors of its products, with whom it enters into written contracts, in which such distributors, itinerant or otherwise, are called "the buyer."

The corporation separately sued four of these buyers for goods sold and delivered f. o. b. Denver, pursuant to such contracts, attaching to each complaint a copy thereof. The suits were consolidated and tried to the court. Judgment went for the defendants on the defense, common to all the answers, that the contract sued upon violated the anti-trust acts of the United States and of this State. Plaintiff appeals.

In the *Jones* case—and the others will not require separate mention—the appellee relies upon these findings:

"VIII. The Court finds that the written contract herein sued upon was, by the circulars, letters and instructions aforesaid sent to defendant by plaintiff, who accepted said instructions and complied with them, so modified that (a) defendant was required to confine his activities in selling plaintiff's products to Roosevelt County, New Mexico, and (b) was required to sell said products at retail prices fixed by the plaintiff, and (c) was required to devote all of his time to the exclusive sale of plaintiff's products.

"IX. The court further finds that the contract herein sued upon and the construction placed upon it by the parties and the manner of operation under said contract by the parties, had the effect of

(a) limiting the trade territory of the defendant Jones to Roosevelt County, New Mexico, and prohibiting any competition in the sale of its products in said County, and (b) of plaintiff fixing the price at which defendant Jones sold its products to the buying public, and (c) requiring the defendant Jones to devote all of his time to the exclusive sale of plaintiff's products.

"X. The Court further finds that the contract herein sued upon is a part of a general scheme and plan upon the part of the plaintiff to (a) restrict the territory of its various agents by counties and districts throughout the United States and the State of New Mexico and prevent the sale of plaintiff's products in competition upon the open market of the State of New Mexico and the United States, and (b) to fix and maintain the retail price at which its said goods are sold to the buying public in the United States and the State of New Mexico, and (c) prevent its dealers from engaging in any occupation or pursuit save and except that of dealing in its products and required them to devote their exclusive time thereto."

"XI. The Court further finds that the practical operation under the contract herein sued upon has the effect in New Mexico of being a contract and combination having for its object and which does operate to restrict trade and commerce and to control the quantity, price and exchange of the articles manufactured by plaintiff and sold in the State of New Mexico, and has the effect of monopolizing the trade and commerce of New Mexico in plaintiff's products.

"XII. The Court further finds that said contract is a part of a general scheme and plan upon the part of plaintiff and others to restrain the trade and commerce of plaintiff's products in inter-state commerce and to monopolize the trade and commerce of the United States, and among the several states, in plaintiff's products."

It is probably to be assumed that "the contract herein sued upon," as the court employed the phrase in findings IX, X, and XI, and "said contract" in finding XII, means the written contract as the court by finding VIII found it to have been modified. At any rate it is here conceded that the original contract was without vice. It is the contract as modified that is attacked.

Appellant specifies four points relied upon for reversal, but their independence is not strictly observed in argument. Their import is that there is no substantial evidence of a modification of the original contract, and that, if the modification theory fail, there is no case of unlawful contract or combination in restraint of trade.

The evidence of modification of the original contract is merely to the effect that, after the buyers had entered into the contract with the corporation and had been launched upon their careers as distributors, the corporation, by literature furnished, and by letters, circular and personal, brought home to all buyers the corporation's insistence upon standard prices and exclusive territory, and that the buyers, and particularly the defendants, acquiesced in the corporation's plan of controlling these matters, through fear of having their supply of goods cut off.

The theory of modification was obviously put forward by counsel to bring the defense within the principle of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. ed. 992, and to take it out of the principle of *U. S. v. Colgate & Co.*, 250 U. S. 300, 39 Sup. Ct. 465, 63 L. ed. 992. Ingenious as it is, we are not persuaded of its soundness. We are unable to fit it anywhere into the law of contracts.

As written out and signed by the parties, the contract provides that the buyer "expressly reserves the exclusive right to determine the price, terms and conditions upon which, and the place where, he will sell the merchandise he buys from the seller." It expressly provides that the seller shall have no rights in or power over the merchandise sold or over the buyer's business. The seller then promises to furnish certain "books, bulletins, service, sales or collection letters, and other letters and literature." This, "with the express understanding that it shall impose no legal restrictions whatsoever and that it shall not alter or modify the written conditions of this contract, nor be considered as orders, directions or restrictions or binding in any way upon the buyer," but to be considered only as "advice and suggestions" which the seller "may follow or not as he may choose." Finally it is provided that the contract "shall not be changed or modified in any way, or by any person, except such change or modification shall be first reduced to writing, signed and agreed to by both parties."

The bona fides of this contract might be doubted. Perhaps it "doth protest too much." The power to terminate it at will practically overrides all rights given to or reserved by the buyer, except the buyer's right, on termination of the relation, to return all goods unsold, at the wholesale prices. But, as stated, it is not urged that the contract is a mere sham to cloak a real understanding and agreement to the exact contrary. It is contended that the parties subsequently modified the contract.

That simply means that failure to object to, or acquiescence in, the "advice and suggestions" contemplated by the contract and expressly stipulated to "impose no legal restrictions whatsoever" and not to "alter or modify the written conditions" of the contract, has in some manner deleted the provision that the buyer "expressly reserves the exclusive right to determine the price, terms and conditions upon which, and the place where, he will sell the merchandise he buys from the seller."

It means that when acquiescence in the advice and suggestions had gone far enough to amount to modification, the buyer would have breached the contract if he had made a sale below the set price or in alien territory; so breached it possibly as to release the corporation from the only promise it has really made, to take the buyer's unsold stock off his hands at wholesale prices.

The right of the corporation to advise and suggest without altering contract rights would seem to imply the right of the buyer to acquiesce in the advice and follow the suggestions without changing the contract.

If the buyers desired to avoid such a modification as this, how should they have proceeded? Should they have made a few sales at cut rates, or have made a few incursions into other territory, to enable them to prove non-acquiescence? Or should they have put up signs, "While I do not exercise, or now care to exercise, the right to cut prices, I claim that right"?

The distinction between the two cases mentioned (the *Miles* case and the *Colgate* case) is of great importance to this decision. The Supreme Court has pointed it out patiently more than once to counsel and jurists who had not grasped it.

The gist of the statute, the violation of which is relied upon as releasing appellant's debtors, is *making a contract,* or *entering into a combination* in restraint of trade.

The Dr. Miles Medical Company had an elaborate network of contracts designed and employed to bring manufacturer, wholesaler and retailer into a combination to withhold merchandise from cut-rate dealers. Each dealer had an active part which he contracted to play in the combination.

Colgate & Company, as the indictment was interpreted, merely had an openly announced and everywhere understood business policy. It would not sell to dealers who cut prices. It had the same end in view. It perhaps accomplished it as well. It employed the same ultimate power, the refusal to sell its goods. But it acted independently. It put no dealer under contract obligation to advance its purpose.

When first distinguishing the two cases, the court said:

"* * * we must conclude that, as interpreted below, the indictment does not charge Colgate & Company with selling its products to dealers *under agreements which obligated the latter* not to resell except at prices fixed by the company."

On the contrary, "In *Dr. Miles Medical Company v. Park & Sons Co., supra,* the unlawful combination was effected through *contracts* which undertook to prevent dealers from freely exercising the right to sell." *U. S. v. Colgate & Co., supra.*

Later the distinction was thus brought out: In the *Miles* case "the effort was to destroy the dealers' independent discretion through *restrictive agreements.*" The *Colgate* decision was "only recognition of the manufacturer's undoubted right to specify its resale prices and refuse to deal with anyone who failed to maintain the same." And,

"In the first, the manufacturer but exercises his independent discretion concerning his customers and there is no contract or combination which imposes any limitation on the purchaser. In the second, the parties are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition and restrain the free and natural flow of trade amongst the States." *U. S. v. Schrader's Son, Inc.,* 252 U. S. 85.

So we see how vital it is for appellees to maintain their theory of modification. It is not enough to show that appellant has schemed and labored to effect restraint of trade. It must be shown that it has contracted or combined with others to that end. If the combination was not effected by the contract as signed, when did it come into existence? When did any of the appellees lose his reserved right to sell his own goods at such prices and places as he pleased? Appellees had the right to acquiesce or not to acquiesce in appellant's advice and suggestions. Neither course could change the contract or the relation. Appellant had the right to refuse to replenish the stocks of the appellees. A threat to do so might coerce; it could not modify the contract; it could not amount to entering into a combination.

We do not overlook the principle of later decisions that the combination may be entered into tacitly as well as formally and expressly. Nor do we decide, for we are not impressed, that the framing and execution of so strange and strained an agreement as this will be proof conclusive against an actual combination. We do hold that, so long as we take this to have been the real contract, we cannot predi-

cate a combination upon some anomalous theory of subsequent modification.

Finding IX might mean that the written contract was not the real agreement; that it was deemed wise to have it available as a defense for all parties against a charge of statute violation; and that the actual understanding and undertaking was the exact contrary.

Of this there is no evidence, as we understand the record. The burden of proof was on appellees, as their defense was affirmative.

No one claims that there was any side or nullifying understanding. All that is claimed is a yielding of the original contract rights to the fear that appellant would exercise its right to terminate the contract, that is refuse to sell. That in itself affirms that there was no combination. Appellees maintained prices and territorial restrictions; not because of obligation voluntarily assumed, but from fear of consequences if they should not. Appellant acted independently in pursuing and enforcing its policy. Appellees acquiesced, as Colgate's customers probably did, not because combined, but because their own interests seemed to lie in acquiescing.

For purposes of this case, we shall assume that, if a contract or combination in restraint of trade had here been shown, the legal result would have been to relieve appellees from the duty to pay for the goods sold and delivered to them, despite the fact that the case as made by appellant exhibits no illegality, and that appellees have been put to it to plead their own wrong. Immunity of debtors is not the law's object however. If and when it follows, it is as a somewhat regrettable result of the law's policy of protecting freedom of trade. Here the defense has a technical standing. Where the public interest is but indirectly, incidentally and almost imperceptibly involved, we do not seek a strained or unsound construction to interfere with the course of justice as between parties who, if in the wrong at all, are in *pari delicto*.

Unable to sustain the affirmative defense which prevailed below, it seems necessary to reverse the judgment. The cause will be remanded with a direction to vacate the judgment and findings, and to make new findings touching the indebtedness of each appellee to the appellant, and to render the appropriate judgment thereon.

It is so ordered.

We concur: Daniel K. Sadler, Chief Justice; Andrew H. Hudspeth, Howard L Bickley, Justices. Zinn, Justice, did not participate.

[¶ 55,081] Allen Moore, et al. v. Elisabeth H. Backus and Seymour W. Backus, Administrators of the Estate of E. W. Backus, Deceased.

United States Circuit Court of Appeals for the Seventh Circuit. Decided July 13, 1935.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

The right of action under Section 7 of the Sherman Act for injury caused through violation of the Act survives the death of the injured person.

Persons have no privilege to refuse to answer interrogatories which will show them guilty of violation of Section 2 of the Sherman Act when at the time of the interrogatories the statute of limitations bars any prosecution for such violation.

Before EVANS, SPARKS, and FITZHENRY, Circuit Judges.

SPARKS, Circuit Judge: On July 28, 1933, E. W. Backus filed in the District Court his action at law against Herbert J. Blum, Gustavus F. Swift, Jr., and Allen Moore. The declaration consisted of seven counts. In the first five counts he sought to recover triple damages for alleged violation of the federal anti-trust laws, 15 U. S. C. A. section 15; in the sixth count he sought recovery of damages for an alleged conspiracy in violation of the Illinois anti-trust laws, Cahill's Illinois Revised Statutes, 1933, Ch. 38, par. 598; and in the seventh count he sought damages for an alleged conspiracy between defendants in violation of the common law of Illinois. Each count charged that prior to July 19, 1928, he had contracted to sell designated

amounts of corn at certain prices in expectation that its market price would decline before the end of July, 1928, and in the belief that he would be able to purchase such corn for July delivery at prices lower than those for which he had sold it. Each count further alleged that Blum, Swift, and Moore purchased July corn and by conspiracy effected a "corner" on substantially all of the July corn available on the Chicago market, and as a result thereof, the price of July corn was raised to such an extent that Backus was compelled to default on his sales contracts and was required to settle for his defaults at a price much in excess of the true commercial value of July corn. In the first five counts he demanded triple damages in the sum of $1,000,000, and under the sixth and seventh counts he demanded damages in the sum of $300,000.

Ancillary to and in aid of his action at law, Backus, on September 29, 1933, filed his bill of discovery against Blum, Swift and Moore, referred to as the "principal defendants," and the various brokers through whom they purchased and sold July 1928 corn, hereinafter referred to as the "defendant brokers." The court overruled appellants' motions to dismiss the bill for discovery, and thereupon answers were filed. Thereafter, Backus filed a supplemental bill of discovery asking for further and detailed evidence, which the court ordered appellants to answer, including certain portions of the original bill of discovery to which appellants had objected. The errors relied upon arose out of the rulings of the District Court requiring appellants to give the discovery requested by the original and supplemental bills.

On February 5, 1935, Elisabeth H. Backus and Seymour W. Backus, the widow and son of E. W. Backus, reported to this court that E. W. Backus had died on October 29, 1934, and that they were the duly appointed, qualified and acting administrators of his estate, by virtue of an order of the Probate Court of Hennepin County, Minnesota. They thereupon prayed this court that they might be substituted for decedent as appellees herein, and they were thus substituted without prejudice to the rights of appellants to move to vacate the order. Subsequently, appellants moved to vacate that order on the ground that the causes of action, which were in tort, did not survive but that they abated upon the death of E. W. Backus.

Accepting as true the allegations of the declaration in the legal action, it would seem that decedent suffered a property injury within the meaning of the Sherman Act. *Chattanooga Foundry v. Atlanta*, 203 U. S. 390. Whether his alleged causes of action survived to his administrators must be tested by the common law as supplemented by the early English statutes. For many centuries the maxim *actio personalis moritur cum persona* applied to all tort actions. In the fourteenth century, however, the English statute of 4 Edw. III, c. 7, was enacted, which limited and became a part of the common law. That statute is the basis of this controversy and reads as follows:

> "Whereas in times past executors have not had actions for the trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished; it is enacted that the executors in such cases shall have an action against the trespassers to recover damages in like manner as they, whose executors they be, should have had if they were in life."

(Quoted in Pollock on Torts (11th Ed.) page 66.)

It is contended by appellants that this statute altered the common law rule only as to actions relating to specific, tangible, personal property, and that with this exception the former common law rule remained precisely the same regardless of whether the defendant or plaintiff died. In other words, they urge that, except as to actions brought to recover damages for injury to personal property in the tangible sense, all actions *ex delicto* abate upon the death of either party in the absence of an express statute to the contrary. It is conceded that there is no express statute other than 4 Edw. III, c. 7, which modifies the common law rule. It will be noted that this statute did not alter the common law rule in cases where the defendant died. Prior to the adoption of the common law and the statute of Edward by the American legislatures the English courts had many occasions to construe that statute with respect to the point here raised, and their construction was adverse to appellants' present contention.

In *Sale v. The Bishop of Lichfield*, Owen 99, 74 English Reports 928 (1589), decedent owned an advowson, consisting of a right of appointment to an archdeaconry, which the Bishop withheld. The executor recovered judgment restoring the advowson and awarding damages. Here there was no taking of tangible goods, but the court held that the statute of Edward was applicable, and said:

> "For the statute says that they shall have an action of trespass for a trespass done to their testator, and not for taking goods, so that the taking of goods is but by way of resemblance, and not that they shall have an action of trespass for taking of goods only. * * *
>
> "Put the case that the testator had judgment to recover damages, shall not that be assets? And why may not the damages here recovered be assets, and why shall not the grant of the advowson be assets in the hands of the executors as well as in the hands of the issue."

In a note by Sergeant Williams to *Wheatley v. Lane,* 1 Wms. Saund. 216, 85 English Reports 228 (1680) it was said that certain actions survive to the executor which do not survive against him, and that:

"The statute of 4 Edward III being a remedial law, has always been expounded largely; and though it makes use of the word *'trespasses'* only, has been extended to other cases within the meaning and intent of the statute. * * * Therefore by an equitable construction of the statute, an executor or administrator shall now have the same actions for any injury done to the *personal estate* of the testator in his lifetime, whereby it is become less beneficial to the executor, as the testator himself might have had, whatever the form of the action may be."

In *Williams v. Cary,* 4 Mod. 403, 87 English Reports 468 (1695) an executor recovered against a sheriff for a false return upon an execution levied during testator's life. The court in holding that the action survived, said:

"It cannot be properly said in this case, that there is any actual wrong or injury done to the person of the testator; for if so, then *moritur cum persona;* but it is an injury done to his personal estate, in which he is represented by his executor, and therefore he may maintain this action within the equity of the statute 4 Edw. III * * * which gives him an action of trespass for a wrong done to his testator. * * * Therefore, though it be true that a personal action dies at common law with the person, yet, upon the equity of this statute, *a wrong* done to his estate still remains."

In *Berwick v. Andrews,* 1 Salkeld 314, 91 English Reports 277 (1704) decedent recovered judgment against an executor who wasted the estate of his testator thereby rendering collection of the judgment impossible. The judgment plaintiff having died, his executor charged the first executor with a *devastavit* and thus sued him in his individual capacity. The court held that the action survived and said:

"It lies for the executor of him to whom the wrong was done, though it lies not against the executor of him that did the wrong. Here the defendant is the person against whom the recovery was, and he has admitted assets; and the executor may as well maintain this action, as he may an action of debt for an escape where his testator might. So an executor of a parson shall maintain debt for tithes, as the testator might: for in this case the tort was to the property of the testator, and vested an interest in him, and is within the equity of the Statute de Bonis Asportatis; and the same reason holds for an action of debt, as for a *scire facias. Vide* 2 Sid. 102."

See 2 Lord Raymond 971, 92 English Reports 147, where the court said:

"But the Statute of Edward 3 is a remedial law, which has always been taken by equity, wherever there is a matter of property in question it is brought within the statute."

We are unable to discover any different interpretation of the statute of Edward by the English courts up to the time it, with the common law pertaining to this subject, was adopted by the American States. That the same construction has been subsequently followed by the English decisions is substantiated by the following citations: *Wilson v. Knubley,* 7 East 128, 103 English Reports 49; *Twycross v. Grant,* L. R. 4, C. P. D. 40; *Hatchard v. Mege,* 18 Q. B. D. 771; Williams on Executors (12 Ed.) Vol. I, 491; Pollock on Torts (11 Ed.) 62.

It is not denied that Illinois, and practically all of the other states, adopted the common law of England as modified by the statute of Edward, with respect to the subject now under discussion. *Bunker v. Green,* 48 Ill. 243; *Wilcox v. Bierd,* 330 Ill. 571; *Shedd v. Patterson,* 312 Ill. 371. In so doing they adopted the construction which the English courts had placed upon the statute of Edward prior to the time of the adoption. Of course, Illinois, as well as the other states, might thereafter construe the common law and its supplementary English statutes as it pleased, and such construction would become the common law of the particular state thus construing it, and it would be enforced even by the federal courts with respect to matters of a local character. In *Wheaton and Donaldson v. Peters and Grigg,* 8 Pet. 591 (657) the Court said: "It is clear, there can be no common law of the United States. * * * When, therefore, a common-law right is asserted, we must look to the state in which the controversy originated." That pronouncement, however, was considerably modified in the later case of *Swift v. Tyson,* 16 Pet. 1. In that opinion, written by Justice Story, the right and duty of the federal courts to depart from the decisions of the state court on general questions received the sanction of the Supreme Court, and became a recognized rule of decision for federal courts. In Note 6 following section 725, U. S. C. A. Title 28, the annotator states, in discussing the *Tyson* case:

"The question involved in that case related to commercial paper, but Justice Story's opinion reaches far beyond questions of commercial law and embraces practically all general questions of common law. Indeed, the only questions the language of that opinion seems to leave under the binding effect of the state decisions are those in relation to 'rights and titles to things having a permanent locality, such as the rights and titles to real estate and other matters immovable and interterritorial in their nature and character.'

"This doctrine declared in the *Swift v. Tyson* case * * * has steadily advanced beyond the actual question involved in that case, and it may be said that at the present time it is the settled general doctrine of the federal courts that they will themselves determine, without regard to the decisions of the highest courts of the state, as binding authority, all general questions of the common law involving matters of mercantile or commercial law or of general jurisprudence."

A long list of cases from the Supreme Court and other federal courts follow and we think they fully support the annotation.

The federal statute upon which decedent's action at law was based is section

7 of the Sherman Act. 15 U. S. C. A. section 15.[1] The Act is quite general in its nature, and its successful enforcement would seem to require a uniform interpretation in its application, as well as a uniform interpretation of the common law as modified by the statute of 4 Edw. III. There is nothing in the character of the legal action as stated in the first five paragraphs which rendered it local to the State of Illinois, and the construction of the common law and of the statutes involved we think must come under the classification of general jurisprudence, and is to be determined by the federal court.

The federal decisions are not in accord with respect to the question here presented. Appellants rely upon *Caillouet v. American Sugar Refining Company*, 250 Fed. 639, and *Bonvillain v. American Sugar Refining Company*, 250 Fed. 641. Both cases were decided by the same judge in the District Court for the Eastern District of Louisiana. In the first case, certain heirs and an assignee corporation sued the Refining Company to recover damages to decedent's estate, caused by the company's successful conspiracy to monopolize the sugar refining business, which depressed the raw sugar market. The court noted that there was no United States Statute controlling the question of survival, and that it must be determined by the principles of the common law, regardless of the law of Louisiana. It held that the death abated the action, and that it was not saved by the exception to the general common law rule with respect to diminishing decedent's estate by depriving it of particular property. The court said that that exception was based on the theory that the duty of the wrongdoer to return the property created a *quasi* contract. That theory was no doubt correctly stated as applied to cases where the defendant died, and even in cases where the plaintiff died before the enactment of the statute of Edward. We do not understand, however, that that statute presupposes the existence of a *quasi* contract. Certainly the construction placed upon it by the English decisions prior to American Independence does not warrant such conclusion.

The *Bonvillain* case was based on facts quite analogous to those in the *Caillouet* case, and the same ruling was made in each. There the court referred to *United Copper Securities Company v. Amalgamated Copper Company*, 232 Fed. 574, and *Imperial Film Exchange v. General Film Company*, 244 Fed. 985, and noted that their holdings were contrary to his holding in the *Caillouet* case, but he declined to follow them. We are constrained, however, to follow the ruling in the two cases last cited for they seem to us more nearly to comport with the generally accepted interpretation of the statute of Edward in connection with what seems to us to be the reasonable construction of section 7 of the Sherman Act. That Act gives a right of action to anyone who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws. In *Chattanooga Foundry v. Atlanta, supra*, it is said that a man is injured in his property when his property is diminished. The allegations of the declaration in the action at law show that decedent sustained such injury, and we think the right of action survives his death.

While we do not agree with appellants' contention that in the determination of the question before us this court is bound by the construction of the common law and the statute of Edward as enunciated by the courts of Illinois, yet, if that point be conceded to appellants, we think our conclusion must remain the same, because we find nothing in the Illinois decisions which is at variance with that conclusion. Of the cases cited and discussed by appellants, *Jones v. Barmm*, 217 Ill. 381, related to the death of the defendant and not the plaintiff, and therefore is not in point. *Wilcox v. Bierd*, 330 Ill. 571, related to personal injuries. *Bunker v. Green*, 48 Ill. 243, held that under the statute of Edward, actions for injuries to personal property should survive, and executors might recover for such injuries. *Shedd v. Patterson*, 312 Ill. 371, held that an action for malicious prosecution did not survive the death of the plaintiff. *Reed v. Peoria and Oquawka Railroad Company*, 18 Ill. 403, related to damages to real estate. None of these cases, save *Bunker v. Green*, comes within the purview of the statute of Edward, for the statute deals only with wrongs to personal property.

Appellants also argue that the fact that the statute on Administration provides for the survival of certain actions in addition to those which survive at common law proves that those actions specified in the Act did not previously survive. The actions named are: "Actions of replevin, ac-

[1] 15 U. S. C. A. section 15. "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

tions to recover damages for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property * * *." Smith-Hurd Illinois Annotated Statutes, Chap. 3, section 125. It will be observed that such statute was necessary to preserve all the actions named as to cases where a defendant died, since neither by the common law nor by the statute of 4 Edward III could such actions survive the death of a defendant. The statute also preserves in favor of the representatives of a deceased plaintiff, actions for personal injuries which had not previously survived. The case upon which appellants rely for a discussion of the effect of this statute, *Jones v. Barmm*, 217 Ill. 381, had to do with an action for malicious interference with business, during the course of which the *defendant* died. It will, therefore, be observed that the case does not operate to change the holding of *Bunker v. Green, supra*, as to the survivability of personal property actions following the death of a plaintiff. We are convinced that the action did not abate upon the death of decedent.

None of the appellants except Moore, Swift, and Blum were parties to the legal action for damages, and we think that none but the parties to or those interested in that action can properly be made parties defendant to this bill of discovery. That seems to be the general rule and is supported by the great weight of American and English authorities. *Brown v. Swann*, 10 Pet. 497; *Southern Railway Company v. North Carolina Corporation Commission*, 104 Fed. 700, 704; *Detroit Copper Mills v. Ledwidge*, 162 Ill. 305. See 9 R. C. L. "Discovery," sections 7 and 8, page 169. The English rule at the time of the adoption of the common law by the American States provided that a person who had such an interest in an action at law as to make him in effect a party thereto, though he was not a party of record, might be made a party defendant to a bill of discovery in aid of such legal action. It will be noted, however, that the right of discovery as to such person presupposed his interest in the action. Where a bill in equity is instituted in aid of a legal action, a person who has no interest in the subject matter of the suit, and against whom no relief is sought, cannot as a general rule properly be made a party defendant for the purpose of discovery. The reason for these rules is that persons not parties to the action may be examined in the trial of the action at law as witnesses. See 20 Annotated Cases 906-910.

In this action there seems to be no reason why the general rule should not be followed. It is no doubt true that the brokers were agents of appellants, but it does not appear and it is not claimed, that any of them have any interest in the action. It will be presumed that they are not thus interested, for if they were, decedent no doubt would have joined them as defendants. In *Sinclair Refining Company v. Jenkins Company*, 289 U. S. 689, upon which appellees rely, the Court said:

> At times, cases will not be proved, or will be proved clumsily or wastefully, if the litigant is not permitted to gather his evidence in advance. When this necessity is made out with reasonable certainty, 'a bill in equity is maintainable to give him what he needs. Equity Rule 58."

That action for discovery was directed to the defendant alone, and we do not understand that the pronouncement was intended to permit a discovery from mere witnesses who had no interest in the action, or for mere evidentiary facts. For the foregoing reasons we hold that it was error to require any of the appellants except Moore, Swift, and Blum to answer any of the interrogatories submitted.

Appellants allege as error the rulings of the District Court in directing Moore, Swift, and Blum to answer certain interrogatories with respect to the transactions in question, and to submit their books, papers, and documents for inspection and examination. We are first confronted with their objections to such orders on the ground that to comply with them would infringe their rights under the Fifth Amendment to the Federal Constitution relative to the disclosure of evidence of an incriminating character, and would tend to establish their guilt of the crime defined in section 2 of the Sherman Act, 15 U. S. C. A., section 2.

It is clear that any criminal action under that section based upon the facts here alleged would be barred by the statute of limitations if it were instituted at any time since 1931. Appellants, however, contend that, so far as this record discloses, there may be a criminal action or actions yet pending which were instituted prior to the expiration of the period of limitations, and that until the non-existence of such action or actions has been established, they should not be required to answer. They urge that the burden of proof thereof rests upon those seeking the discovery. We think appellants' contention is sound. The rule is that if the offense is outlawed or pardoned, or the criminal liability therefor has been removed by statutory enactment, then the interrogated party cannot claim the constitutional protection. When the privilege is demanded, the question first arises whether the action is outlawed.

If it is not outlawed, the interrogating party may still demand the answers if it is shown either that a pardon has issued or that a statutory enactment has relieved the witness from criminal prosecution, and the burden of establishing those facts, we think, clearly rests upon the interrogator. If the criminal action is outlawed, the questions must be answered, but here again, we think the burden of establishing the fact of its being outlawed rests upon the interrogator. Wigmore on Evidence, section 2279, says as to this problem:

"A crime erased by lapse of time exists no longer. There is therefore no criminal fact to be privileged from disclosure. * * * The only question can be whether the claimant or the opponent of the privilege has the burden of proof with respect to the usual condition upon which the running of the statutory period depends, namely that no prosecution has been begun within the time; and this burden is held to be upon the opponent."

(Citing *Southern R. N. Co. v. Russell,* 91 Ga. 808; *Lamson v. Boyden,* 160 Ill. 613; *Bank v. Henry,* 2 Denio (N. Y.) 155.) See also *O'Neil v. O'Neil,* 229 Fed. 914; *Nekoosa-Edwards Company v. News Publishing Company,* 174 Wis. 107; Jones, Commentaries on Evidence (Second Edition) Vol. 6, section 2485. The record in the case at bar is silent as to whether or not any prosecution was pending when the questions were asked, and since we think the burden rested upon decedent to prove the absence of it, it follows that the bill of discovery could not be enforced against appellants Moore, Swift, and Blum.

In support of appellees' contention that the running of the statute disentitles the party interrogated to claim the privilege, they cite *Brown v. Walker,* 161 U. S. 591; *Hale v. Henkel,* 201 U. S. 43; and *Robertson v. Baldwin,* 165 U. S. 275. In none of those cases was the question of burden of proof before the Court, or passed upon. Each, however, recognized the rule that before answers could be required, the offense must have been outlawed or pardoned, or the criminal liability removed by statutory enactment. In the first two cases cited, there was an express statutory enactment which relieved the witness from prosecution, and in the third, those two were referred to in passing on the question of the constitutionality of a statute relating to deserting seamen. We have found no case, and our attention has been called to none, where the question of burden of proof was squarely presented to the court and the ruling was adverse to the claimant of the privilege.

Under the rulings we have referred to, we think the court erred in requiring Moore, Swift, and Blum, and all other defendants who raised the objections upon which we have passed, to answer the interrogatories, and it is therefore unnecessary to pass on the other alleged errors.

The orders are reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

[¶ 55,082] United States of America v. Radio Corporation of America, RCA Communications, Inc., et al.

United States District Court for the District of Delaware. Filed July 2, 1935.

Amendment to consent decree.

A radio corporation is enjoined by a consent decree from entering into foreign communication agreements preventing others from establishing radio circuits to or from the United States.

Amending consent decree reported herein at ¶ 55,015.

Part VI of the consent decree entered herein on November 21, 1932, having provided that the issues presented by the amended and supplemental petition, and the amendment to the amended and supplemental petition with reference to contracts, arrangements and understandings between the defendants or any of them and foreign companies and governments should be specially reserved for trial and determination if that should become necessary, for a period of two and one-half years from the date thereof;

And such of the issues aforesaid as pertained to license and sales agreements having been terminated before the expiration of such period of two and one-half years by the entry of a decree on May 25, 1934; and the period of two and one-half years referred to in Part VI of the aforesaid decree having elapsed, and petitioner by leave of court having filed its second amendment to its amended and supplemental petition, and defendants, Radio Corporation of America and RCA Communications, Inc., having filed their answers

to the amendment and to the second amendment to the amended and supplemental petition, and the cause having heretofore been set down for hearing and trial upon the remaining issues, that is to say, those pertaining to foreign traffic and communications agreements, arrangements and understandings between defendants, Radio Corporation of America or RCA Communications, Inc., and foreign governments and companies and others; and no testimony or evidence having been taken herein;

And said defendants, Radio Corporation of America and RCA Communications, Inc., and petitioner having consented to the entry of this Amendment to said consent decree entered on November 21, 1932, as noted at the foot hereof;

Now, therefore, said consent decree entered on November 21, 1932, is hereby amended by adding thereto the following paragraphs:

A

Said defendants, Radio Corporation of America and RCA Communications, Inc., and their subsidiaries are hereby perpetually enjoined from claiming or asserting that any of their foreign traffic or communication agreements, arrangements or understandings with governments, companies or others prevents or prohibits the other contracting party thereto (a) from establishing, or permitting to be established, with any other person or persons, such radio circuit or circuits to or from the United States, its territories or possessions (either direct or indirect) as such other contracting party may desire, in addition to or other than those provided for by the aforesaid agreements, arrangements, or understandings, or (b) from transmitting, or permitting to be transmitted, by or over such other or additional circuit or circuits messages which may be specially so routed by the sender.

B

Said defendants, Radio Corporation of America and RCA Communications, Inc., and their subsidiaries are hereby perpetually enjoined from hereafter making or entering into any foreign traffic or communications agreement, arrangement or understanding with any government, company or person which shall, or which shall be claimed or construed by said defendants or any of their subsidiaries to prevent or prohibit the other contracting party thereto (a) from establishing, or from permitting others to establish, with any other person or persons, such radio circuit or circuits to or from the United States, its territories or possessions (either direct or indirect) as the other contracting party may desire, in addition to or other than any circuit or circuits provided for by such agreement, arrangement or understanding, or (b) from transmitting, or permitting to be transmitted, by or over such other or additional circuit or circuits messages which may be specially so routed by the sender.

C

The said defendants, Radio Corporation of America and RCA Communications, Inc., being the only defendants involved in said reserved issues as to foreign traffic and communication contracts, arrangements or understandings, this cause is dismissed as to the other defendants, as to said issues.

John P. Nields, D. Judge.

[¶ 55,083] Federal Trade Commission v. Hires Turner Glass Company.

United States Circuit Court of Appeals, for the Third Circuit. Decided July 11, 1935.

Upon Application for Enforcement of an Order of the Federal Trade Commission.

A Federal Trade Commission order, prohibiting the advertising of mirrors coated with a mixture of shellac and powdered copper as "copper-backed" mirrors, is affirmed.

Affirming Federal Trade Commission Complaint No. 1985.

Before Woolley, Davis and Thompson, Circuit Judges.

Thompson, Circuit Judge. The Federal Trade Commission, the petitioner, charged Hires Turner Glass Company, the respondent, with unfair competition in interstate commerce in violation of section 5 of the Federal Trade Commission Act (15 U. S. C. A. 45) and issued the following cease and desist order:

"* * *

It is ordered that respondent, Hires Turner Glass Company, a corporation, its officers, directors, agents, representatives, servants, and employees in connection with the sale, offering for sale, or distribution in interstate commerce, of mirrors having thereon a protective coating consisting of a mixture of shellac and powdered copper, cease and desist from designating the same as 'copper-back' mirrors, 'copper-backed' mirrors, mirrors 'backed with copper', or by other word, words, or expression of the same meaning or like import.

* * *."

The respondent refused to comply with

this order. The petitioner thereupon filed an application for an enforcement order in this court. The respondent contends that there is no evidence that the terms "copper-back," "copper-backed," or "backed with copper" are not properly descriptive of its mirrors; or that trade is diverted to the respondent because of its use of the prohibited terms; or that such use tends to deceive the trade and purchasing public.

In approaching these issues, we bear in mind the admonition in *Federal Trade Commission v. Algoma Co.*, 291 U. S. 67, 73, where the Supreme Court said:

"'The findings of the Commission as to facts, if supported by testimony, shall be conclusive.' 15 U. S. C. sec. 45. The Court of Appeals, though professing adherence to this mandate, honored it, we think, with lip service only. In form the court determined that the finding of unfair competition had no support whatever. In fact what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision (*Federal Trade Comm'n v. Pacific States Paper Trade Assn.*, 273 U. S. 52, 61, 63) forbid that exercise of power."

What facts did the petitioner find? Are these facts supported by testimony? We summarize the findings of facts:—

The respondent is a Pennsylvania corporation engaged in the manufacture of mirrors and in their sale in interstate commerce. In 1930 the respondent began to manufacture in commercial quantities and to sell in interstate commerce mirrors having a protective coating or backing consisting of a mixture of shellac and powdered copper. The mixture was applied by brush or spray either immediately next to the reflecting medium or separated therefrom by an intervening coating of ordinary mirror-backing paint, in accordance with a process owned by the Peacock Laboratories, Inc. The respondent was the first licensee of the Peacock Laboratories, Inc., to advertise and sell mirrors as "copper-back," "copper-backed," and "backed with copper," when prepared by the above process. The same terminology was used by the respondent, its officers, agents, and representatives in letters, invoices, communications and conversations with the trade. Prior to the respondent's use of this process, these terms had acquired a fixed meaning in the trade and signified mirrors backed with a solid sheath or film of copper deposited upon the reflecting medium by an electrolytic or electro-plating process. The mixture of shellac and powdered copper does not form a solid metallic copper coating or film. The metallic element is not continuous nor are the particles of copper in metallic contact, since each particle of copper is surrounded by a film of shellac and no part of the copper is adherent to or in metallic contact with the reflecting medium. The respondent's type of mirror sells for slightly more than ordinary mirrors and for considerably less than electrolytic copper-back mirrors since its manufacture does not require special equipment. The use of the prohibited terms, when applied to the respondent's mirrors, has a tendency and capacity to confuse, mislead and deceive the trade and public and to divert trade to the respondent.

The following is a summary of the testimony upon which the petitioner based its findings:

Electrolytic copper-back mirrors had been known since 1858 and had been imported in large quantities from England, France, Belgium and Holland from 1900 until the World War and thereafter in lesser quantities. The terms generally used to describe and designate these imported mirrors were "copper-back," "copper-backed," or "backed with copper," literal translations of the French "dos cuivre" and the German "verkupfert." English mirrors, on which were stamped "copper-backed" and which were similar to those imported between 1902 and 1914, were offered in evidence. Electrolytic copper-back mirrors had been manufactured in the United States for approximately forty years. In 1925 the Pittsburgh Plate Glass Company began the production of electrolytic copper-back mirrors on a large commercial scale. It placed a label containing the term "copper-back mirror" on every such mirror manufactured by it. It used this terminology in advertising, circulars and magazine articles, as well as in correspondence, invoices and orders. The only use of this terminology, prior to its use by the respondent, had been in its application to electrolytic copper-back mirrors. Trade was diverted from the makers of electrolytic copper-back mirrors because of comparatively low price of the respondent's mirror and from the makers of ordinary mirrors because of the general belief that copper-back mirrors are superior to painted back mirrors.

It may well be that, had this court been a fact-finding tribunal, it might have reached conclusions other than those reached by the petitioner. The petitioner, however, had before it ample evidence upon which to find that the terminology had acquired a secondary meaning, prior to its use by the respondent, and that the respondent's mirrors did not contain the essentials of genuine copper-back mirrors. Inasmuch as it is the duty of the Commission to determine the facts, it is our duty to sustain the Commission if there is any substantial evidence upon which its findings are based.

Federal Trade Commission v. Artloom Corp., 69 F. (2d) 36.

Even though there was no evidence of actual deception, the natural and probable result of the use of descriptive names, which do not properly describe the respondent's product, has the tendency and capacity to deceive. *Federal Trade Commission v. Balme*, 23 F. (2d) 615. *Notaseme Hosiery Co. v. Straus*, 201 Fed. 99. As was said by the Supreme Court in *Federal Trade Commission v. Algoma Lumber Co., supra*:

"The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. * * * In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance."

So, if the purchaser orders a copper-back mirror in the justifiable belief that he will receive a mirror with a backing consisting of a solid sheath of copper electrolytically applied to the reflecting medium and receives, instead, a mirror having a backing of shellac and powdered copper, he is prejudiced.

The order of the Federal Trade Commission is affirmed. An enforcement order may be entered in accordance with the prayer of the petition.

There is pending before us the respondent's motion for a writ of certiorari for diminution of the record. We are asked to order the Federal Trade Commission to certify to this court the report of the Trial Examiner. As we have indicated, the Commission's findings of fact are conclusive if supported by any evidence. In the absence of proof that the fact findings are not so supported, there is no substantial ground for the granting of the respondent's motion. It is accordingly denied.

[¶ 55,084] Baush Machine Tool Company v. Aluminum Company of America.

United States Circuit Court of Appeals for the Second Circuit. Decided September 16, 1935.

When, in a suit for treble damages under the Clayton Act, excerpts from the opinion of a higher court in the same case are read before the jury, prejudicial error occurs if those excerpts which are read impress upon the jury the weight which the higher court places on evidence given in a former trial.

Proof by the plaintiff of the cost of a competitor, in a suit for treble damages under the Clayton Act, is admissible to meet the claim of the defendant that the failure of the plaintiff to operate its business profitably was due to inefficiency of its plant, with high manufacturing costs, rather than to high prices of material due to the alleged monopoly.

In a suit for damages under the Clayton Act for an alleged monopoly in aluminum, the plaintiff may properly show that the price of aluminum in England was higher than the export price.

In a suit for treble damages under the Clayton Act, the opinion of a witness as to the reasonable value of plaintiff's plant, assuming a reasonable prospect of profitable operation, was inadmissible as the assumption was too speculative in view of the fact that the plant had never been operated at a profit.

Before MANTON, SWAN and CHASE, Circuit Judges.

At Law. Appeal by the defendant from a judgment of the District Court for the District of Connecticut.

Suit by the plaintiff to recover its damages because of the defendant's alleged violation of the anti-trust laws. Reversed.

William Watson Smith, Edward F. McClennen, Frederick H. Wiggin, Frank B. Ingersoll, Leon E. Hickman, Edward Williamson, Attorneys for the Appellant.

Cummings & Lockwood, Edward C. Park, Attorneys for Appellee. Mark W. Norman, Claude B. Cross, Edward C. Park, Raymond E. Hackett, of Counsel.

CHASE, Circuit Judge: This litigation was first before this court on an appeal from an order relating to a bill of discovery. See 63 Fed. (2) 778. Following that the case was tried to a jury in the District Court where a verdict was returned in favor of the defendant and judgment entered thereon. The plaintiff's appeal to this court resulted in a reversal and remand for a new trial. See 72 Fed. (2) 236. At the second trial, the plaintiff obtained a verdict for $956,300.00 upon which judgment for three times that amount together with costs including an

attorney's fee of $300,000.00 was entered. The present appeal is from this judgment.

The defendant, a Pennsylvania corporation, is the sole producer of virgin aluminum in the United States. Its business is the outgrowth of that of the Pittsburgh Reduction Company which began to manufacture aluminum at Pittsburgh, Penn. in 1888. Its predecessor and the defendant will hereinafter be treated as one and called the defendant. It acquired the rights under the U. S. patents to Charles M. Hall which issued in 1886 and disclosed a revolutionary process for extracting alumina (the oxide of aluminum) from the base ore bauxite by means of electrolysis and mainly because it controlled these patent rights succeeded in vastly increasing the production of aluminum at a small percentage of its former cost. Before the Hall patents expired in 1903 the defendant was firmly entrenched in the business of producing virgin aluminum in this country and it has ever since successfully maintained its supremacy in that field. It strenuously insists that this, however, has been due solely to the momentum of its patent monopoly coupled with its business skill and financial resources which have been employed at all times without violation of the anti-trust laws.

There are producers of virgin aluminum in foreign countries who have branches in this country from whom domestic users who do not choose to deal with the defendant may buy. The only ones which need be mentioned are the British Aluminum Company, Ltd.; L'Aluminium Francais (French); Aluminium Industrie (Swiss); and a German company, Vereinigte Aluminum Werke Aktiengesellschaft. They will hereafter be referred to as the foreign producers.

Besides virgin aluminum, the defendant and the foreign producers also manufacture aluminum alloys which have a higher tensile strength than the pure metal and have been given various trade names. One which is perhaps most commonly known is called duralumin and was first developed commercially in Germany under that name. The defendant's product of similar composition and quantity is known as 17S and was first made in 1916.

Though the defendant alone produces virgin aluminum in the United States there is a large business, which it does not control, in the reduction of aluminum scrap that yields a product not as uniform in quality but in other respects the equal of the virgin metal. The defendant's virgin aluminum and its alloys are sold in ingot form to manufacturers of aluminum sheet, wire, tubing, electric cable, foil, powder, rods, forgings, extruded and structural shapes, and many other articles. No distinction will be made herein between the pure aluminum and the alloys but both will be called aluminum.

Besides selling to manufacturers the defendant has domestic subsidiaries who manufacture all kinds of aluminum products and who compete directly with independent manufacturers of such goods. Until 1928 it also had foreign subsidiaries and itself engaged in foreign business but in that year a Canadian corporation called Aluminum Limited was organized to which were transferred all of the defendant's foreign holdings, except its Dutch Guiana bauxite mines and the Alcoa Power Company which owned a water power development in Canada, in return for all of Aluminum Limited's capital stock. This stock was at once distributed to the defendant's stockholders in the ratio of one share of Aluminum Limited to each holder of three shares of the defendant's stock. Since then changes in stock ownership have occurred but a small group of stockholders common to both corporations have always owned more than half of the stock of each. Since the organization of Aluminum Ltd., the defendant has confined its business to the United States.

The plaintiff, a Massachusetts corporation, is a manufacturer in Springfield and Chicopee, Mass., whose business in part is the making of aluminum products from aluminum ingot. It was already well established in business when, in 1919, it entered this field. Its aluminum business led a precarious existence from the start and was never a profitable venture. On April 18th in that year, the plaintiff brought a suit similar to this against the defendant in the District Court for the District of Massachusetts which was pending, though never tried, when the present action was brought in Connecticut on July 24, 1931.

The gist of its complaint is (1) that the defendant has monopolized interstate trade in virgin aluminum by unlawfully combining and agreeing with the foreign producers that they will all charge substantially the same prices for virgin aluminum in this country; (2) that it so combined and agreed with Aluminum Ltd., that Aluminum Ltd., would not compete with it in the United States by selling virgin aluminum here; (3) that it did itself and with its domestic subsidiaries monopolize and restrain interstate trade in virgin aluminum; and (4) that it did, or attempted to, in concert with its domestic subsidiaries, monopolize interstate trade in substantial part by keeping the price of virgin aluminum high and the price of products manufactured from it low so that it was impossible for the defendant to compete with it in the manufacture of aluminum products in that the cost of defendant's raw material plus the cost of manufacture and sale exceeded the price at which its product could be sold in competition which similar products so manufactured and sold by the defendant. In this connection the domestic subsidiaries of the defendant and the defendant will be herein treated as one.

The assignments of error are needlessly numerous. They cover no less than ninety pages in the record. None of them question the sufficiency of the evidence to take the issues to the jury. The occurrences which prejudiced the defendant, so it claims, have to do with the conduct of the trial wherein it is said that the trial judge abused his discretion; ruled erroneously in excluding and in admitting certain evidence; and made errors both of omission and commission in the charge.

The evidence that the defendant had violated the anti-trust laws as charged by the defendant was largely circumstantial. The only direct evidence of any such unlawful agreement is found in the testimony of Haskell, the plaintiff's president, who testified to a conversation he had with A. V. Davis, the president of the defendant, in which he said Davis told him that the defendant and the foreign producers had an agreement fixing the price at which they would all sell aluminum in the United States which price the plaintiff must pay to obtain its raw material. Davis denied any such conversation and other evidence than his own testimony tended strongly to discredit Haskell. The issue of credibility thus raised had been squarely presented to

the jury in the first trial of this cause in a charge which made the verdict turn on its determination as to the verity of that evidence and the jury then found not in accordance with Haskell's testimony but in favor of the defendant. In our reversing opinion [77 Fed. (2) 236] we held that the issues could not be confined so closely, saying in part:

"Appellant's claim for damages is based upon the claim that the appellee had a monopoly. It was obliged to prove injury by the monopoly. It first attempted to show there was in fact a monopoly, and, for this purpose, evidence was admissible to show the conduct of persons in control and agreements and acts done preceding the vesting of power. Such evidence could be considered, although the acts occurred prior to the injury. To exclude this evidence was error. Nor should the appellee have been restricted to the introduction of evidence relating to transactions with domestic corporations. Relations with foreign corporations were admissible also for another reason. A monopoly within the United States created by contract or agreement with foreign corporations is unlawful. * * *. The contracts entered into by the appellee and the appellee's subsidiaries with foreign corporations and the purchase of stock in these foreign corporations were admissible for the purpose of showing a tacit understanding not to compete. * * *. The evidence of uniformity of prices in the United States which the appellee and the foreign producers charged over the period from 1919 to 1931 inclusive, under the circumstances, as the evidence disclosed, might well support a finding by the jury of an agreement between the appellee and the foreign producers. This issue should have been submitted to the jury irrespective of belief or disbelief of Haskell's testimony. Conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done and from the circumstances. * * * The evidence presented by the appellant should have been submitted * * *. Moreover, the relationship of Aluminum Limited, with the appellee and the holdings of Aluminum Limited in the foreign corporations were items not to be disregarded."

At the instant trial one Babson, the vice-president and general manager of the plaintiff, was produced as a witness for the plaintiff. During his examination by plaintiff's counsel he testified to making a trip abroad in 1929 during which he visited Switzerland and talked with officials of the Swiss Company at Neuhausen. After saying that he talked with a Mr. Kaufman who was then director of sales for the Swiss company and that he asked Kaufman to quote him a price for aluminum the question "What did he say?" was asked. To this counsel for the defendant objected on the ground that it was hearsay.

* * *

[The Court here quotes at length from the record in the lower Court, including discussions between the Court and attorneys, and excerpts of the prior opinion of this Court which were read in the presence of the jury.]

This exception should be considered in connection with another exception taken to the reading from our former opinion a few days later during the cross-examination of one MacDowell, the first witness called by the defendant after the plaintiff rested. This witness had testified that he had spent many years in Japan as a salesman for the defendant and was familiar with the aluminum situation and prices in Japan when he was there; that he was sales manager of Aluminum Limited, which sold aluminum in Japan and that following the Japanese market was a part of his business with which he was familiar. He was then asked: "What was the price of aluminum in Japan in 1930?" At this point the following took place in the presence of the jury.

* * *

[The Court here quotes further from the record.]

Though the foregoing excerpts from the record which have been given at long length, for greater clarity designating the remarks of counsel by the terms defendant's attorney and plaintiff's attorney respectively, contain primarily a discussion of legal questions had between counsel and court which when indulged in briefly are often helpful and, indeed, necessary common practice in the presence of the jury, a majority of this court believes that in this instance the defendant was so seriously prejudiced by what was done that a fair and impartial verdict based solely upon the evidence in this record could not reasonably be expected.

During the discussion as to the admissibility of the question asked Babson the real issue was whether it called for hearsay. The general admissibility of uniformity of prices set by the foreign producers and the defendant was discussed in our opinion but nothing as to whether or not the question asked called for admissible evidence. The judge very properly ruled the evidence admissible as against the only ground of objection to the question and then the insistence of plaintiff's attorney in reading what we had said as to the effect of such evidence, ostensibly to secure a broader ruling after the judge had already indicated his readiness to admit the evidence without any restriction whatever, put before the jury our opinion as to the weight to be given that evidence. Not only was that done but it was, inadvertently, done with great emphasis when the judge referred to the opinion as his "orders." That what was said was being closely followed by the jury is apparent from the remarks of the foreman. It seems entirely clear that the direct tendency of what was done was to inform the jury that the appellate court from whom the trial court took "orders" had decided that if uniformity of prices was shown the jury would be expected by this court to find that they were established by an unlawful agree-

ment between the defendant and the foreign producers; that a finding of such an unlawful agreement would follow as a matter of law in accordance with an opinion to which the trial court must bow. The curtailment of the scope of the jury's independent judgment as to the weight of the evidence was thus made rigid without any explanation that what we had said was not binding upon the jury on that subject. Of course this was not done by reading directly to the jury but by reading directly to the judge what the jury could hear and what it could not help but believe was the law which pointed the way to its duty once it was satisfied that practical uniformity of prices had been established.

The reading during MacDowell's cross-examination but served to add to damage which had already wrecked the defendant's chances of having the jury return a verdict not dictated by what we were thought to have decided as to their duty. There was nothing in our opinion dealing directly with the admissibility of the prices Aluminum Limited charged for aluminum in Japan. When objection was made to the question, the evidence, following some discussion, was admitted. Then the answer was not taken, however, as a discussion immediately arose as to whether or not Aluminum Limited was controlled by the same people who controlled the defendant. After conflicting claims as to what was in evidence concerning that [which] had been advanced by the attorneys, the judge desired to know what we had said. Reading from our former opinion in the presence of the jury was again objected to by the defendant but without avail and then were read as above set forth the general statements as to the common control of Aluminum Limited and the defendant by four men of prominence in the defendant's organization with the expressed thought that though this implied as to Aluminum Limited "an order rather than an agreement not to compete in the United States that implication does not negative the fact that the close relationship of the two competitors might carry with it a tacit agreement between the two corporations proper not to compete with each other." Certainly the question whether the defendant and Aluminum Limited were in fact controlled as one was of necessity to be determined from the evidence in the case being tried. It is highly significant that when this question arose it was resolved by reading our version of what the evidence admissible in the former trial showed as to that and what in our opinion might follow from it as a conclusion of fact that the defendant had a tacit agreement with Aluminum Limited concerning prices to be charged for aluminum in the United States. This was one of the vital issues before the jury. It was purely a question of fact and when our opinion as to the effect of the evidence was made known to the jury with the indication that what we said were "orders" to the trial court, it is impossible to believe that what was done could have been understood by the jury other than that such tacit agreement had in our opinion been recognized as an existing fact.

This is quite other than the perfectly proper practice, in cases requiring submission to a jury, of having a federal trial judge make such comments to the jury as he thinks helpful as to the weight he believes attributable to the evidence in the case being tried provided he leaves the jury, notwithstanding, free to decide the issues of fact for itself in accordance with its own analysis of the evidence. What was done had the effect of a preemptory command to that jury to draw the conclusions of fact we had said might be drawn. To be sure this aspect of its duty was not shown to it by any direct reading to the jurors but no one could reasonably believe that when they were made acquainted with what we had said, its supposed import was not as thoroughly driven home as though that had been its avowed purpose.

We have before reversed when our opinion in the same case on a former appeal was read to the jury. The danger inherent in so doing and the consequences which may result are well set forth in *Press Publishing Co. v. McDonald*, 63 Fed. 238. Certainly it is proper enough for an attorney to inform the court as to the law claimed to be applicable to any issue which may arise during a jury trial and to do so in the presence of the jury provided it is done in a way which leaves the jury free to find the facts solely from the evidence introduced at the trial and to reach a verdict upon those facts and the law expounded by the presiding judge. The error in the method here adopted lies in so getting before the jury our interpretation of the evidential effect of what we held should have been admitted in the former trial that when it was admitted in this one the case was prejudged in respect to highly controverted issues which it was vital for the plaintiff to establish and which were proved, if proved at all, by circumstances that might or might not have existed without any unlawful agreement on the part of the defendant. As to this the defendant was entitled to have the jury exercise its own judgment as to the facts and the plaintiff was entitled to no more. When our opinion as to the weight attributable to the evidence was read, in every practical sense, to the jurors without any explana-

tion that what we had said in that respect was only in connection with the former appeal and not intended for the guidance of the jury in finding the facts, the trial took such a turn that we cannot say that the jury was not, in returning its verdict, following a course so pointed out rather than deciding the issues upon the evidence introduced. Where reading to the jury from the opinion of an appellate court does so circumscribe the jury's function to decide the facts the judgment should be reversed. *Brown et al. v. United States,* 298 Fed. 428; *Arey v. DeLoriea,* 55 Fed. 323; *Butler v. Slam,* 50 Pa. 456; *Laughtin v. Street Ry. Co.,* 80 Mich. 154; *Olney v. Boston & Maine R. R. Co.,* 73 N. H. 85; *Hudson v. Hudson,* 90 Ga. 581; *Clark v. Iowa Cent. Ry. Co.,* 162 Iowa 630; *Griebel v. Rochester Printing Co.,* 24 A. D. (N. Y.) 288; *Allaire v. Allaire,* 39 N. J. L. 113.

During the trial, the deposition of A. V. Davis was read to the jury. In cross examination he had been asked: "There was a suit brought by the Government of the United States against the Aluminum Company of America and a decree entered, was there not?" When, in reading the cross-examination, plaintiff's counsel came to this question the attorney for the defendant objected to its being read but the objection was overruled. The question referred to a consent decree entered in 1912 in the government's suit. Previously the witness had testified that parts of an agreement made by the defendant with The Norton Company on April 20, 1909 had been abrogated and it was the apparent purpose of the plaintiff to show that the abrogation had been due to the suit. Being a consent decree, the decree itself was inadmissible. 15 U. S. C. A. Sec. 16 This was well known to plaintiff's attorney for he stated during the discussion which ensued following the objection to the reading of the question: "If we were to offer a decree under conditions which we knew obtained, it would be inadmissible; therefore we have not in mind to offer anything of the kind. We are simply asking for facts which are within the knowledge of this witness, as bearing upon his statement as to how this came to be abrogated." From this episode much was made. The defendant indicated a desire to introduce the decree in evidence inasmuch as the fact that one had been entered had been made known to the jury but later decided not to. The opportunity thus afforded to argue to the jury that the defendant was electing to keep the contents of the decree out of the case was seized upon and much was made of what was really a false issue. *Commonwealth v. Coughlin,* 182 Mass. 558. As similar trouble, however, may be avoided at a retrial by simply excluding the question before the deposition is read we need make no further comment.

Many of the other exceptions argued relate to questions which are not likely to arise again and so need not be noticed. Most of the questions as to the admission and exclusion of evidence may be resolved by reference to our former opinion. It may be worth while now to indicate our opinion briefly as to some of them.

The defendant claimed that the failure of the plaintiff to operate its aluminum business profitably was due not to the high prevailing price of its raw material and the low competitive price of its product but to the inefficiency of its plant with resulting high manufacturing costs. To meet this the plaintiff proved the operating costs of Sheet Aluminum Co., a competitor. Such proof was admissible. *American Can Co. v. Ladoga Canning Co.,* 44 Fed. (2) 763, 770.

The plaintiff introduced in evidence copies of the London Times to show the price of aluminum in England in 1925-1927 was higher than the then export price and to show that in 1928-1931 no export price was quoted. There was no error in so doing. *Virginia v. West Virginia,* 238 U. S. 202, 212. The weight of such evidence was wholly for the jury.

A copy of a tentative agreement between defendant's Canadian subsidiary, Northern Aluminum Company, and some foreign aluminum producing companies dated April 28, 1912 was introduced as were the minutes of meetings of representatives of the companies, parties to agreement and to one dated June 10, 1912. The tentative agreement was admissible under our former opinion but the minutes to be so admissible should have been properly authenticated. *Esnault-Pelterie v. Chance Vought Corp,* 56 Fed (2) 393, 407. This applies also to the minutes of proceedings of meetings of a committee of an Aluminum Association which had been formed on June 10, 1912 for the purpose of controlling sales of aluminum outside of the United States and were introduced apparently to show the attendance of A. V. Davis at a meeting he had testified that he did not remember having attended.

The exceptions to the charge as given are without merit. What was said in its entirety fairly covered the issues. The defendant filed sixty-six requests to charge and took a general exception to the claimed failure of the court to comply with fifty-one of them which were designated in the exception only by their numbers. Such an exception fails utterly in pointing out to the court wherein essential matter has

been omitted in order that a correction may be made, if required, in time to be of benefit at the trial, *Robinson & Co. v. Belt,* 187 U. S. 41, and serves only as a catch-all for error to urge an appeal. The judge was entitled to have his attention called directly to what were claimed to be specific errors or omissions and could not be required to go over a mass of numbered requests to pick out the wheat from the chaff. This exception is valueless for that reason alone. *Silkworth v. United States,* 10 Fed. (2) 711; *Hamburg-American Steam Packet Co. v. United States,* 250 Fed. 747; *Penn. R. Co. v. Minds,* 250 U. S. 368.

On the question of damages a witness named Hall, who was qualified generally as an expert consulting engineer and had appraised manufacturing plants for about fifteen years, testified as to the value of plaintiff's plant. A comparatively small part of the value he assigned to it on the hypothesis that it would be operated on the basis of a free and open market for raw material related to the land on which it stood. Concerning that valuation he was shown to have had very meagre knowledge. Too little to make his opinion of the value of the land itself admissible. Moreover, he was asked to assume in making his valuation of the plant that there was in 1925 "a reasonable prospect of profitable operation." This was an assumption impossible to be made in view of the evidence. The plaintiff had never operated its plant at a profit. Its net loss in 1919 had been $77,000.00; in 1920, $115,000.00; in 1921, $86,000.00; in 1922, $115,578.35; in 1923, $84,725; and in 1924, $112,389.13. In the light of this record, it required substantial evidence of changed conditions to make the assumption of a reasonable expectation of profit in 1925 anything but unfounded optimism and there was no such evidence. Furthermore, the actual experience of the plant was a net loss in 1925 and each succeeding year comparable in amount with those already given. The plaintiff's damages, if any, suffered more than six years before this suit was brought were not recoverable because of the bar of the statute of limitations. The base valuation of its plant consequently had to be shown as of 1925 and it was error to value it except with reference to conditions then actually existing.

The plaintiff was permitted to show by Haskell his estimate of its loss of profits during the period for which recovery was permitted. As there had never been any profits and no reasonable prospect that any would be made was shown as of 1925 his estimate was nothing but a guess based on conditions contrary to fact. It was too speculative to be admissible. *Eastman Kodak Co. v. Blackmore,* 277 Fed. 694; *American Sea Green Slate Co. v. O'Halloran,* 229 Fed. 77; *Central Coal & Coke Co. v. Hartman,* 111 Fed. 96. In *Wm. H. Rankin Co. v. Associated Bill Posters,* 42 Fed. (2) 152 we upheld the admission of an estimate of lost profits but there was a proper basis for estimate in that case afforded by a period of profitable operation prior to the defendants' unlawful interference which prevented a continuance of the former success.

The very large attorney's fee allowed at this trial should not be deemed to have been either approved or disapproved by us. If and when occasion for another allowance should arise, it will be for the trial judge to determine in the first instance wholly in the exercise of his own sound judgment based upon then existing facts what should be the amount of the reasonable attorney's fee which the statute provides should be allowed a successful plaintiff in a case of this kind.

Judgment reversed and cause remanded.

MANTON, C. J., dissents with opinion.

[¶ 55,085] James J. O'Brien v. The New York Edison Company.

United States District Court, Southern District of New York. Decided September 26, 1935.

In a suit for treble damages under the Anti-Trust laws, it is not enough to allege that the defendant is engaged in interstate commerce; it must also appear that the acts complained of were in the course of or in connection with its interstate transactions.

James J. O'Brien, personally appearing.
Whitman, Ransom, Coulson & Goetz, (Wesley A. Sturges, Henry Jaffe, and Richard Joyce Smith, of Counsel) for defendant.

PATTERSON, D. J.: The action is one at law. There is a motion by the defendant for judgment on the pleadings under Rule 112 of the New York Rules of Civil Practice. There are also cross-motions by the plaintiff and the defendant for summary judgment under Rule 113, but as I am of opinion that the defendant must prevail on its motion for judgment on the pleadings it is unnecessary to determine the motions for summary judgment.

The complaint alleges that the plaintiff is an architect, a citizen of New York, and the defendant a New York corporation, in the business of generating and distributing electric current in New York City. It is charged that the defendant is also engaged in interstate commerce, by furnishing electric energy to a railroad operating between New York and New Jersey. The plaintiff, it is alleged, made a contract with one Salmon to supervise the installation of electric plants in three buildings in New York City and to receive for his services an agreed compensation, the defendant at the time furnishing the electric current for the buildings. Thereafter, with knowledge of the plaintiff's negotiations, the defendant lowered its rates for current in the class of buildings to which these three belonged, pursuant to petition filed with the New York Public Service Commission, causing Salmon to cancel his contract with the plaintiff. The plaintiff alleges that he has been damaged $24,876, and claims treble damages under the anti-trust laws.

The action is styled as one brought under the federal anti-trust laws. It can be considered in no other aspect, for there is no diversity of citizenship and hence no jurisdiction to entertain the case other than as one under the anti-trust laws.

The Sherman Act, in sections 1 and 2, prohibits contracts, combinations, and conspiracies and monopolies in restraint of interstate commerce. And the Clayton Act, in section 4, gives to any person injured in business or property by reason of anything forbidden in the anti-trust laws a right of action for treble damages. The complaint alleges that the defendant is engaged in interstate commerce, but this is not enough. To state a cause of action under the anti-trust laws, the complaint must show that the defendant in the course of its interstate business or in connection with such business has made contracts in restraint of such commerce or has monopolized or attempted to monopolize interstate commerce, with resultant damage to the plaintiff. If the acts of the defendant that are complained of were not transactions in interstate commerce, no cause of action is set forth. *Blumenstock v. Curtis Publishing Co.*, 252 U. S. 436.

Here the plaintiff's grievance is the lowering by the defendant of its rates for the three buildings in question. If such conduct can be deemed wrongful at all, it certainly was not a wrong in the course of interstate commerce but was of local force and effect only, and for redress the plaintiff must have recourse to the state courts.

It is thus evident that the complaint does not state a cause of action of which this court can take cognizance. The defendant's motion for judgment on the pleadings must be granted.

ROBERT P. PATTERSON, United States District Judge.

[¶ 55,086] Federal Trade Commission v. Walker's New River Mining Company.

United States Circuit Court of Appeals, Fourth Circuit. Decided October 8, 1935

The Federal Trade Commission's order to cease applying the term "New River" to coal produced in a district other than in New River, West Virginia, is affirmed. It is held that, while there can be no exclusive trade appropriation of a geographical term, where a geographical origin has acquired a peculiar trade significance, the use of a term descriptive of such article can not be applied to a product of a different origin, even though such a product may be of identical quality.

On Application for Enforcement of an Order of the Federal Trade Commission.

Affirming Federal Trade Commission Complaint No. 2028.

Before PARKER and NORTHCOTT, Circuit Judges, and Chesnut, District Judge.

James M. Brinson, Special Attorney, Federal Trade Commission (W. T. Kelley, Chief Counsel, Martin A. Morrison, Assistant Chief Counsel, Federal Trade Commission, and James W. Nichol, on brief) for Petitioner. George Cochran Doub (Parker, Carey & Doub on brief) for Respondent.

NORTHCOTT, Circuit Judge: This is a proceeding under the provisions of the Federal Trade Commission Act, Section 5 (15 USCA Section 45), seeking the affirmance and enforcement of an order entered by the Commission on the first day of February, 1934, requiring the respondent, Walker's New River Mining Company, a corporation, to cease and desist from certain practices, found by the Commission to constitute unfair methods of competition forbidden by the Act.

In April, 1932, the Federal Trade Com-

mission, hereinafter referred to as the Commission, filed and served complaint against the respondent, charging "unfair methods of competition in interstate commerce" in violation of said Section 5 of the Federal Trade Commission Act. Respondent's answer to the complaint was filed in May, 1932, and after the complaint was amended, in an immaterial respect, evidence was taken before an examiner of the Commission and a number of witnesses were examined. The matter was then heard before the Commission and after consideration the Commission entered the following order:

"This proceeding having been heard by the Federal Trade Commission upon complaint of the Commission, the answer of respondent, the testimony and evidence, briefs and arguments of counsel for the Commission and counsel for respondent, and the Commission having filed its report stating its findings as to the facts and its conclusion that the respondent has violated the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,"

It is now ordered that respondent Walker's New River Mining Company, in or in connection with, offering for sale or selling coal in interstate or foreign commerce or in commerce between the State of West Virginia and the District of Columbia or in the District of Columbia, cease and desist directly or indirectly from—

(1) Describing or designating said coal as "New River" coal or by the abbreviation "N. R.," or by any other abbreviation, letters or words of the same or similar import unless such coal originates, is produced or mined in that portion of West Virginia lying, being or situated within the territory generally known as the "New River" field or district.

(2) Using in its corporate name the words "New River" or words, or abbreviations of the same or similar import unless coal so offered for sale or sold originates or is produced or mined in the "New River" field or district as described in paragraph one hereof.

It is further ordered that respondent file a report in writing with the Commission within 60 days from and after service of this order, setting forth in detail the manner and form of its compliance therewith."

After the entry of this order and on March 23, 1934, the respondent tendered an offer of compliance with the order which, in August, 1934, the Commission notified the respondent was not satisfactory and, in its answer to the application before us, the respondent withdrew that offer and requested a determination of the validity of the order of the Commission without reference to this offer of compliance.

The respondent is a West Virginia corporation and has since the year 1927, and is now, engaged in the business of mining coal from mines situated at Flint in the county of Randolph in the State of West Virginia, in the vicinity of the Town of Elkins, where it has its principal office and place of business. The company sells its coal in various states of the United States in competition with various producers and sellers of coal in interstate commerce, including producers of coal in what is known as the New River coal field, producing and selling "New River" coal.

Coal has been mined in southern West Virginia in territory contiguous or adjacent to New River since the year 1872, and this territory has for a number of years been known or designated as the New River field or district. Coal is mined in this New River district from several seams, principally, the Sewell, the Beckley, the Fire creek, and the Welch. These seams extend beyond the boundaries of the so-called New River field, both in a northerly and southerly direction. The Sewell seam extends to the north into Pennsylvania and in that state is known as the Sharon. Coal from all these seams named as being mined in the New River field are classified in geological literature as "New River Group of the Pottsville Series." Mining operations in what was originally known as the New River field were extended from time to time until that field, as it is now known, embraces substantial parts of the counties of Fayette, Raleigh and Greenbrier in the state of West Virginia.

There are sixty-three producers of coal in what is properly known as the New River field, and for more than twenty-five years last past coal from this field has been and is now being sold as New River coal. It has been and is the policy of the coal operators in the New River field to offer for sale as New River coal only coal of the highest grade mined in the New River district, irrespective of the particular seam from which it has been extracted. Coal found in any seam in the New River field of an inferior quality is not sold by the producers of coal in that field as New River coal. Coal producers of the New River field have for many years past spent large sums of money in advertising such high-grade product of their mines as "New River" coal. The result has been that wholesale and retail dealers in coal and the consuming public have associated the words "New River" with coal of a distinctively and uniformly high-grade character and quality, produced in what is known as the New River field proper. The words New River have therefore acquired a value in the coal business, and the use of the words New River is of unquestioned advantage in that business.

The mines of the respondent are situated in a region from seventy-five to one hundred miles distant from what is recognized in the coal business as the New River field or district, a region separated from the New River field not only by distance but by a range of mountains. The mines of the respondent are situated in what is known as the Cheat Mountain Coal Field, and the Commission found as a fact that

coal produced from respondent mines is not New River coal as known by the purchasing public.

Respondent enjoys a more favorable freight rate for the transportation of its coal to certain sections in the northeast of the United States than producers of coal in the New River district.

At the time of its organization as a company, respondent adopted the words New River and incorporated them in its company name and has used and now uses said words in connection with offering for sale and selling its coal in interstate commerce and has caused the words to be conspicuously displayed in advertising its product. Respondent describes the coal it sells as "New River" coal and invoices it as such.

As the result of respondent's practices, dealers in coal have bought its product and sold it to consumers as New River coal.

From all this the Commission reached the conclusion in its opinion that the practice of respondent in using the words "New River" in its corporate and trade name and offering for sale and selling its coal as New River coal resulted in misleading and deceiving the public into the handling and use of its coal as New River coal, when in fact it was not New River coal as generally recognized for a number of years in the coal trade, and that the effect of these practices of the respondent has been to divert trade to respondent from competitors selling coal produced in the New River district and from competitors selling coal from other districts or fields in the United States, including the Cheat Mountain district.

The sole question presented here is whether the Commission was warranted in reaching the conclusion that the respondent has not the right to use the words "New River" in its business, and if respondent has not this right whether the proceeding before the Commission was in the "interest of the public" as required by the statute.

The findings of the Commission as to facts, if supported by testimony, are conclusive. (15 USCA Section 45; *Federal Trade Commission v. Algoma Lumber Company*, 291 U. S. 67). Here the Commission has found that the efforts of the coal operators, in what is geographically known as the New River field, to distinguish New River coal from other grades of coal and to give it a recognized reputation for quality, have been successful; that New River coal is widely known in the trade as a coal of high quality; that this result has been brought about by the expenditure of large sums of money by the coal operators in what is geographically known as the New River field; and that not all coal mined in the New River field is regarded or sold as New River coal, only that of the best quality mined there being so sold. We are of the opinion that all of these findings are correct and that they are supported by the testimony taken before the Commission.

The Commission, in its opinion held, that, while there can be no exclusive trade appropriation of a geographical term, where a geographical origin has acquired a peculiar trade significance the use of a term descriptive of such article cannot be applied to a product of a different origin, even though such a product may be of identical quality; and that it was misleading to pretend to the trade and the public that a geographical test of quality is being offered, when in truth the test offered is a geological one. We agree with this holding. In *French Republic v. Saratoga Vichy Company*, 191 U. S. 427 the court said:

"True the name is geographcal; but geographical names often acquire a secondary signification indicative not only of the place of manufacture or production, but of the name of the manufacturer or producer and the excellence of the thing manufactured or produced, which enables the owner to assert an exclusive right to such name as against every one not doing business within the same geographical limits; and even as against them, if the name be used fraudulently for the purpose of misleading buyers as to the actual origin of the thing produced, or of palming off the productions of one person as those of another."

Suit for unfair competition may be maintained in the case of the use of a name that has acquired a secondary significance, even though the name be not a good trade mark, on account of its generic or geographical nature.

Elgin National Watch Company v. Illinois Watch Company, 179 U. S. 665.

That the brand "New River" coal has acquired a particular significance in the coal trade, both to the dealer and the consumer, cannot be doubted; that this result has been brought about, as found by the Commission, by the expenditure of large sums of money by the coal operators in the New River field (geographically) is undisputed. This being true, these operators have acquired something of value and are entitled to be protected in the use of it. That the use of these words is of value is shown not only by the testimony, but is to be presumed from the fact that the respondent has shown itself so anxious to use and continue to use the words New River in its business without having in any way contributed to the efforts which gave the words their peculiar value in the coal trade. That such a course on the part

of the respondent constitutes an unfair method of competition is plain.

The law with respect to unfair business methods has been well settled by the decisions of the various courts, especially those of the Supreme Court of the United States. In *Federal Trade Commission v. Winsted Hosiery Company,* 258 U. S. 483, the court discusses the unfairness of the methods of competition which passes off one product as and for another product, and this decision has been followed by the courts without exception.

Federal Trade Commission v. Algoma Lumber Company, 291 U. S. 67.

Federal Trade Commission v. Artloom Corporation, 69 Fed. (2) 36.

Federal Trade Commission v. Balme, 23 Fed. (2) 615.

In *Federal Trade Commission v. Algoma Lumber Company, supra,* Mr. Justice Cardoza lays down the unquestioned rule that the Circuit Court of Appeals is not at liberty to make its own appraisal of the testimony or to substitute the judgment of the court for that of the Commission. Here we feel that the conclusion of the Commission was not only supported by testimony but was the proper one.

Even were the product of the respondent identical in quality with New River coal, that would not justify the use of the words "New River." In *Federal Trade Commission v. Royal Milling Company et al.,* 288 U. S. 212 the court said:

"* * * If consumers or dealers prefer to purchase a given article because it was made by a particular manufacturer or class of manufacturers, they have a right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally as good, but having a different origin."

That the public interest is involved cannot be doubted. It is manifestly in the interest of the public to prevent the continuance of an unfair practice which tends to deceive the public and divert trade from competitors.

Federal Trade Commission v. Winsted Hosiery Company, supra.

Federal Trade Commission v. Raladam Company, 283 U. S. 643.

While it is true that what is now known as the New River coal field may properly, in the development of the coal business in that region, be extended to include sections not now included, clearly that field may not now be considered to include the section in which the respondent's mines are located, distant as they are from seventy-five to one hundred miles from the New River field and being separated from it by a mountain range.

The order of the Commission was fully warranted by the facts and the law; was made by an experienced body created by Congress for the purpose of deciding questions of this character and the order to cease and desist is affirmed. An enforcement order may be entered in accordance with the prayer of the petition.

Affirmed.

[¶ 55,087] Battle Creek Appliance Company, Ltd., v. Federal Trade Commission.

United States Circuit Court of Appeals, Sixth Circuit. Filed and entered October 14, 1935.

The Court affirms an order of the Federal Trade Commission directing respondent to discontinue misrepresentations concerning a treatment for goitre.

Affirming Federal Trade Commission Complaint No. 2017.

Before: Moorman, Hicks and Simons, Circuit Judges.

Order

The court being of opinion that the findings of fact made by the respondent, Federal Trade Commission, are supported by the evidence introduced before the Commission, and further, that such findings are legally sufficient to support the order complained of;

It is ordered that the order of the Commission be affirmed.

[¶ 55,088] Cooper & Cooper, Inc. v. Angert.

Supreme Court of Kings County, Special Term, Part I. New York. Decided November 1, 1935.

The New York Fair Trade Act is held to be within the constitutional powers of the legislature.

By Mr. Justice BRENNAN.—Motion granted. In enacting the statute, the constitutionality of which is herein questioned, the Legislature acted within its constitutional powers. It recognized an existing condition as evil and did not act arbitrarily or unreasonably when it provided a means of making effective a remedy for that condition. The statute in no sense authorizes general price fixing in any industry. It merely sets forth as the economic policy of the state a practice theretofore recognized by the courts of the state as proper (*Marsich v. Eastman Kodak Co.*, 244 App. Div., 295), characterizes practices that would make said policy ineffective as unfair competition and grants a right of action against a person indulging in such unfair competition to any person damaged thereby. It is clear that the plaintiff has a cause of action under this statute.

[¶ 55,089] Federal Trade Commission v. Aviation Institute of U. S. A., Inc.

United States Court of Appeals for the District of Columbia. Decided October 9, 1935.

An application for the enforcement of a Federal Trade Commission order involving the use of the term "U. S. A." in the corporate name of an aviation school is dismissed on agreement of counsel, upon the respondent changing its name.

Dismissing an application for enforcement of FTC Complaint No. 1834.

This cause came on to be heard on the transcript of the record from the Federal Trade Commission, and counsel for the respective parties, in open court, having informed the Court that the corporate name of the respondent, Aviation Institute of U. S. A., Inc., has been changed to Aviation Institute of America, Inc., to meet the requirements of the order to cease and desist entered by the Federal Trade Commission in this proceeding, which change in corporate name has been accepted by said Commission as a compliance with its said order; and the parties, by their counsel, in open court, on the basis of this change in respondent's corporate name, having agreed that this proceeding may be dismissed,

On consideration whereof, It is now here ordered and adjudged by this Court that this proceeding be, and the same is hereby, dismissed.

Per Mr. Chief Justice MARTIN.

[¶ 55,090] Federal Trade Commission v. Nathan Hoffman, Doing Business Under the Trade Name Hoffman Engineering Company.

United States Circuit Court of Appeals for the Second Circuit. November 7, 1935.

Application for enforcement of a Federal Trade Commission order.

Respondent is enjoined from representing that a device designated "Super-Fyre Amplifying Unit" will, when used in connection with the ignition system of an automobile engine, give more power and speed, lessen the accumulation of carbon, or save gas.

Affirming Federal Trade Commission Complaint No. 2207.

Decree

The Federal Trade Commission, Petitioner herein, having filed with this Court on, to-wit, October 17, 1935, its application for the enforcement of an order to cease and desist issued by it against the Respondent, under date of March 18, 1935, under the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and du-

ties and for other purposes" (38 Stat. 719, 15 U. S. C. A. Sec. 45); and said Petitioner, having also certified and filed herein, as required by law, a transcript of the entire record in the proceeding lately pending before it, in which said order to cease and desist was entered, including all the testimony taken and the report of said Petitioner; and Respondent having subsequently filed his answer to said application for enforcement, in which answer Respondent stated he was not willing to contest said application for enforcement or the proceedings based thereon, and in which answer said Respondent consented that this Court might, upon said application and Respondent's answer thereto, and upon the pleadings, testimony, and proceedings set forth in the transcript aforesaid, make and enter its decree affirming said order to cease and desist and commanding Respondent, his agents, representatives and employees to comply therewith—

Now, therefore, it is hereby ordered, adjudged and decreed, that said order to cease and desist, issued by the Federal Trade Commission, Petitioner herein, under date of March 18, 1935, be and the same hereby is affirmed.

And it is hereby further ordered, adjudged and decreed, that the Respondent Nathan Hoffman, doing business under the trade name Hoffman Engineering Co., or under his own or any other trade name, his agents, representatives, and employees, in the sale and offering for sale in interstate commerce of amplifying units or appliances for use in connection with the ignition system of automobile engines, do:

Cease and desist from representing or causing it to be stated or represented to dealers or others, or to members of the public, directly or indirectly, either verbally or in advertisements in newspapers, circulars, or other publications, or on labels, or by means of the radio, that the appliance or device designated Super-Fyre Amplifying Unit, or by any other name, will, when used in connection with the ignition system of an automobile engine, affect the operation of the spark plugs of the ignition system, so as to cause the engine to have more power and speed, to be smoother in its running, to have less accumulation of carbon and less mechanical trouble from accumulation of carbon, to cause the engine to start more readily, and to save gas in the operation of the engine, and that by the use of the said appliance or device more mileage can be obtained from a certain quantity of gas than would be obtained without the use of the said appliance or device; unless and until the said appliance or device is in fact so constructed and so adjusted to the resistance of fouled spark plugs of an ignition system with which it is sold to be used, that the appliance or device will interrupt the electric current of the ignition system to the extent necessary to cause the fouled spark plugs to fire, which, before the appliance or device was used, would not fire.

And it is hereby further ordered, adjudged and decreed, that the Respondent, Nathan Hoffman, shall, within thirty (30) days after the service upon him of a copy of this decree, file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which he has complied with said order to cease and desist, and with this decree.

By the Court:

MARTIN T. MANTON, LEARNED HAND,
United States Circuit Judges.

[¶ 55,091] E. W. Ebeling, a sole trader doing business under the name of E. W. Ebeling Sign Company v. Foster & Kleiser Co., a corporation; George W. Kleiser; Walter P. Foster; Gerald O'Neil and Arthur Gerbel, Jr.

United States District Court for the Western District of Washington, Northern Division. November, 1935.

Memorandum ruling on motion to strike and make more definite and certain.

In a suit to recover treble damages under the Sherman Anti-Trust Act, plaintiff must designate in its complaint the states or localities in which plaintiff claims to transact interstate commerce, and the acts which are claimed to constitute interstate commerce.

The actions of defendants which plaintiff claims constitute a conspiracy to monopolize interstate commerce must be alleged in the complaint in a suit for treble damages under the Sherman Act, and the persons with whom the confederation is claimed must be named.

Plaintiff in a suit for treble damages under the Anti-Trust Acts must allege the nature and character of the injury he has suffered, and the fact that plaintiff is engaged in

like business is not material unless he has been injured directly, aside from injury common to all.

Messrs. Glenn R. Madison and Roy E. Jackson, Attorneys for Plaintiff.
Mr. Herbert W. Clark of Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark, Attorneys for Foster and Kleiser Company.
Mr. Stephen V. Carey of Messrs. Kerr, McCord & Carey, Attorneys for Gerald O'Neil and Arthur Gerbel, Jr.

NETERER, District Judge: Plaintiff seeks treble damages under Section 7 of the Anti-trust Act. Motion is made to strike and make more definite and certain.

It should be stated at the outset that "Section 7, Anti-trust Act, gives a right of action to one who has been injured in his business or property." Again, "Recovery cannot be had unless it is shown that as a result of defendant's acts damages in some amount susceptible of expression in figures resulted * * * These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture." *Keogh v. Cn. & W. Ry. Co.*, 260 U. S. 156, 163, 165.

Damages may only be recovered when they are pleaded.

The motion is granted to require the plaintiff to state in what states or localities, other than in Bellingham, the plaintiff transacted interstate commerce, and the acts, transactions, which are claimed to constitute interstate commerce.

That Paragraph II, page 3, line 1, "And was and has been engaged in Interstate Commerce between the various States of the United States," be made more definite by stating what acts were done constituting commerce between the states; and that matters relating to the defendants O'Neill and Gerbel, Jr., be stricken.

Paragraphs IV, VI, VII, XII, XIII and XV are stricken.

Paragraph VIII is stricken to and including the word "California" on line 18 of page 9, and the motion to make Paragraph VIII more definite and certain is granted, that acts claimed to constituted plan, scheme or conspiracy to restrain or monopolize interstate commerce, be set forth. Billboard advertising, of itself, is intrastate. *Packer Corporation v. Utah*, 285 U. S. 105, at 110. And that the persons and corporations with whom confederation to monopolize interstate commerce is claimed, be named. A conspiracy with intent to restrain interstate commerce is obnoxious to the law. *New York Central v. Chisholm*, 268 U. S. 29; *Schecter v. U. S.*, 295 U. S. 547.

The first subdivision of Paragraph IX is stricken. Plaintiff will set out in said paragraph the additional bulletins referred to in the second subdivision of said paragraph, or furnish to the defendants a bill of particulars.

Conclusions, or argumentative pleading tenders no issue of fact. This is a private controversy, not a prosecution for the common good, and overt acts must be pleaded upon which to ground the statutory liability to the plaintiff. The plaintiff must show injury to business or property. *Keogh v. Chicago & Northwestern Ry. Co. et al.*, 260 U. S. 156. The fact that plaintiff is engaged in like business is not material, unless he has been injured directly, aside from injury common to all. It is not sufficient to allege things forbidden by the Anti-trust Law, U. S. C. A. Title 15-1-7. He must allege nature and character of the injury. *American Sea Green Slate Co. et al. v. O'Halloran, et al.*, 229 Fed. 77; *Noyes v. Parsons, et al.*, 245 Fed. 589; *Alexander Milburn Co. v. Union Carbide & Carbon Corp. et al.*, 15 Fed. (2d) 678. The wrongful act must be specific and the natural and probable effect of the combination and conduct with relation to plaintiff's business, and this must be facts directly related to the defendants' conduct from which damages are logically and legally inferable and not merely conjecture; and must be by the *exercise of existing* power, not *merely* that the power *existed*. *Buckeye Powder Co. v. DuPont Powder Co.*, 248 U. S. 55.

It is not sufficient to plead aggressive and efficient management in matters purely local, but therewith must be shown confederation with interstate commerce, correlated with the local matters, all for the purpose of, and do, monopolize trade or commerce which logically and legally does hurt to the plaintiff as the proximate cause, resulting in damages susceptible of expression in figures.

If jurisdiction of the court depends on diversity of citizenship, it must be positively alleged and proven. If proof should fail, jurisdiction fails and dismissal must follow. *Charroin v. Romort Mfg. Co.*, 236 Fed. 1011. The allegation of residence of certain defendants is immaterial. All other parts of the motion are denied.

[¶ 55,092] Radio Corp'n of America v. Raytheon Mfg. Co.

Supreme Court of the United States. Decided December 23, 1935.

The Court affirms the decision of the Circuit Court of Appeals, First Circuit, holding that the plaintiff in a suit for treble damages for violation of the Anti-Trust Laws is entitled to a trial at law of the question as to whether an alleged release is in fact invalid because of duress exerted in obtaining the release.

Mr. Justice CARDOZO delivered the opinion of the Court.

The question is whether in the circumstances here exhibited the validity of a release pleaded by a defendant as a bar to a cause of action at law is triable in equity.

Plaintiff, respondent in this court, is a Massachusetts corporation, once known as Raytheon Manufacturing Company, now known as Raytheon, Inc. It sues for the benefit of Raytheon Manufacturing Company, a Delaware corporation, which by agreement is to receive the fruits of a recovery. The cause of action is under the anti-trust laws for treble the damages suffered by the plaintiff through a combination and monopoly in restraint of trade and commerce. 15 U. S. C., § 1, 2, 14, 15. The defendant, petitioner in this court, pleads as one of its defenses that after the cause of action had arisen the plaintiff without duress and for a valuable consideration signed and delivered to the defendant a general release under seal.

At this point there is need to recur to the allegations of the complaint. From them it appears that the defendant's monopoly became complete by the early part of 1928. The plaintiff's business had then been destroyed to its damage in excess of $3,000,000. "Wholly because of this destruction and of the illegal duress" imposed by the monopoly, the plaintiff and the Delaware corporation were compelled to seek and accept a license from the defendant and to execute a release. The complaint does not state whether the document was sealed. "The illegal duress aforesaid by the defendant rendered said release void, and the plaintiff has never executed a valid release of said claim." Moreover, there was an agreement upon "the execution of the void release" that its effect in stated contingencies was to be subject to exceptions. The release was not to be pleaded as a bar if there was "pecuniary recognition" by the defendant of the rights of other claimants. Such "pecuniary recognition" there has been to the extent of $1,600,000, with the result that plaintiff may recover within that limit, even if not beyond. All this appears from the complaint with many amplifying statements unimportant here and now.

The issues being thus defined, the defendant moved upon the pleadings to transfer the case to equity for a preliminary hearing upon the validity of the release. This motion was granted against the plaintiff's opposition. Thereafter plaintiff moved to vacate or supersede the transfer, disclaiming "any right or remedy in this case because of duress, to be relieved from such operation as said release would have at law had there been no duress."* This motion was denied. Thereafter plaintiff moved for a final decree dismissing it from equity, and reiterated its disclaimer of any right or remedy not belonging to it at law. This motion also was denied. At the same time a decree was entered at the instance of the defendant adjudging that the release as set forth in the defendant's answer was "valid and binding," and sending the case back to law for further proceedings. From the decree and the supporting orders there was an appeal by the plaintiff to the Circuit Court of Appeals for the First Circuit, where the decree and orders were reversed. 76 F. (2d) 943. The opinion covers a wide range. It considers the distinction between fraud in the "factum" and fraud in the "inducement" as affecting the power of a court of law to nullify a release not otherwise illegal, and the distinction for the same purpose between sealed and unsealed instruments. It suggests, without deciding, that the presence or absence of a seal, whatever significance may have attached thereto of old, has now ceased to be important. In the end it holds, however, that the release signed by the plaintiff was so connected with the unlawful combination and monopoly as to be inoperative at law, irrespective of the possibility of avoiding it in equity. A writ of certiorari issued to resolve a claim of conflict with decisions of this court.

The answer with its plea in bar will be searched in vain for the suggestion of an

*For greater certainty we add the next succeeding paragraph:

"Following this disclaimer, the issue, as to duress, for trial is whether the purported release which was obtained by the defendant from the plaintiff was originally obtained in fact by the duress of a power obtained by the defendant by unlawfully restraining interstate trade and substantially lessening competition therein by contract, combination or conspiracy or otherwise or by monopolizing or attempting to monopolize interstate trade in violation of Code of Laws of the United States, Title 15, Chapter 1, sections 1, 2 and 14, or any of them, and if so whether a court of law, not equity, of the United States will adjudge originally valid a release so obtained, notwithstanding such duress."

equitable defense. A release under seal is a good defense at law, unless its effect is overcome by new matter in avoidance. This will happen, for illustration, when it is so much a part of an illegal transaction as to be void in its inception. If it is subject to that taint, a court of law is competent to put it out of the way. We assume that a like competence exists in other circumstances. True there are times when a release, unassailable at law, is voidable in equity, and in equity only. If the plaintiff were demanding relief upon that basis, the equitable issue would have to be disposed of at the beginning. *American Mills Co. v. American Surety Co.*, 260 U. S. 360, 363; *Liberty Oil Co. v. Condon National Bank*, 260 U. S. 235, 242; *Enelow v. New York Life Insurance Co.*, 293 U. S. 379, 383; *Adamos v. New York Life Insurance Co.*, 293 U. S. 386. With the parties so arrayed, the situation would be the same as if a bill in equity had been filed to set aside the release, the suitor thus removing a bar to a recovery. *Enelow v. New York Life Insurance Co., supra*, p. 382. But the plaintiff disclaims any title to relief upon that basis. It insists that the release is void at law on one or other of two grounds, either because not sealed by the maker, or because tainted with the same illegality as the illegal combination. It concedes here, as it did in the District Court, that if unable to prevail at law, it is unable to prevail anywhere. Before the days of equitable defenses no one would have insisted that a suitor who refused to file a bill in chancery could be sent there against his will. The only penalty for refusing to go would be the loss of any remedy peculiar to a court of equity. There is no other penalty now after the reforms of the Judicial Code. The defendant, setting up a legal defense, the bar of a release, would have us force upon the plaintiff an equitable replication which the plaintiff disavows. Accepting the disavowal, a court of equity must decline at this stage to adjudicate the validity of the release or its effect upon the parties, leaving that issue along with others to adjudication at law.

In thus delimiting the issue we delimit at the same time the scope of our decision. We do not attempt to say whether the release will collapse upon the showing of an illegal combination or will retain an independent life. That is matter for the trial at law, where the bond between monopoly and surrender can be shown with certainty and fulness. Till then it will be best to put aside as premature not a little that is said in the opinion of the court below. Enough for present purposes that there are issues triable at law, and none triable in equity. We leave our ruling there.

The decree of the Circuit Court of Appeals is accordingly *affirmed.*

[¶ 55,093] Fox Film Corp'n v. A. B. Muller.

Supreme Court of the United States. Decided December 9, 1935.

A writ of certiorari to the Supreme Court of Minnesota is dismissed for want of jurisdiction. In a suit for breach of contract, the suit was dismissed in the State Court on the ground that the contract contained an arbitration clause which was itself invalid and rendered the entire contract invalid. The Supreme Court of the United States holds that its jurisdiction fails as this non-Federal ground is adequate to support the judgment, even though the question of the validity of the contract under the Federal Anti-Trust Law is also involved.

On Writ of Certiorari to the Supreme Court of the State of Minnesota.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

This is an action brought in a Minnesota state court of first instance by the Film Corporation against Muller, to recover damages for an alleged breach of two contracts by which Muller was licensed to exhibit certain moving-picture films belonging to the corporation. Muller answered, setting up the invalidity of the contracts under the Sherman Anti-trust Act. It was and is agreed that these contracts are substantially the same as the one involved in *United States v. Paramount Famous Lasky Corp., et al.*, 34 F. (2d) 984 (aff'd 282 U. S. 30); that petitioner was one of the defendants in that action; and that the "arbitration clause," paragraph 18 of each of the contracts sued upon, is the same as that held in that case to be invalid. In view of the disposition which we are to make of this writ, it is not necessary to set forth the terms of the arbitration clause or the other provisions of the contract.

The court of first instance held that each

contract sued upon violated the Sherman Anti-trust Act, and dismissed the action. In a supplemental opinion that court put its decision upon the grounds, first, that the arbitration plan is so connected with the remainder of the contract that the entire contract is tainted, and, second, that the contract violates the Sherman Anti-trust law. The state supreme court affirmed. 192 Minn. 212. We granted certiorari, 293 U. S. 550; but, when the case was called for argument, it appeared that no final judgment had been entered and the writ was dismissed as improvidently granted. 294 U. S. 696. The case was then remanded to the state supreme court; and, the judgment having been made final, and again affirmed by the state supreme court on the authority of its previous opinion, — Minn. —, we allowed the present writ. 295 U. S. —.

In its opinion, the state supreme court, after a statement of the case, said (192 Minn. at p. 214):

"The question presented on this appeal is whether the arbitration clause is severable from the contract, leaving the remainder of the contract enforceable, or not severable, permeating and tainting the whole contract with illegality and making it void."

That court then proceeded to refer to and discuss a number of decisions of state and federal courts, some of which took the view that the arbitration clause was severable, and others that it was not severable, from the remainder of the contract. After reviewing the opinion and decree of the federal district court in the *Paramount* case, the lower court reached the conclusion that the holding of the federal court was that the entire contract was illegal; and upon that view and upon what it conceived to be the weight of authority, held the arbitration plan was inseparable from the other provisions of the contract. Whether this conclusion was right or wrong we need not determine. It is enough that it is, at least, not without fair support.

Respondent contends that the question of severability was alone decided and that no federal question was determined by the lower court. This contention petitioner challenges, and asserts that a federal question was involved and decided. We do not attempt to settle the dispute; but, assuming for present purposes only that petitioner's view is the correct one, the case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. This rule had become firmly fixed at least as early as *Klinger v. State of Missouri*, 13 Wall. 257, 263, and has been reiterated in a long line of cases since that time. It is enough to cite, in addition to the *Klinger* case, the following: *Enterprise Irrig. Dist. v. Canal Co.*, 243 U. S. 157, 163-165; *Petrie v. Nampa &c. Irrig. Dist.*, 248 U. S. 154, 157; *McCoy v. Shaw*, 277 U. S. 302; *Eustis v. Bolles*, 150 U. S. 361.

Whether the provisions of a contract are non-severable, so that if one be held invalid the others must fall with it, is clearly a question of general and not of federal law. The invalidity of the arbitration clause which the present contracts embody is conceded. It was held invalid by the federal district court in the *Paramount* case, and its judgment was affirmed here. The question, therefore, was foreclosed; and was not the subject of controversy in the state courts. In that situation, the primary question to be determined by the court below was whether the concededly invalid clause was separable from the other provisions of the contract. The ruling of the state supreme court that it was not, is sufficient to conclude the case without regard to the determination, if, in fact, any was made, in respect of the federal question. It follows that the non-federal ground is adequate to sustain the judgment.

The rule announced in *Enterprise Irrig. Dist. v. Canal Co., supra,* and other cases, to the effect that our jurisdiction attaches where the non-federal ground is so interwoven with the other as not to be an independent matter, does not apply. The construction put upon the contracts did not constitute a preliminary step which simply had the effect of bringing forward for determination the federal question, but was a decision which automatically took the federal question out of the case if otherwise it would be there. The non-federal question in respect of the construction of the contracts and the federal question in respect of their validity under the Anti-trust Act were clearly independent of one another. See *Allen v. Southern Pacific Railroad Co.*, 173 U. S. 479, 489-492. The case, in effect, was disposed of before the federal question said to be involved was reached. *Chouteau v. Gibson*, 111 U. S. 200; *Chapman v. Goodnow*, 123 U. S. 540, 548. A decision of that question then became unnecessary; and whether it was decided or not, our want of jurisdiction is clear.

Writ dismissed for want of jurisdiction.

The Chief Justice took no part in the consideration or decision of this case.

[¶ 55,094] Federal Trade Commission v. Ward I. Miller, Trading as Amber-Ita.

United States Circuit Court of Appeals, Sixth Circuit. December 3, 1935.

Respondent is ordered to cease and desist from representing that the use of his product, Amber-Ita, in conjunction with diet, constitutes a safe, efficacious or proper treatment for diabetes.

Affirming Federal Trade Commission Order to cease and desist No. 2103.

Decree

MOORMAN, SIMONS and ALLEN, JJ.: The Federal Trade Commission, Petitioner herein, having filed with this Court on, to-wit, October 21, 1935, its application for the enforcement of an order to cease and desist issued by it against the Respondent, under date of June 12, 1934, under the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes" (38 Stat. 719, 15 U. S. C. A. Sec. 45); and said Petitioner, having also certified and filed herein, as required by law, a transcript of the entire record in the proceeding lately pending before it, in which said order to cease and desist was entered, including all the testimony taken and the report of said Petitioner; and Respondent having subsequently filed his answer to said application for enforcement, in which answer Respondent stated he was not willing to contest said application for enforcement or the proceedings based thereon, and in which answer said Respondent consented that this Court might, upon said application and Respondent's answer thereto, and upon the pleadings, testimony, and proceedings set forth in the transcript aforesaid, make and enter its decree affirming said order to cease and desist and commanding Respondent, his agents, employees and representatives to comply therewith—

Now, therefore, it is hereby ordered, adjudged and decreed, that said order to cease and desist, issued by the Federal Trade Commission, Petitioner herein, under date of June 12, 1934, be and the same hereby is affirmed.

And it is hereby further ordered, adjudged and decreed, that the Respondent, Ward J. Miller, his agents, employees and representatives, in connection with the advertising, offering for sale, and sale in interstate commerce, or in the District of Columbia, of the commodity Amber-Ita, or any other product of the same or substantially the same ingredients or compound, cease and desist from representing in any manner, including by or through the use of testimonials or endorsements, that the use of Amber-Ita in conjunction with diet, or otherwise, constitutes a safe, efficacious or proper treatment for diabetes, or that it will cure or aid in the cure of diabetes, or remove or relieve the symptoms thereof, or that it has any thereapeutic value whatever in the treatment of diabetes, or that it is a proper tonic to be used by those afflicted with diabetes.

And it is hereby further ordered, adjudged and decreed, that the Respondent, Ward J. Miller, shall, within sixty (60) days after the service upon him of a copy of this decree, file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which he has complied with this decree.

By the Court:

(Signed) CHAS. H. MOORMAN, United States Circuit Judge.

[¶ 55,095] Fairyfoot Products Company v. Federal Trade Commission.

United States Circuit Court of Appeals, Seventh Circuit. December 23, 1935.

Upon petition of respondent for review, the court affirms a Federal Trade Commission order to cease and desist from misrepresenting the efficacy of its product, a treatment for bunions.

Affirming Federal Trade Complaint No. 2178.

Before EVANS and ALSCHULER, *Circuit Judges*, and STONE, *District Judge*.

ALSCHULER, *Circuit Judge*. Petitioner seeks review of a cease and desist order[1] of the Federal Trade Commission upon its holding that petitioner had transgressed the Federal Trade Commission Act by its unfair competition in the advertising of a bunion plaster.

There is no question but that petitioner, in the marketing in interstate commerce of its bunion plaster, had employed the advertising methods condemned by the Commission's order. Petitioner maintains, however, that this matter was not properly objectionable, but was largely justified by the facts, and that where exaggeration appeared it was only such "puffing" of the article as is not violative of the law. Petitioner further contends, and the evidence fairly establishes, that long prior to the filing of the Commission's complaint petitioner had been informed by the Commission that the advertising matter was objectionable, and was asked to refrain from further employment of it; that thereupon petitioner modified its advertisements by eliminating the alleged objectionable features, destroying its plates which contained them, and preparing new advertising matter which was submitted to the Commission and was thereafter used; and that petitioner entered into an obligation to the Commission that the alleged objectionable matter would not again be, and that it was not thereafter, employed; that it was the practice of the Commission in such cases to accept this assurance, and not begin any proceeding based on the practices objected to which had been in good faith abandoned and were not thereafter renewed; that for over two years next preceding the commencement of the proceeding against the petitioner the matters called to its attention by the Commission as objectionable had been entirely eliminated, and were not used; that nevertheless, contrary to the practice of the Commission, the proceeding against petitioner was begun, predicated entirely upon the advertising matter which had long been discontinued; and that the findings of the Commission and its "cease and desist" order were based wholly upon the abandoned advertising matter.

That petitioner's plaster has virtue may, for the purposes hereof, be conceded. Indeed, it would be quite unreasonable to assume that one putting out a purported remedy for an affliction would not employ some ingredients or means calculated to benefit some cases at some stage. But this would not justify such sweeping claims as the condemned items of this advertising matter disclose, which were evidently intended to induce in the public mind the belief that here was an absolute and unfailing panacea for bunions of all kinds and degrees.

Just where lies the line between "puffing," which is not unlawful and unwarranted, and misleading representations in advertising, is often very difficult of ascertainment. But in our judgment this case does not present such embarrassment, since the advertising here condemned is well beyond any "puffing" indulgence.

We are satisfied that the record discloses substantial evidence to support the Commission's findings that the condemned advertising matter constituted unfair trade competition. In general, where the Commission's findings are thus supported, its order properly predicated thereon may not be disturbed by the courts. 15 U. S. C. A. § 45; *Federal Trade Comm. v. Algoma Lumber Co.*, 291 U. S. 67; *Federal Trade Comm. v. Pacific States Paper Trade Assn.*, 273 U. S. 52; *Federal Trade Comm. v. Winsted Hosiery Co.*, 258 U. S. 483.

It seems that after the Commission first notified petitioner of the asserted impropriety in the advertising matter, petitioner, while maintaining the propriety of its advertising, expressed a willingness to comply with the Commission's wishes in the matter; and thereafter there was sent from the Commission to petitioner a form to be filled out, which embodied an undertaking to discontinue and not renew the methods of competition objected to as unfair. This form petitioner filled out and signed and forwarded to the Commission.

[1] It is Now Ordered that the respondent, Fairyfoot Products Company, its officers, agents and employees, forthwith cease and desist from representing in advertising matter, circular letters, by means of radio broadcast, or otherwise, in or in connection with selling or offering for sale in interstate commerce, its device or preparation known as "Fairyfoot" bunion remedy treatment:

"That the treatment is approved by leading physicians and surgeons; that by the use of Fairyfoot bunions are dissolved, pain is stopped instantly, or almost instantly, and permanent relief follows; the foot again resumes its natural appearance and shape; bunion suffering is ended completely, the normal functions are stimulated; the absence of irritation and the continuous massage of the plaster plus the special 'Fairyfoot' formula gradually reduces the bunion hump; that 'Fairyfoot' gently dissolves the swelling caused by inflammation and should restore the foot to its normal appearance; it brings sure and certain relief from bunion suffering and the user can know the pleasure of bunion-free feet; and cease and desist from representing in any other or similar manner or words that its said device or preparation works a cure for, or gives permanent relief from, bunions, or attribute to it or its medicinal formula any result or effect other than that which may be derived from a mechanical device that relieves the pressure or irritation of the shoe at the affected part and temporarily relieves pain."

Probably this would have ended the matter but for the communication which petitioner sent the Commission with the executed form, stating:

"If within six months from date any competitor publishes or uses in any form of printed matter words or phrases such as we have been barred from using, or any representations or statements equivalent thereto, in form or substance, we shall then feel at full liberty to resume any and all part of such phrases or words as are contained in the stipulation."

The Commission made no reply to this communication, but about two years later filed the complaint. Thereafter, in replying to petitioner's contention that the objectionable advertising had been long and permanently discontinued, and an undertaking to that effect sent to the Commission, it was stated to petitioner on behalf of the Commission:

"This condition made the acceptance of your stipulation impossible and the Commission declined to approve it, and then ordered that the complaint against you be issued and served."

While it would have been in line with good practice and gracious conduct for the Commission to notify petitioner that no such conditional stipulation could be or would be accepted, we are of the view that the imposition of the condition neutralized the stipulation as an undertaking to discontinue the alleged unfair trade practices. Besides, it has been often held that the mere discontinuance of an unfair competitive practice cannot serve to bar a "cease and desist" order based on that discontinued practice, particularly where there is no definite assurance that it will not be renewed. *Federal Trade Comm. v. Wallace,* 75 F. (2d) 733; *Federal Trade Comm. v. Good-Grape Co.,* 45 F. (2d) 70; *Lighthouse Rug Co. v. Federal Trade Comm.,* 35 F. (2d) 163; *Arkansas Wholesale Grocers' Assn. v. Federal Trade Comm.,* 18 F. (2d) 866; *Moir v. Federal Trade Comm.,* 12 F. (2d) 22.

It is contended for petitioner that all its sales were made upon the stipulation that if after seven days' trial the customer is not satisfied with the remedy he may return the unused portion of it and the whole purchase price will be unconditionally refunded, and that this of itself indicates the absence of unfair trade practice. The unfairness alleged is not in any sale or sales, but in competition in the trade. If without any refund offer the methods to induce purchase of the articles are unfairly competitive, it is immaterial what the seller may propose to do in case the customer becomes dissatisfied. The unfairness, if any, lies in the methods of securing the order as against competitors, regardless of what thereafter may happen. In *Harrison v. United States,* 200 Fed. 662, which petitioner cites with evident reliance, no such question was involved. In that case there were indictments for using the mails in furtherance of a scheme to defraud in the sale of washing machines and vacuum cleaners. It was held that a bona fide offer to refund in case of a buyer's dissatisfaction would have important and possibly controlling bearing upon the question of fraudulent scheme. But no question of fraud is here involved. Indeed, a given unfair competitive practice may exist even if the one accused of the practice is in entire good faith in its employment. *Federal Trade Comm. v. Algoma Lumber Co., supra,* p. 79; *Federal Trade Comm. v. Balme,* 23 F. (2d) 615.

While the Commission's findings whereon its order herein is predicated are phrased in the present as well as in the past tense, we do not understand that these findings to any extent impugn or condemn the advertising matter employed by petitioner after its discontinuance of the advertising matter first complained of; nor that the order under review includes within its scope any of petitioner's advertising matter used after such discontinuance; and it is upon such construction of the order that we conclude the order is in this respect, as well as otherwise, not objectionable.

The order of the Commission is

Affirmed.

[¶ 55,096] In the Matter of Louis Leavitt.

United States Circuit Court of Appeals, Second Circuit, December 24, 1935.

A fine of $1,000 is imposed for contempt of a decree affirming a Federal Trade Commission cease and desist order.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 24th day of December, one thousand nine hundred and thirty-five.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

A motion having been made herein by counsel for the Federal Trade Commission to punish the above named Louis Leavitt for contempt of the decree of this Court entered December 16, 1926, in a proceeding entitled *"Louis Leavitt, petitioner, v. Federal Trade Commission, respondent,"* to review an order of the Federal Trade Commission theretofore issued against Louis Leavitt.

Upon consideration thereof the Court hereby orders that said Louis Leavitt pay one thousand dollars ($1,000.00) fine and that if the same be not paid within ten days from the date of this order, said Louis Leavitt be committed to the County Jail of the County of New York, in the State of New York, and confined therein until the same be paid.

Wm. Parkin, Clerk.

[¶ 55,097] Vitagraph, Inc., RKO Distributing Corporation, Paramount Pictures Distributing Corporation, Metro-Goldwyn-Mayer Distributing Corporation, Fox Films Corporation, United Artists Corporation v. Harry Perelman and Louis Perelman.

United States Circuit Court of Appeals, for the Third Circuit. Decided January 16, 1936.

Appeal from the United States District Court for the Eastern District of Pennsylvania.

The defendant moving picture producers and distributors are held to have violated Section 1 of the Sherman Act when they prohibited moving picture exhibitors who leased films from them from exhibiting double features.

Opinion

Before Buffington, Davis and Thompson, Circuit Judges.

Buffington, Circuit Judge. This is an appeal from a decree of the District Court in a suit in equity under sections 12 and 16 of the Clayton Act for an injunction to restrain violations of sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act. The District Court held that the appellants, hereinafter called defendants, as they were below, had violated certain provisions of those acts and entered a decree restraining them from further violations.

The appellees, Harry Perelman and Louis Perelman, hereinafter called plaintiffs, are the owners and operators of two motion picture theatres in Philadelphia.

The defendants, Vitagraph, Inc., RKO Distributing Corporation, Paramount Pictures Distributing Corporation, Metro-Goldwyn-Mayer Distributing Corporation, United Artists Corporation, and Fox Films Corporation, are distributors of motion pictures in interstate commerce. The Fox Films Corporation is the only one of the defendants who also produces motion pictures

Motion pictures are exhibited either in theatres which are controlled in some fashion by producing companies or their subsidiaries or in theatres operated by persons who are not connected with producers or their subsidiaries such as the two theatres owned and operated by the plaintiffs. The first group of exhibitors is called "affiliated theatres" and the second "independent theatres."

There are a number of affiliated theatres in Philadelphia. With their connections, they are able to display the earliest exhibitions of motion pictures released by the largest producers through their distributors. Naturally, this gives to them a considerable advantage.

Theatres which are operated by persons who lack the connections or resources to display "first run" motion pictures are able to exist only by offering the public something other than novelty. A common means of attracting audiences has been to offer an exhibition of two full length motion pictures at one performance and for one admission.

The group of producers which the defendants represent furnish considerably more than half of all the motion pictures exhibited in the United States. The remainder of the pictures are produced by a few other large producers, not defendants here, and a group of small companies, sometimes called "independent" or "minor" producers.

The independent theatres are required by necessity to purchase motion pictures from the defendants. They would be unable to remain in business without offering such exhibitions and the defendants and their connections derive a large share of their income from these theatres.

The independent theatres, including the plaintiffs, purchase motion pictures for the purpose of exhibition from the major producers or their distributors by contract for a period of time in anticipation of their needs. The method used is known to the industry as "block booking." At the time the contracts are made, the motion pictures are not identified, the contracts simply call for a supply of films to fill the number of exhibitions anticipated.

In the case of the plaintiffs, the contracts with the defendants contain a clause in which the plaintiffs agree not to display another full length motion picture or feature with the one supplied by the contract. The clauses prohibiting double featuring are worded differently but are contained in one form or another in the plaintiffs' contracts with all of the defendants. The following clauses appear to be typical of those used:

"Exhibitor agrees not to exhibit any other pictures of feature length."

"The exhibitor agrees not to exhibit any of the feature photoplays licensed for exhibition hereunder at the same performance with any other photoplay of feature length, that is, as part of a double feature program; that upon violation hereof distributor shall have the right to terminate this agreement and recover from the exhibitor as damages for such violation the license fee payable in respect of all photoplays not theretofore exhibited hereunder."

"Exhibitor agrees not to exhibit any of the photoplays licensed for exhibition hereunder at the same performance with any other photoplay of feature length. That is as part of a double feature program and that upon violation hereof distributor shall have the right to change or modify the run, availability and/or protection herein provided for."

The plaintiffs base their suit on the clauses in their contracts prohibiting double featuring.

The District Court found as facts that in order to obtain feature motion pictures which are necessary to the continued existence of the plaintiffs and other independent theatres, they must sign the contracts in the form offered by the defendants, that they cannot survive by exhibiting features produced solely by minor producers; that the double feature clauses cause such independent theatres to purchase fewer feature films and lessens the production of such films by minor or independent producers; that double featuring increases the production of full length films.

The court further found as facts that the prohibiting of double featuring tends to create a monopoly in the production and distribution of pictures in the defendants and their affiliates and connections in the motion picture industry; that it tends to lessen competition by restricting such independent theatres from purchasing from the defendants' competitors; that the restrictive clauses are the result of an agreement among the defendants and the other major interests in the industry; and that the insertion of the restrictive clauses in the contracts is the result of a combination and conspiracy among the defendants and other major companies in the industry.

The court concluded as a matter of law that the restrictive double feature clauses were inserted in their contracts with the plaintiffs as the result of a combination and conspiracy in restraint of trade and commerce among the several states, and that the combination or conspiracy lessens competition and tends to create a monopoly of interstate commerce and trade, and that by placing such clauses in the contracts, the defendants have violated section 1 of the Sherman Act and section 3 of the Clayton Act and that the plaintiffs are entitled to an injunction. These sections provide as follows:

Section 1 of the Sherman Act.

"Section 1. Trusts, etc., in restraint of trade illegal; penalty. Every contract, combination in the

form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court." (July 2, 1890, c. 647 Sec. 1, 26 Stat. 209.) 15 U. S. C. A. 1.

Section 3 of the Clayton Act.

"14. Sale, etc., on agreement not to use goods of Competitor. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, * * *, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. (Oct. 15, 1914, 323 Sec. 3, 38 Stat. 731.)" 15 U. S. C. A. 14.

The defendants contend that there is no evidence of a combination or conspiracy among the defendants concerning the double feature clauses contained in the plaintiffs' contracts and that if the evidence supported such a finding, the restrictive clauses constitute neither a violation of the Sherman Act nor of the Clayton Act.

The first question is whether or not the defendants have as a fact combined and conspired to prohibit the exhibition of double features. We have no power to disturb the finding of the District Court if there is any substantial evidence to support it.

It is admitted that double featuring has been a serious problem in the industry. In some sections of the country it is a common practice in motion picture theatres. In certain urban districts, small theatres generally independently owned have resorted to the practice to enable them to compete with the larger, more luxurious theatres which enjoy the privileges of exhibiting first run motion pictures and other attractions. Without enlarging on that condition in the industry, a great many implications immediately arise.

The testimony bears them out despite the insistence of the defendants by a greater number of witnesses that they have neither combined, nor conspired, nor agreed to destroy the practice of exhibiting double features.

There is testimony to the following effect:

The defendants are connected with the strongest interests of the industry. They distribute more than half of the annual production in which the artists who command the largest audiences are displayed. Their productions are the most comprehensive and pleasing. While they compete among themselves, they have a common interest in confronting the minor or independent producers who lack the resources to manufacture exhibitions on their scale. The independent theatres require their productions in order to continue in business. But to improve their business and to permit them in some fashion, other than by offering lower prices of admission, to carry on in the face of the de luxe theatres, they must exhibit double features. The independent theatres generally purchase the second full length film from the independent producer but they are prohibited from exhibiting double features, as in the case of the plaintiffs, by their contracts with the major producers. Thus, they purchase less films from the independent producers.

With such a situation existing in the industry, one might logically be struck with the idea that it is more than mere coincidence that the defendants who represent a large majority of the major producers are in unanimity in prohibiting double features in their contracts. The fact that this unanimity of purpose is not carried out formally in the same language does not destroy the inference. Coincidence in form as well as purpose might have been fatal; while here the plaintiffs are required to bring forward other evidence to establish their case.

The finding of the District Court that a combination and conspiracy existed among the defendants is binding upon us in view of the testimony of the plaintiffs' witness, Chadwick, an independent producer, and Kuykendahl, the president of the largest organization of independent theatres.

Chadwick testified as to the development and growth of the double featuring which led to the prohibition of the practice by the defendants in their California contracts in 1930. That resulted in a consent decree to the effect that the defendants had entered into a conspiracy violating the Sherman Act. Dissatisfaction with the injunction caused the industry in 1932 to agree voluntarily to discontinue double featuring. On May 1, 1934, at a meeting of exhibitors, producers and distributors in Los Angeles at which the defendants were represented, an executive of one of the defendants purported to speak on behalf of the defendants and stated that a method had been devised to stop the exhibition of double features and that the distributors could take and had taken steps to remove the menace. He further stated to the meeting that the practice had been stopped in Chicago and if the theatres wanted features, they must use "our features and not use double features."

Kuykendahl, a witness for the defendant, testified how he and the association which

he represented repeatedly urged the defendants to stop double featuring and that they agreed to cooperate with his association to that end.

The testimony as to the consent decree was not admitted as, or intended to be, prima facie evidence against the defendants in this case, but was simply admitted as a fact in showing the activity of the defendants to prevent double featuring and as such the testimony was admissible.

The defendants argue that Chadwick's testimony concerning the statements made at the meeting in May, 1934, by the executive who purported to represent the defendants there present was inadmissible. Their contention is based on the rule that agency cannot be proved by the declarations of an agent. That is so, but the speaker was the president of the distributors' organization and he was introduced in the presence of the defendants to speak and did speak on their behalf. Furthermore this is not a question of agency, but was simply a statement by one of the conspirators in the presence of the other conspirators of what they had done and intended to do to stop double featuring.

The defendants point to the fact that a number of their witnesses who were either officers or managing agents in the Philadelphia district of one or another of the defendants, testified to the effect that there was no conspiracy or concerted action between the defendants in reference to the double feature provisions of the contract. They further testified that in every case, such provisions were the result of independent judgment.

As we have stated heretofore, we cannot retry this case for the defendants. The authorities they cite are inapplicable here. *Ariasi v. Orient Insurance Company*, 50 Fed. (2d) 548, (C. C. A. 9); *Arnall Mills v. Smallwood*, 68 Fed. (2d) 57 (C. C. A. 5); *Pennsylvania Railroad Company v. Chamberlain*, 288 U. S. 333. The District Court did not arbitrarily reject the defendant's testimony. It chose rather to accept as probable the plaintiffs' case which was built on a background of direct and circumstantial evidence. That is the right of the trial court.

The defendants pointed out that the plaintiffs argued that the testimony of the executives and the managers was inherently improbable because they testified that the defendants had not discussed the matter of double featuring with one another. The defendants go on to say:

"Everybody in the motion picture industry knew the rule laid down by the Supreme Court in the *Paramount* case. (*Paramount Famous Lasky Corporation v. United States, infra*) and every one of these large organizations understood that it must act in the formation of its policies according to its independent judgment and without conference or agreement with its competitors. This is the perfectly obvious reason why the men in the various defendant companies did not discuss this question of policy with each other, but acted on their own judgment."

That argument in itself has been seized upon, with some justification, by the plaintiffs to bring the defendants within the rule that a conspiracy may be made out without express words or writings but simply by working toward a common purpose through a tacit understanding or agreement. Thornton, On Combinations in Restraint of Trade, page 492 and the cases cited therein. The defendants might have refrained from discussing openly in conference the question of double featuring for the obvious reason of avoiding violations of the principles laid down in the *Paramount Famous Lasky Corporation v. United States*, 282 U. S. 30.

In that case, the Supreme Court held that an agreement of the ten competitors controlling 60 per cent of the motion picture industry to refuse to contract with exhibitors except on a standard form which provides for compulsory joint arbitration violated section 1 of the Sherman Act. The Court said therein:

"It may be that arbitration is well adapted to the needs of the motion picture industry; but when under the guise of arbitration parties enter into unusual arrangements which unreasonably suppress normal competition their action becomes illegal."

The second question is whether or not the restrictive double feature clauses in the defendants' contracts with the plaintiffs resulting from a combination or conspiracy between the defendants violate section 1 of the Sherman Act and section 3 of the Clayton Act.

Section 1 of the Sherman Act makes contracts, combinations and conspiracies in restraint of interstate trade or commerce illegal. Section 3 of the Clayton Act outlaws contracts in which a party agrees not to use the goods of a competitor.

In *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 359, the Court said:

"The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious

and destructive practices and to promote competition upon a sound basis. The decisions establish, said this Court in *Nash v. United States,* 229 U. S. 373, 376, 'that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.'"

The double feature clauses undoubtedly reduce the production of full length motion pictures. So great is the public demand for the defendants' films that independent theatres must exhibit them in order to stay in business. If they do exhibit features of one of the defendants they must agree not to display at the same time a feature of another producer. This naturally prevents exhibitors from purchasing films from producers who are in competition with the defendants and destroys the opportunity of those independent producers to produce and sell more films. The necessary and inevitable tendency of the conspiracy or combination is to produce a material and unreasonable restraint on interstate commerce. *Paramount Famous Lasky Corporation v. United States,* 282 U. S. 30.

Business necessity forces the exhibitors to buy from the defendants. It is true that they need not deal with the defendants if they do not wish to do so, but if they do not do so, they would be driven out of business. The effects of the double feature clauses naturally result in strengthening the position of the defendants and weakening that of the independent competitor.

The defendants contend that the double feature provisions were adopted for the best interests of the industry, their customers and the public and that the effects and motives of the defendants are important in determining whether or not there is an undue restraint of trade. For this, they rely upon the case of *Appalachian Coals, supra.*

In that case, the Supreme Court carefully considered evidence relating to the economic conditions existing in the bituminous coal industry to determine whether or not an agreement among coal producers to eliminate competitive and destructive practices was illegal. The court concluded that under the facts of that case, there was no undue restraint of competition and commerce and no violation of the Sherman Act. The court said that "the question under the Act is not simply whether the parties have restrained competition between themselves but as to the nature and effect of that restraint."

But the Court was emphatic in stating that good motives or intentions or benefits to the industry must give way to the law and if there is an undue restraint of commerce and impairment of fair competitive opportunities, the statute must be applied.

The Court did not intend that the *Appalachian Coals* case should change its interpretation of the anti-trust laws. The test laid down in *Nash v. United States,* 229 U. S. 373, 376, (quoted in the *Appalachian* case) has been restated, approved and applied time and again. *Maple Flooring Association v. United States,* 263 U. S. 403; *Paramount Famous Lasky Corporation v. United States,* 282 U. S. 30.

In this case the District Court found that the defendants had combined or conspired to outlaw the exhibition of full length motion pictures. The evidence of the conditions in the industry leads to the conclusion that the inclusion of those provisions in the contracts between the defendants and independent exhibitors seriously affects the exhibitors and the smaller producer. This tends to reduce production and stifle competition. Whether or not the defendants intended to suppress competition, we do not need to know; the fact is that their contracts operated to that effect.

It may also be said for the same reason that in practical effect, the restrictive clauses relating to the exhibition of double features result in contracts not to use the goods of competitors and that such clauses both substantially lessen competition from independent exhibitors and producers and tend to create a monopoly in the defendants or their connected interests. *United Shoe Machinery Company v. United States,* 258 U. S. 451.

The plaintiffs brought suit under sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act, but the District Court found that the defendants had violated only section 1 of the Sherman Act and section 3 of the Clayton Act. The proofs unquestionably show that the defendants violated section 1 of the Sherman Act which entitles plaintiffs to injunctive relief under section 16 of the Clayton Act. It becomes unnecessary to determine whether or not the defendants also violated section 2 of the Sherman Act. It may be that section 3 of the Clayton Act was also violated, but as there is some question as to the sufficiency of the pleadings to support such a finding, we do not determine that question here.

Warner Brothers Pictures, Inc., First National Pictures, Inc., and Paramount Publix Corporation were declared as parties in the bill of complaint in this case. They are producers outside of the jurisdiction of the trial court and were not served. While their names appeared in the caption on appeal, they were in fact not proper parties and consequently have been omitted from it.

The decree of the District Court is affirmed.

[¶ 55,098] Federal Trade Commission v. Hires Turner Glass Company.

United States Circuit Court of Appeals, for the Third Circuit. December 20, 1935.

Upon Application for Enforcement of an Order of The Federal Trade Commission.

On Petition for Modification of Judgment.

The section of the Federal Trade Commission Act which authorizes the Circuit Court of Appeals to enforce, set aside or modify orders of the Commission does not confer authority to make rulings as to what name, or names, comply with the cease and desist order prior to action thereon by the Commission.

Modifying the decision reported at ¶ 55,083, and the order of the Federal Trade Commission in Complaint No. 1985.

Opinion

Before DAVIS and THOMPSON, Circuit Judges.

THOMPSON, Circuit Judge. The Federal Trade Commission Act confers authority upon this court to enforce, set aside or modify orders of the Commission (15 U. S. C. A. 45), but, we think, does not confer authority upon the court to make rulings as to what name, or names, comply with the cease and desist order prior to action thereon by the Commission. If, however, the Commission's order is so comprehensive as to prevent respondent from using such designations for its mirrors as are accompanied by qualifying terms which clearly signify that its copper backing is not electrolytically applied, it may be modified to that extent.

The Commission's cease and desist order is accordingly modified by adding thereto the following:

"Provided, however, that the respondent may use such designations as are accompanied by qualifying terms which clearly signify that the copper backing on its mirrors is not electrolytically applied."

[¶ 55,099] United States of America v. Columbia Gas & Electric Corporation, Columbia Oil & Gasoline Corporation, George H. Howard, Philip G. Gossler, Charles A. Munroe, Thomas R. Weymouth, Thomas B. Gregory, Edward Reynolds, Jr., Burt R. Bay and John H. Hillman, Jr.

District Court of the United States for the District of Delaware.

A consent decree enjoins defendants from interfering with the production, transportation, sale or delivery of gas, and from holding stock in a certain gas corporation in contravention to the Anti-Trust laws, and one corporation is ordered to divest itself of stock in another.

Decree

This cause coming on to be heard this 29th day of January, 1936, and the several defendants having accepted service of process and having appeared and filed their answers to the Amended and Supplemental Petition herein, which latter has superseded the original Petition and is hereinafter referred to as the Petition;

And the petitioner and the defendants having filed a stipulation with the Clerk of the Court wherein and whereby they consent to the making and entering of this decree;

And it appearing that the petitioner alleges that the defendant Columbia Gas & Electric Corporation, through ownership by its affiliate Columbia Oil & Gasoline Corporation of various securities of Panhandle Eastern Pipe Line Company and otherwise, has interfered with, dominated and controlled the management and operation of said Panhandle Eastern Pipe Line Company with the purpose and effect of preventing competition, actual and potential, between said Panhandle Eastern Pipe Line Company and said Columbia Gas & Electric Corporation, and of monopolizing and attempting to monopolize interstate trade and commerce in natural gas in certain sections of the United States;

And it further appearing from said stipulation that the petitioner and the defendants have agreed that provision against domination or control, direct or indirect, in the affairs of Panhandle Eastern Pipe Line Company by the defendant Columbia Gas & Electric Corporation and the maintenance of said Panhandle Eastern Pipe

Line Company in a position of free and independent action in the production, transmission, sale and distribution of natural gas in competition with others constitutes the proper basis for the entry of this decree;

Now, Therefore, without taking any testimony or evidence and in accordance with such stipulation, it is hereby ordered, adjudged and decreed as follows:

I. That the Court has jurisdiction of the subject matter hereof and of all the parties hereto, with full power and authority to enter this decree; and that the petition states a cause of action under the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and the Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful resertains and monopolies, and for other purposes."

That the restrictions and injunctions herein shall apply not only with respect to the parties hereto and corporations mentioned herein but also to all persons, corporations, partnerships, associations or organizations acting, claiming or assuming to act for or on behalf of them or any of them; to their successors or assigns and any and all partnerships, corporations or individuals who may directly or indirectly acquire the ownership or control of the property, business, or assets (except securities of Panhandle Eastern) of said parties whether by merger, consolidation, reorganization or otherwise; and to the taking of action prohibited herein by indirection or by or through subsidiaries, affiliates, officers, directors, shareholders, agents, receivers, trustees, attorneys, employees, or otherwise, individually or collectively.

That the defendant Columbia Gas & Electric Corporation, a Delaware corporation hereinafter referred to as "Columbia Gas," is a holding company owning more than 50 subsidiary companies; that a substantial part of the business of said enterprise is the production, transmission, distribution and sale of natural and artificial gas;

That the defendant Columbia Oil & Gasoline Corporation, hereinafter referred to as "Columbia Oil," is a corporation of the State of Delaware organized to hold and operate oil and gasoline properties formerly owned by Columbia Gas and has not been and is not now engaged in the business of producing, transmitting, distributing and selling natural gas except that it owns certain securities of said Panhandle Eastern Pipe Line Company and all of the outstanding capital stock and certain indebtedness of Indiana Gas Transmission Corporation;

That Panhandle Eastern Pipe Line Company, hereinafter referred to as "Panhandle Eastern," is a corporation of the State of Delaware, owns and controls large gas producing areas in the Texas Panhandle and in Kansas and has constructed a natural gas pipe line from said producing areas through the States of Oklahoma, Kansas, Missouri, Illinois, and touching upon Indiana, for the purpose of transmitting, distributing and selling such natural gas;

That Panhandle Corporation is a corporation of the State of Maryland, and now owns stock and notes of Panhandle Eastern;

That the individual defendants named in the petition herein are citizens of the United States and have been either voting trustees of the common stock of Panhandle Eastern or officers or directors of said corporation, and with the exception of the defendants Burt R. Bay and John H. Hillman, Jr., have been officers or directors of Columbia Gas and Columbia Oil.

II. That the defendants be and they are hereby perpetually enjoined from exercising, or attempting, individually or collectively, directly or indirectly, to exercise any dominion or control over Panhandle Eastern and from restraining, or interfering in any manner with, the free and independent action of said Panhandle Eastern in the production, transportation, sale or delivery of natural gas to any person, corporation, community or section of the United States; from holding, acquiring, voting or in any manner acting as the owners, directly or indirectly, of the whole or any part of the stock, or other share capital, or bonds, property or assets of Panhandle Eastern or any other company, corporation, association or organization owning any substantial amount of its securities; and from participating in any way, directly or indirectly, or from exercising any control, direction, supervision, or influence, in the management or control of Panhandle Eastern; except

(a) That defendants may own stock in and obligations of Columbia Gas and Columbia Oil and be and exercise the lawful rights of directors or officers thereof;

(b) That defendants may own stock and obligations in Panhandle Corporation for, and pending, the dissolution of the latter corporation and the disposition of its interests in Panhandle Eastern as speedily as possible, in a manner not inconsistent with the provisions of this Section II and the purposes and further provisions of this decree; and defendant Hillman may continue to own 60,000 shares of stock he now holds in Missouri-Kansas Pipe Line Com-

pany so long as the voting rights appurtenant thereto are exercised independently of the other defendants herein and not in a manner inconsistent with the purposes and provisions of this decree;

(c) That Columbia Gas and defendant Hillman may own or acquire obligations, without present or potential voting rights, of said Panhandle Eastern, except that Columbia Gas is hereby enjoined and restrained in connection with enforcing any rights under said obligations with respect to principal, interest or sinking fund, from acquiring any of the pipe line or other physical assets of Panhandle Eastern;

(d) That Columbia Oil may own or acquire stock or obligations in Panhandle Eastern and exercise voting rights appurtenant thereto (and defendant Bay may be and exercise the lawful rights of an officer of Panhandle Eastern), subject to the further terms and provisions of this decree, but Columbia Gas is hereby perpetually enjoined and restrained from acquiring any interest in such stock, by operation of law, or in connection with enforcing any lien created through the present or future existence of any debt, whether funded or unfunded, of Columbia Oil to Columbia Gas, or otherwise;

(e) That, when Columbia Gas has effectively divested itself of all control, direct or indirect, legal or practical, of Panhandle Eastern by no longer owning stock of any class having present or potential voting rights in Columbia Oil, upon the approval of this Court Columbia Oil shall no longer be subject to the restrictive clauses of this Section II;

III. That Gano Dunn is hereby nominated, constituted and appointed trustee for the purposes and with the powers and duties set forth in this Section III;

That within 10 days after the entry of this decree Columbia Oil shall execute, and deposit with said trustee the agreements and offers executed by it in accordance with, its agreements set forth in Section V of the stipulation pursuant to which this decree is entered;

That within 10 days after the entry of this decree Columbia Oil shall transfer all of its stock now owned and thereafter all stock subsequently acquired in Panhandle Eastern, having present or potential voting rights, to said trustee to hold the legal title to said stock and to exercise all the rights and privileges incidental to the absolute ownership thereof upon the following terms and conditions:

(a) To vote said stock for the election of as many directors of Panhandle Eastern as the number of shares thereof may be entitled to elect; *Provided,* that one of the directors so elected shall be the trustee; and that the remainder shall be selected from among persons recommended by the beneficial owner of said stock, in conference and with the advice of the trustee, but not including any of the individual defendants herein or any one (except with the approval of the trustee and this Court) who after January 1, 1931, has been or hereafter becomes an officer, director, agent or employee of Columbia Gas; and that, as to the directors so selected, the trustee is empowered to remove and replace such directors with others of his own choosing upon his own motion, if in his judgment such action is necessary in the interest of Panhandle Eastern or for the effectuation of the purposes of this decree; subject however in this as well as in the exercise of all other powers to the authority of this Court upon the motion and showing of any party hereto, or upon its own motion, to restrain said trustee from abuses of sound discretion, in view of the purposes of this decree and the law under which it is entered, or in case said trustee does not act in good faith hereunder;

(b) To vote said stock upon all other questions and matters in which the stock is entitled to vote, as directed by the beneficial owners thereof, except when such directions are inconsistent with the purposes of this decree;

(c) To deposit for safe keeping the certificate for such stock with such bank or trust company as he may select and to issue, or arrange for the issuance, by such bank or trust company to the defendant Columbia Oil, of receipts for the stock so deposited in such form as the trustee may approve;

(d) To receive reasonable compensation, the amount thereof to be approved by this Court at not less than $15,000.00 per annum, for all services rendered by him as trustee, and to be reimbursed for any expenses incurred by him in the performance of his duties hereunder, upon quarterly accounts to this Court, which, when approved by the Court, shall be paid in equal shares by the defendants Columbia Gas and Columbia Oil;

(e) To pay over to Columbia Oil all dividends received upon said stock, except that dividends in the form of stock having present or potential voting rights shall be retained by the trustee subject to the same terms and conditions as the other shares held hereunder;

(f) To exercise all rights to subscribe to additional stock or other securities of Panhandle Eastern as Columbia Oil may direct;

(g) To report to this Court semi-annually; and to account for any action hereunder

only in proceedings in this Court, any further order of this Court entered upon notice to such trustee and to the parties hereto shall be full protection to him for any action taken pursuant thereto, and the trustee shall not be personally responsible for mistakes in judgment or mistakes of law or fact in the execution of his duties hereunder but only for lack of good faith;

That during the existence of the trust hereby created the trustee herein appointed shall be subject to removal by this Court in its discretion; and in the event of such removal or in the event of the death, resignation or inability to act of such trustee, his successor shall be appointed by this Court upon recommendation of the parties hereto;

That the trust hereby created shall be and remain in full force and effect until terminated with the approval of this Court when (1) Columbia Gas has effectively divested itself of all control, direct or indirect, legal or practical, of Panhandle Eastern by (a) no longer owning stock of any class having present or potential voting rights in Columbia Oil or (b) by Columbia Oil divesting itself of ownership of all stock of Panhandle Eastern; or when (2) under the circumstances then existing, the continuation of said trust is no longer essential or necessary in carrying out the purposes of this decree; *Provided,* that no such stock of Panhandle Eastern shall be divested by transfer to any competitor of Panhandle Eastern or without prior notice and full disclosure of the facts to petitioner.

IV. That the defendants be and they are hereby perpetually enjoined from restraining or interfering in any manner in the freedom of Panhandle Eastern to contract or to finance or arrange the financing of all contracts, extensions (including the proposed new line to Detroit, whether or not built and owned by it), repairs, maintenance, service, or improvements necessary in its business through or with any firm, person, or corporation with whom it may choose to deal (and to that end any such financial or contractual arrangements made by Panhandle Eastern to consummate its contract dated August 31, 1935, with the Detroit City Gas Company shall be subject to the approval of the trustee who shall receive, and consider the advisability of, alternative methods of financing from any responsible underwriter);

That if such contracts be made with or financial assistance be secured from Columbia Gas, such contracts may be made or financial assistance furnished only upon terms or conditions which do not in any way, directly or indirectly, presently or potentially, confer upon Columbia Gas any voting rights, control or participation in the management of Panhandle Eastern or confer any rights of ownership in the works or properties of Panhandle Eastern except as security for the investment; and in the event that Columbia Gas shall, with respect to any contract or any contractual rights of any kind whatsoever or any property held as security or used in connection with any contract, in any way prevent the free transportation, sale, and distribution of gas by Panhandle Eastern, then upon application to this Court or any court of competent jurisdiction Panhandle Eastern shall have the right (1) to the immediate appointment of a trustee to hold such contract rights or property subject to the purposes and provisions of this decree; (2) to immediate specific performance of any and all contracts with Columbia Gas; and (3) to immediate injunction, both temporary and final, as well as any other appropriate remedy at law or in equity, including any remedy hereunder.

V. That jurisdiction of this cause and of the parties hereto is retained for the purpose of giving full effect to this decree and for the enforcement of strict compliance herewith and the punishment of evasions hereof, and for the further purpose of making such other and further orders and decrees or taking such other action as may from time to time be necessary to the carrying out hereof; and that Panhandle Eastern, upon proper application, may become a party hereto for the limited purpose of enforcing the rights conferred by Section IV hereof.

Dated, Wilmington, Delaware, January 29, 1936.

John P. Nields,
United States District Judge.

[¶ 55,100] **Max Factor & Co., a corporation, and Sales Builders, Inc., a corporation, v. Clarence G. Kunsman.**

Supreme Court of the State of California. Filed February 28, 1936.

Section 1½ of the California Fair Trade Act is held constitutional by a four to two decision, and an order sustaining a demurrer to a complaint seeking to enjoin a noncontracting retailer from cutting prices of trade-marked cosmetics, is reversed.

The adoption by the California legislature of the Fair Trade Act is held to change its former economic policy of free competition under the anti-trust laws in order to recognize a manufacturer's property right in good will toward his trade-marked articles, and the Court holds that it is a legislative and not a judicial function to determine economic policy.

As the California Fair Trade Act is passed in exercise of the State's police power, and there is no constitutional right to own property free from regulation, the fact that the statute deprives a retailer of a right which he formerly possessed to sell goods at prices fixed by himself, is held not *per se* to brand the statute as unconstitutional.

Respondent urges that the legislature can only regulate prices as to articles affected with a public interest, but the Court holds that the Fair Trade Act does not aim primarily at regulating prices, but at protecting the property and contract rights of the manufacturer, producers, distributor and retailer. "Moreover, the statute does not attempt to regulate the price of any one article. It may be that when the legislature attempts to regulate the price of a particular commodity, in order to justify classifying that article differently from other commodities, its purchase and sale must affect the public interest. But here the legislation affects an entire class of articles, which class, as will later appear, is reasonably the subject of classification."

The *Doubleday Doran* case is distinguished in that there only a single contract was alleged, and that was between a publishing company and its subsidiary and amounted to a contract between themselves, and further, the publisher apparently sold to the price cutting retailer without attempting to contract with him as to resale prices. Here the distributor uniformly sold its products only to those retailers who contracted to observe its prices, and the price cutting retailer obtained the articles from some one else without the distributor's knowledge or consent.

This cause presents an attack upon the provisions of the "Fair Trade Act" adopted by the legislature in 1931 (Stats. 1931, p. 583; Deering's Gen. Laws, Act 8782) as amended in 1933 (Stats. 1933, p. 793 Deering's Gen. Laws. Act 8782).

Prior to the adoption of these provisions, the legislature adopted an act commonly known as the "Cartwright Act," in order to promote free competition in commerce, which, among other things, declares it to be unlawful for two or more persons to enter into any combination or contract by which they agree to establish the price of any commodity to the public or consumer, and declares any such combination or contract to be against public policy, and void. (Stats. 1907, p. 984, as amended by Stats. 1909, p. 593; Deering's Gen. Laws, Act 8702.) The Fair Trade Act departs widely from the restrictive provisions of the Cartwright Act, in that it provides (in section 1) that "no contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of California" by reason of any provision which may be contained in such contract, among others, (1) "that the buyer will not resell such commodity except at the price stipulated by the vendor"; and (2) "that the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee." This statute, as originally passed, limits its application to persons who voluntarily enter into such contracts with respect to such resale prices, thus apparently seeking to except such contracts from the application of accepted principles respecting com-

binations and monopolies restraining trade through price-fixing agreements. The amendment to the Fair Trade Act added in 1933, designated as section 1½, presents the crucial point of this case. It reads as follows:

"Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

These facts appear from the allegations of the complaint:

The plaintiff, Max Factor & Co., a Delaware corporation, engaged in the manufacture of cosmetics and toilet articles manufactured by it under certain adopted and registered trade-marks. These trade-marks have long been used in connection with the manufacture, sale and distribution of the cosmetics and toilet articles manufactured and sold by the corporation; that the corporation is the sole owner of the business and goodwill in the state of California and all the states in the United States connected with the distribution and sale of the articles associated with such trade-marks; that prior to the commencement of this action, Max Factor & Co. transferred and sold to the plaintiff Sales Builders, Inc., the exclusive right and privilege of distributing and selling in the states of the United States, including the state of California, the cosmetics and toilet articles then and thereafter manufactured by Max Factor & Co., and the goodwill pertaining thereto, with the right to use the trade-marks, and the sole right to sell and distribute the cosmetics and toilet articles in all these states. Plaintiff Sales Builders, Inc., has ever since been, and is, the sole owner of the exclusive right to sell and distribute in all of the states, including California, all of the cosmetics and toilet articles manufactured by the plaintiff Max Factor & Co., and associated with the use of the trade-marks adopted by Max Factor & Co.

The defendant is, and at the times mentioned has been, the owner, proprietor and operator of a retail drug store situated in the city of Beverly Hills in this state, and was, and now is, engaged in selling at retail to consumers of cosmetics, toilet articles and other merchandise.

For many years there has developed in the drug trade in California the practice of cutting prices, both wholesale and retail, of well-advertised commodities well known to the public, and sold and identified under distinctive trade-marks, brands and names. Such products have been, and are, offered by retail dealers at prices conspicuously lower than the marked or established prices of said commodities as so-called "leaders," for the purpose of creating the impression that other goods of which the prices are not so well known are sold at corresponding reductions, and that all articles dealt in by the particular dealer are sold by him at less than they could be obtained elsewhere. The stores in which these practices are prevalent have become known as "cut-rate drug stores." The complaint here sets out at some length matter relative to the fact that the practice of cutting known and established prices has engendered a condition by which other dealers were forced to meet the cut prices advertised by their competitors, one cut producing another in retaliation, so that ultimately, in a particular community, well-known articles identified by trade-marks, brands, and names with an established price are offered at prices cut to a joint which yields no profit, and in many cases represents a loss. Other alleged evils of the practice are set forth at length. It is also alleged that to remedy this evil the legislature of California has enacted the Fair Trade Act (*supra*), the constitutionality of which act is here sought to be established.

In order to protect itself against the alleged injuries and uneconomic practices described in the complaint, plaintiff Sales Builders, Inc., adopted a system of doing business, as set out in the complaint, under which contracts are entered into between the plaintiff and its wholesale jobbing distributors, and between plaintiff and retail druggists and other persons, firms, or corporations selling the Factor products in the state of California, by the terms of which contracts the distributors are obligated to sell these products only to retailers who will resell the same at specified prices, and who, in turn, have entered into a written contract with the plaintiff Sales Builders, Inc., to sell the Factor products at the specified prices. The prices fixed and established by plaintiff Sales Builders, Inc., in said contracts, it is alleged, are fair and reasonable, and no higher than is required to yield to distributers at wholesale and retail a reasonable compensation for their services. It is also alleged that, as known to defendant, practically all of the wholesale druggists in the state of California have executed these wholesale distributers' contracts, and practically all of the retail druggists in the state of California, including the prominent department stores dealing in cosmetics and toilet articles, have executed the retail distributers' contracts, and are observing and conforming with the terms of the contracts. Price-cutting on products of plaintiff Max Factor & Co. has ceased, and plaintiff Sales Builders, Inc., is enjoying, under the terms of the California Fair Trade Act, a reasonable profit from the sale of its goods, and immunity from destructive and uneconomic price-cutting. The distribution of its goods has been unobstructed, and its business has been greatly benefited.

However, the defendant, a retail distributer of plaintiffs' goods, is engaged in selling such goods at prices conspicuously lower than other retail dealers in the state of California, in many instances at less than the cost of the commodities to the defendant, with the result that other dealers are forced to meet defendant's price competition by offering plaintiffs' goods for sale at prices competitive with those quoted by defendant. Sales Builders, Inc., upon inauguration of its system of contracts heretofore referred to, tendered to defendant a contract and an opportunity to deal in plaintiffs' goods on the same terms offered to every other retail dealer in the commodity in the state of California. The defendant refused and declined to execute the contract or to conform to the system of distribution employed by Sales Builders, Inc., or to observe the sales price fixed in the contract.

The plaintiff Sales Builders, Inc., declined, and has continued to decline, to sell its commodities to the defendant unless and until the defendant enters into the tendered contract with plaintiffs. Defendant has proceeded, and is proceeding, to carry out the alleged unlawful and wrongful scheme, and, it is alleged, in so doing has been, and is, acting maliciously and without legal justification therefor. In pursuance and as part of the wrongful and unlawful plan and scheme, defendant, unbeknown to plaintiffs, has procured, and continues to procure, commodities manufactured by Max Factor & Co. bearing the trade-marks, brands and names of Max Factor & Co., and has sold, and is now selling, the commodities at prices less than the retail sales prices which are being sustained by substantially all of the retail dealers in cosmetics and toilet articles in the state of California. Defendant has been, and now is, engaged in informing retail dealers under contract with plaintiff Sales Builders, Inc., as well as the public generally, of defendant's intention to sell plaintiffs' goods at cut-rate prices, which act and the others in the complaint complained of are unduly influencing retail and wholesale distributers of Max Factor & Co.'s products; and the wholesale and retail distributers have complained that they will be compelled to cancel the contracts with plaintiff Sales Builders, Inc., and to sell the Max Factor & Co. products not in conformity with the terms of the contracts entered into by them, but at prices which will meet those announced by the defendant, and at which prices the defendant sells at retail the Max

Factor & Co. products. The result of such cancellation, it is claimed, will be the destruction of the business of plaintiffs and the goodwill pertaining thereto.

It is further alleged that the defendant threatens to, and will, unless restrained by judgment of court, continue to sell and dispose of the products of the plaintiff Max Factor & Co. at retail prices less than the retail sales prices regulated by plaintiffs, the continuance of which acts will produce great and irreparable injury to plaintiffs in that it will be extremely difficult, if not impossible, to ascertain the amount of damage that will afford plaintiffs adequate relief for the loss of sales and the destruction of business of plaintiffs and the goodwill pertaining thereto. For these reasons, plaintiffs seek equitable relief by way of injunction against the wrongs complained of.

To the complaint containing the foregoing allegations, defendant interposed a general demurrer, which the trial court sustained without leave to amend. Judgment was thereupon entered for the defendant, and the plaintiffs have appealed, presenting the single question: "Is section 1½, added to the Fair Trade Act of the state of California in 1933 (Stats. 1933, p. 793, supra), constitutional?"

The title of the Fair Trade Act as passed in 1931 indicates its purpose. It is as follows: "An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name." (Stats. 1931, p. 583.) In its entirety, the act aims at preventing price-cutting of articles sold under a trade or brand name, or under a trade-mark. As amended in 1933 (Stats. 1933, p. 793), section 1½ provides, in order to accomplish the above purpose, that all retailers, whether the goods were originally sold to them under a contract fixing the resale price or not, who have knowledge of such contracts of resale, must sell at not less than the fixed price. It is respondent's main contention that such a statute violates the due process and equal protection clauses of the federal and state constitutions, in that it denies to him the liberty and freedom of contract.

We think there are certain fundamental concepts which are decisive of the present case:

1. In the first place, this court has neither the power nor the duty to determine the wisdom of any economic policy; that function rests solely with the legislature. We recognize that economic and juridical thought is, and for many years has been, divided on the economic question as to the benefits to the consuming public of free and open competition, and its necessary corollary, price-cutting. The Sherman and Clayton Anti-Trust Acts passed by congress, and the Cartwright Act passed by our state legislature, and many other similar statutes, are indications that the particular legislatures involved, at the time such statutes were passed, were of the view that, from a social standpoint, free and open competition was desirable. The basis of this view is that, in the long run, it is against public interest to allow the manufacturer, producer, or distributer to fix the resale price of an article. In recent years, there has developed, in opposition to the above views, the concept that a manufacturer of a trade-marked article that is sold in competition with articles of a similar nature and who has fixed a fair price at which he, as well as his distributor and retailer, can make a fair profit, has a property right in the goodwill towards his product which he has created, and that it is sound public policy to protect that property right against destruction by others who have no interest in it except to use it in a misleading way to deceive the public. The basic theory on which this concept rests is that, from a social standpoint, price-cutting, in the long run, adversely affects the public interest, and that the public will be adequately protected against excessive prices by the ordinary play of fair and honest competition between manufacturers of similar products. This latter protection is found in section 2 of the present act, which prohibits manufacturers contracting between themselves to fix the resale price.

As already indicated, the state legislature, by the adoption of the Cartwright Act, *supra,* adopted in 1907, partially, at least, the first economic policy above discussed. By the enactment of the Fair Trade Act in 1931, as amended in 1933, the state legislature, for reasons known to it and which we must presume were sufficient, has seen fit to attempt to change its former policy, and to adopt the second economic concept above discussed. Insofar as the statute involves a mere change in the economic policy of the state, this court has no power or right to interfere. The members of the court may or may not agree with the economic philosophy of the Fair Trade Act, but it is no part of the duty of this court to determine whether the policy embodied in the statute is wise or unwise. It is primarily a legislative and not a judicial function to determine economic policy. The power of the court is limited to determining whether the subject of the legislation is within the state's power, and if so to determine whether the means adopted to accomplish the result are reasonably designed for that purpose, and have a real and substantial relation to the objects sought to be attained. These principles have frequently been stated by the United States Supreme Court. In the recent case of *Nebbia v. New York,* 291 U. S. 502, at page 537, 54 Sup. Ct. Rep. 505, Mr. Justice Roberts, speaking for the majority of the court, said:

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adopted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio.* 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' *Northern Securities Co. v. United States,* 193 U. S. 197, 337-8. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

"The law-making bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process. Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

In *Central Lumber Co. v. South Dakota,* 226 U. S. 157, 160, 33 Sup. Ct. Rep. 66, Mr. Justice Holmes stated:

"If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in certain case, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."

As was said *In Re Lasswell,* 1 Cal. App. (2nd) 183, 188, 36 Pac. (2nd) 678:

"It is a salutary doctrine that statutes should be sustained by the courts wherever and whenever this is reasonably possible. It is the purpose, right and duty of the legislative branch of the government to enact such legislation as it deems desirable and its limitations are natural law and the written Constitutions; the courts have no voice in the policy nor in the wisdom of legislative action; they construe the language of the statute and determine its constitutional status."

2. In the second place, it must be kept in mind that the present statute is one passed in the exercise of the *state's* police power, and so differs fundamentally from statutes passed by the federal government. The latter is, of course, limited by the powers enumerated in the Constitution, while the states are not subject to such limitation. When the statute is viewed from the standpoint of police power, it is at once apparent that it is not a complete answer to the question of constitutionality to merely point out that the statute restricts a retailer from selling property of a certain class owned by him at prices fixed by himself, and so, of course, restricts his freedom of contract. There is no constitutional right to own property, as such, free from regulation. That a state statute deprives a person of a right which he formerly possessed, whether it be a right to go where he pleases, conduct himself as he pleases, or buy what he pleases, or sell what he pleases at prices fixed by himself, does not *per se* brand the statute as unconstitutional. The process of civilization has consisted largely of the gradual regulation of the individual in his liberty of action and ownership of property for the public good. As society has become more complex, the necessity for such regulation has become more acute. Neither the state nor the federal constitution guarantees any person absolute liberty of action. The liberty guaranteed by our law is a liberty subject to regulation in the public good—an equal liberty rather than an absolute liberty. In *Jacobson v. Massachusetts,* 197 U. S. 11, 26, 25 Sup. Ct. Rep. 358, this principle is expressed as follows:

"But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others."

In holding a state statute constitutional which provided that all employees should be paid in cash and paid semi-monthly, and that such regulation should apply even to existing contracts, the United States Su-

preme Court, in *Erie R. R. Co. v. Williams,* 233 U. S. 685, 699, 34 Sup. Ct. Rep. 761, stated:

"The legislation having been passed in the exercise of the reserved power of the state, is it valid, notwithstanding it prohibits both the plaintiff and its employees from contracting against its provisions? Plaintiff asserts the negative and attempts to sustain the assertion by a very comprehensive argument in which a number of decisions of this court and of other courts are cited and reviewed. They illustrate by various instances the fundamental and indisputable principle that personal liberty includes the power to make contracts. But liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail—principle or condition—cannot be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance."

Under its police power, the state, in a proper case, has the power, acting in the interests of the general welfare, to regulate property and contract rights, and this includes, of course, the power to regulate the right of free bargaining. The fact that a state can lawfully pass a statute requiring free and open competition, such as the Cartwright Act, supra, which regulates the rights of a manufacturer or producer, and limits his freedom of contract, indicates this power exists.

The fact that a statute limits the rights of the owner of property, lowers its value, or limits its use, or limits the right of free bargaining in other ways, does not, of itself, determine the validity of the enactment. There are innumerable illustrations of statutes, passed under the police power, which interfere with the right of free bargaining which have been upheld on the theory the regulation is in the public interest. There are limits to this power, of course, but within those limits the legislature is supreme. These limits cannot be fixed by precedent. As the state progresses, the police power, within reason, develops to meet the changing conditions. (*Miller v. Board of Public Works,* 195 Cal. 477, 484, 234 Pac. 381; *People ex rel. v. Associated Oil Co.,* 211 Cal. 93, 100, 294 Pac. 717.)

Many illustrations of the power of the state to regulate, in the public interest, the right of free bargaining could be given. The United States Supreme Court has held that a legislature may (1) fix the charges the owners of grain elevators and warehouses may make (*Munn v. Illinois,* 94 U. S. 113; *Budd v. New York,* 143 U. S. 517, 12 Sup. Ct. Rep. 468); (2) fix the charges of insurance companies (*German Alliance Ins. Co. v. Lewis,* 233 U. S. 389, 34 Sup. Ct. Rep. 612); (3) fix the time within which the services of employees must be paid for and provide for semi-monthly payments of wages, and prohibit contracts varying the times of payment (*Erie R. R. Co. v. Williams,* 233 U. S. 685, 34 Sup. Ct. Rep. 761); (4) fix the fees chargeable by attorneys appearing for employees before Workmen's Compensation Commissioners (*Yeiser v. Dysart,* 267 U. S. 540, 45 Sup. Ct. Rep. 399); (5) fix the rate of pay for overtime work (*Bunting v. Oregon,* 243 U. S. 426, 37 Sup. Ct. Rep. 435); (6) establish maximum hours of labor for men in certain industries (*Holden v. Hardy,* 169 U. S. 366, 18 Sup. Ct. Rep. 383); (7) establish maximum hours of labor for women (*Muller v. Oregon,* 208 U. S. 412, 28 Sup. Ct. Rep. 324; *Miller v. Wilson,* 236 U. S. 373, 35 Sup. Ct. Rep. 342); (8) prohibit the payment of wages in advance (*Patterson v. Bark Eudora,* 190 U. S. 169, 23 Sup. Ct. Rep. 821); (9) require loaves of bread of only a certain size be sold (*Schmidinger v. Chicago,* 226 U. S. 578, 33 Sup. Ct. Rep. 182); (10) establish maximum rentals (*Block v. Hirsch,* 256 U. S. 135, 41 Sup. Ct. Rep. 458; *Marcus Brown Holding Co. v. Feldman,* 256 U. S. 170, 41 Sup. Ct. Rep. 465; (11) fix the maximum rate of interest chargeable on loans (*Griffith v. Connecticut,* 218 U. S. 563, 31 Sup. Ct. Rep. 132); (12) regulate the net weight of retail packages (*Armour & Co. v. North Dakota,* 24 U. S. 510, 36 Sup. Ct. Rep. 440); (13) declare sales of commodities on margin or for future delivery void (*Booth v. Illinois,* 184 U. S. 425, 22 Sup. Ct. Rep. 425); (14) forbid unfair competition by charging of lower prices in one locality than those exacted in another (*Central Lumber Co. v. South Dakota,* 226 U. S. 157, 33 Sup. Ct. Rep. 66); (15) fix the retail price of milk (*Nebbia v. New York,* 291 U. S. 502, 54 Sup. Ct. Rep. 505).

In each of the above cases the police power of the state was held broad enough to warrant an interference with free bargaining. As was said by Chief Justice Hughes in *Miller v. Wilson, supra,* at page 380:

"As the liberty of contract guaranteed by the Constitution, is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest—the question is whether the restrictions of the statute have reasonable relation to a proper purpose."

The police power is no longer limited to measures designed to protect life, safety, health, and morals of the citizens, but extends to measures designed to promote the public convenience and the general prosperity (*People ex rel. v. Associated Oil*

Co., supra; Chicago B. & Q. Ry. v. Illinois, 200 U. S. 561, 26 Sup. Ct. Rep. 341), and includes economic measures regulating competition. (*Northern Securities Co. v. United States,* 193 U. S. 197, 24 Sup. Ct. Rep. 436; *Nebbia v. New York, supra.*)

The above cases conclusively establish that there is no absolute right of free bargaining guaranteed by the constitution. Since, under the proper circumstances, the right of free bargaining can be, and in the past has been, regulated, it necessarily follows that, in a proper case, this power to regulate free bargaining includes the power to regulate the price. Every one of the cases above cited, and many more than could be cited, illustrates the breadth of the power invested in the state legislature to affect the terms of a business bargain between individuals, and in every case the regulation affected the price. As was said in the *Nebbia case, supra* (p. 532):

"The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negativated many years ago. *Munn v. Illinois,* 94 U. S. 113."

Respondent seriously urges that the legislature can only regulate prices as to those articles "affected with a public interest." There are several answers to this contention. As already pointed out, this statute does not aim primarily at regulating prices, but at protecting the property and contract rights of the manufacturer, producers, distributor and retailer. Moreover, the statute does not attempt to regulate the price of any one article. It may be that when the legislature attempts to regulate the price of a particular commodity, in order to justify classifying that article differently from other commodities, its purchase and sale must affect the public interest. But here the legislation affects an entire class of articles, which class, as will later appear, is reasonably the subject of classification. Another complete answer to this contention is that if the purchase and sale of any one article or entire class of articles is subject to regulation under the police power, for reasons already stated, then its purchase and sale does affect the public interest. This was the exact holding in the *Nebbia* case, *supra,* where, at pages 533 and 536, it is stated:

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. Thus understood, 'affected with a public interest' is the equivalent of 'subject to the exercise of the police power'; and it is plain that nothing more was intended by the expression. * * *

"The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest', and 'clothed with a public use', have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon a proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."

The next major factor that must be emphasized is that the statute here involved is not solely a price fixing or regulating statute. It is true that the statute permits the producer to fix by contracts with his distributor, and the latter by contracts with retailers, the minimum resale price of the product, and that by section 1½ of the act the minimum price so fixed is made binding on all retailers who have knowledge of the contracts, and in this sense it is a price regulating statute. However, to regulate prices as such was not the main purpose of the statute. The statute only applies to certain articles sold under the trade-name or brand or trade-mark of the producer. As to such articles, the producer or manufacturer, through advertising or other means, has built up a goodwill in connection with the articles, which goodwill is a species of property entitled to protection. When the retailer sells such an article to a customer, the article is not sold solely on the reputation of the retailer, but partially, at least, on the reputation built up by the owner of the trade-mark, brand or trade-name. Moreover, section 1½ comes into operation only when the manufacturer or producer has entered into contracts fixing the resale price. The statute, as its title indicates, by preventing price-cutting, is aimed at protecting these valuable property and contract rights of the manufacturer or producer—rights just as valuable and just as much entitled to protection as the right of the retailer, who is attempting, by exercising his claimed right of freedom of action, to injure the property and contract rights of the manufacturer or producer. The statute, in other words, does not merely prohibit price-cutting in order to regulate prices, but prohibits price-cutting in an attempt to protect the validly acquired rights of others. The common law, without statutory authorization, long recognized that unjustifiable interference with contract rights of others constituted a tort. (*Lumley v. Gye,* 2 El. & Bl.

216.) The statute here involved, in a large measure, merely extends that common law doctrine to the transactions enumerated in the statute.

(4) Another important factor that must be kept in mind is that insofar as the Fair Trade Act permits the producer to fix the resale price of his product by contract, the act merely embodies a rule of law well settled in this state. In *Grogan v. Chaffee,* 156 Cal. 611, 105 Pac. 745, and in *D. Ghirardelli Co. v. Hunsicker,* 164 Cal. 355, 128 Pac. 1041, it was held that as far as articles in intrastate commerce are concerned, without statutory authorization the manufacturer, by contract with a retailer, may fix the resale price. The Fair Trade Act as passed in 1931 merely codifies the rule of those cases, which was partially changed by the Cartwright Act, *supra.*

When the above concepts are applied to section 1½ of the Fair Trade Act, we have no hesitancy in holding that the section is constitutional. The object sought to be attained is clearly within the sphere of state regulation, and the means provided in the statute have a reasonable relation to this object. In our opinion the statute is neither arbitrary nor discriminatory.

California apparently is the first state to have passed a statute containing the provisions found in section 1½ of the Fair Trade Act. New Jersey, in 1916, however, passed a statute that permitted the manufacturer to fix the resale price of a trademarked article, or article sold under a trade or brand name, by attaching a notice fixing the resale price to the container in which the article was sold. The resale price so fixed was made binding on all retailers. In *Ingersoll & Bro. v. Hahne & Co.,* 88 N. J. Eq. 222, 101 Atl. 1030, 89 N. J. Eq. 332, 108 Atl. 128, the New Jersey court, in two opinions, held the statute constitutional on substantially the same reasoning set forth in this opinion.

Since the oral argument and submission of the cause, respondent has cited a decision of the New York Court of Appeals, in which that court held the New York Fair Trade Act unconstitutional. (*Doubleday, Doran & Co., Inc. v. R. W. Macy & Co., Inc.,* decided January 7, 1936, 269 N. Y. 272, 199 N. E. 409. Because the New York Act was copied verbatim from the California Statute, respondent cites the opinion of the New York court as "strongly persuasive." We are not prepared to share counsel's optimistic view of the weight to be given the decision. While, on first impression, it seems entitled to the importance attached to it by respondent, we are of the view that, upon careful analysis, it loses its persuasive force. A brief discussion of the decision will, we believe, be helpful in throwing in relief some of the high lights of the situation now before this court. For several reasons, the decision of the New York court impresses us as not being in point in the discussion here. It is expressly limited to a declaration that section 2 of the New York act (identical with section 1½ of the California act) is unconstitutional "as applied to the facts set forth," which are different from those of the case now before this court. The plaintiffs in the New York case were Doubleday, Doran & Company, Inc., publishers, and Doubleday, Doran Book Shops, Inc., retailers. The contract mentioned in the decision is one between the publishing corporation and the retailing corporation. Aside from any inference to be drawn from the similarity of names, the opinion states that the two plaintiffs, in reality, were one and the same, for it refers to "the price which they (the plaintiffs) stipulated as a rental price in a *contract between themselves.*" Other language indicates the book shop corporation is merely a subsidiary and agent of the publishing company. Again, the plaintiff publishers sold the books in question to the defendant without exacting for, insofar as appears, attempting to exact, from the buyer any restriction on the price for resale. In other words, the producer of goods placed a retail price upon its product by its own independent action, and voluntarily sold the goods to a retailer (Macy & Co.) for resale without seeking, or at least obtaining, any agreement by the retailer to observe any retail price. In the action, it seeks to prevent the retailer, to whom it has sold the goods without restrictions, from selling the goods at prices less than those which the producer saw fit to fix, in a contract between it and a subsidiary. The New York court accepts, for the purpose of the decision, the interpretation of the act as covering such situation, and, upon that assumption, and apparently that assumption alone, holds section 2 of the act to be unconstitutional. The plaintiffs in the New York case allege only a single contract purporting to fix the resale prices, and that in a pretended contract made with itself, far different from the factual setup in the Max Factor & Co. case. Here there has been adopted a system of making written contracts, generally between producers and retailer distributors, under which the products may and will be sold only to retailers who will resell at specified prices and have entered into contracts with the distributor to so sell such products. Practically all of the wholesale and retail druggists in California have executed such contracts, and are observing them, and the plaintiffs' distributers have refused, and

will refuse, to sell such products to wholesalers or retailers who do not enter into such contracts. A contract has been tendered to defendant for execution, but defendant will not enter into the agreement. The plaintiffs therefore decline to sell the commodities to defendant unless the defendant enters into the contract. The defendant, with full knowledge of the system of contracts, and the extent of the execution and compliance with their terms by the trade, has obtained Factor products "unbeknown" to plaintiffs, and is selling them at prices less than the prices fixed by the contracts so extensively entered into by others. These facts serve to vitally differentiate the situation in New York from that here. In place of a single pretended contract made by the producers with itself, we have here a uniform system of contracts applied generally to wholesale and retail distributers in the state. In place of a voluntary sale without restriction by the producer to a retailer, there is here a consistent refusal by the producer or owner to sell to the defendant or to any other buyer who will not agree to maintain resale prices. A retailer who has been given an opportunity to enter into the contract has refused to do so, and, having obtained goods, not from the producer or owner, but indirectly and without the consent or knowledge of the producer, is engaged in cutting prices of the products. The New York decision does not discuss the fundamental basis and purpose of the legislation represented in the California Fair Trade Act, and does not disclose the ground upon which the section of the New York act, as interpreted for the purpose of the decision, is unconstitutional. We cannot find, in this casual treatment of a constitutional question, sufficient justification for regarding the decision as applicable to the facts here.

Respondent also urges that the statute denies equal protection of the laws in that it applies only to articles sold under a trade-mark or trade or brand name, and does not apply to non-trade-marked commodities, and, among trade-marked articles, applies only to those in free and open competition with others of a similar nature. As already pointed out, it is only in reference to those commodities included within the statute that the manufacturer or producer has a property right in the nature of goodwill, which, in the public interest, should be protected. Such a classification is reasonable. The exclusion of trade-marked articles not in free and open competition with others of a similar nature is likewise reasonable. By that provision the public is protected from artificially high prices imposed by one with an exclusive market. (See *Borden's Farm Products Co. v. Ten Eyck, Commissioner,* decided by the United States Supreme Court February 10, 1936.)

The contention made by the respondent that the Fair Trade Act attempts to regulate interstate commerce, and so is unconstitutional, is without merit. The allegations of the complaint clearly establish that as to the transaction now before the court it is one arising and involving goods wholly located within this state. Although the terms of the statute are broad, and could conceivably be interpreted to include interstate transactions, we must necessarily construe the act as applying only to transactions within the state, that being the sole territorial extent of the legislatures' powers. (*California Adjustment Co. v. Atcheson, Topeka & Santa Fe Ry. Co.,* 179 Cal. 140, 175 Pac. 682; *American Banana Co. v. United Fruit Co.,* 213 U. S. 347, 29 Sup. Ct. Rep. 511.)

Respondent presents several hypothetical situations under which enforcement of the act would be inequitable or difficult, or, perhaps, even unconstitutional. It is elementary, of course, that a statute may be invalid as applied to one set of facts, yet valid as applied to another. (*Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282, 42 Sup. Ct. Rep. 106). The situations conjured up by respondent are not here involved, and respondent is limited in his attack to the application of the statute to the factual situation now before the court. Moreover, the principal remedy granted by the statute is injunctive relief. The equity court has broad and flexible discretionary powers, and can, and undoubtedly would, deny injunctive relief where such relief would be inequitable.

It is beyond denial that, under our form of government, the use of property and the making of contracts are normally matters of private concern. Here, no question of impairment of existing contracts is involved. No criminal proceedings have arisen under the circumstances of the case. The plaintiffs are seeking, in a civil action, to restrain conduct on the part of the defendant which the legislature, in determining a question of economic policy, has declared to be "unfair competition, and actionable at the suit of any person damaged thereby." We are of the view that its action, measured by the yardstick of the cases cited, and other authorities of similar import, must be held to be free from constitutional objections, and, not being shown to be unreasonable or arbitrary, it must be sustained as a proper legislative declaration of the policy of the state on the practice of price-cutting. The demurrer

of defendant to the complaint should have been overruled.

For the foregoing reasons, the judgment entered on the order sustaining the demurrer without leave to amend is reversed.

WASTE, C. J.

We concur: CURTIS, J., LANGDON, J., SEAWELL, J.

DISSENTING OPINION

I dissent. I cannot bring myself to agree with the majority opinion in this case. The question herein is not whether the court or the Legislature is authorized to determine the wisdom of an economic policy. It is, of course, elementary that it is beyond the function of the court to attempt to define or limit the economic policy or to determine the wisdom of a chosen course by the State. And it is also fundamental that simply because such determination does not fall within the judicial function it does not follow that it belongs in the legislative field. It may be reserved by the State Constitution to the people, or the State may be prevented from acting by the inhibition of the Federal Constitution. The question, then, in this case may be phrased as follows: Has the Legislature exceeded its powers as limited by some inhibition of the Constitution in which the people have defined for themselves an economic policy and in which they have set up a safeguard against the infringement by the Legislature of some natural right with which they are endowed? If the act in question exceeds the legislative power thus measured, it is likewise beyond the judicial function to sap the inhibition or safeguard of its essential vitality, by construction, in order to accomplish or permit a course of action the court may deem to constitute a wise economic policy. (See opinion of Mr. Justice Burnett in *Ex Parte Newman,* 9 Cal. 502, 510, for a comprehensive statement of this principle.) The respondent insists that the section brought under our scrutiny in this cause does no violence to sections 1 and 13 of Article I and section 25 of Article IV of our State Constitution, as well as the fourteenth amendment to the Federal Constitution. It seems to me the argument in this regard is unanswerable. Section 1 of Article I reads as follows: "All men are by nature free and independent, and have certain inalienable rights among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness." Section 13 of the same article provides that no person shall "be deprived of life, liberty or property without due process of law," which, is of course, in keeping with a portion of the fourteenth amendment to the Federal Constitution. Section 25 of Article IV forbids the enactment of special laws respecting enumerated subjects or where a general law can be made applicable.

Sections 1 and 13 of the First Article have been considered by this court in previous cases, and I believe if the amendment under attack is to be sustained, they must be directly overruled or the court forced to the extent of saying all trade-marked goods, including the specific item of cosmetics here involved, have been so devoted to a public use that they have become "affected with a public interest." I can scarcely believe that anyone would adopt the latter alternative. Hence I advert to the construing authorities. It was held in the early case of *Ex Parte Newman,* to which I have already referred, that the declaration of principles contained in Article I, and which were intended for the protection of every individual, "can be enforced by judicial determination." In *Ex Parte Quarg,* 149 Cal. 79, this court proceeded to enforce the section upon which the respondent relies for his protection. With respect to an enactment which attempted to prohibit the sale of theater tickets at a price in excess of that originally charged, it is there said: "The constitutional guaranty securing to every person the right of 'acquiring, possesing and protecting property' refers to the right to acquire and possess the absolute and unqualified title to every species of property recognized by law, with all the rights incidental thereto, and in connection with the right of personal liberty, *it includes the right to dispose of such property* in such innocent manner as he please, and *to sell it for such price as he can obtain in fair barter*" (italics added). To the same practical effect is *Ex Parte Dickey,* 144 Cal. 234, in which we find this expression: "This right of contract common to the followers of all legitimate vocations is an asset of the petitioner in his chosen occupation, and, as has been said, is a part of the property in the enjoyment of which he is guaranteed protection by the Constitution. By the act in question he is arbitrarily stripped of this right of contract, and deprived of his property, and left, in following his vocation and in pursuit of his livelihood, circumscribed and hampered by a law not applicable to his fellow men in other occupations" (See also *In Re Smith,* 193 Cal. 337). Again in *People v. Pace,* 73 Cal. App. 548, after approving the language which we have quoted from *Ex Parte Quarg,* it was held that the Legislature could not require a person to secure a permit as a condition precedent to the sale of his own stock, although in repeated and successive transactions. The court said: "In these days when the urge is strong upon legislative bodies to extend the paternal arm of government into the realm of economic activities, it is particularly important that courts in the exercise of the particular functions imposed upon them by the Constitution, should scrutinize with care legislation which tends to encroach upon the constitutional guaranties, to the end that the right of the individual to liberty and possession of property shall become, not a mere theory, but shall be maintained as a practical reality. And while it is true that the increasing conflict between the rights of the individual and the general welfare of society presents ofttimes difficult and perplexing problems, nevertheless courts should not and will not permit the violation of those most fundamental rights that underlie our very existence as a nation. (*Dobbins v. Los Angeles,* 195 U. S. 223 (49 L. Ed. 169, 25 Sup. Ct. Rep. 18, see also Rose's U. S. Notes): *Pacific Palisades Ass'n. v. City of Huntington Beach, et al.,* 196 Cal. 221 (40 A. L. R. 782, 237 Pac. 538).)"

There are a host of authorities from other jurisdictions which might be cited to the same effect, but for my purposes it will be sufficient to refer to but two. First we find comparable language in the case of *Tyson Bro.-United Ticket Office v. Banton,* 273 U. S. 418, as follows: "In the endeavor to reach a correct conclusion in respect of this inquiry it will be helpful by way of preface to state certain pertinent considerations. The first of these is that the right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, *Case of the State Freight Tax,* 15 Call. 232, 278; and as such, within the protection of the due process of law clauses of the fifth and fourteenth amendments. See *City of Carrollton v. Bazzette,* 159 Ill. 284, 294; 31 L. R. A. 522, 42 N. E. 837." Second I refer to *Doubleday, Doran & Company, Inc., v. R. H. Macy & Co., Inc.,* 199 N. E. 409, which case involved a practically verbatim copy of the section here involved, adopted by the Legislature of New York. Bearing in mind that the New York Court of Appeals was the same court which first sustained the New York Milk Control Act (*People v. Nebbia,* 262 N. Y. 259), which was the subject of judicial inquiry in the case of *Nebbia v. New York,* from which the majority opinion has quoted so extensively, the expressions we find in the case are especially illuminating. It is there said: "That the States cannot fix the selling price of any and all commodities has been settled. (*Williams v. Standard Oil Co.,* 278 U. S. 235, 49 S. Ct. 115, 73 L. Ed. 287, 60 A. L. R. 596; *Tyson & Bro. v. Banton,* 273 U. S. 418, 47 S. Ct. 426, 71 L. ed. 718, 58 A. L. R. 1236; *Wolff Packing Co. v. Court of Industrial Relations,* 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 128; *Straus v. Victor Talking Machine Co.,* 243 U. S. 490, 37 S. Ct. 412, 61 L. Ed. 866, L. R. A. 1917 E., 1196, Ann. Cas. 1918 A. 955.)

"Books, at least these books, are not 'affected with the public interest' any more than theater tickets. No emergency has yet arisen in literary publications and the business is not such as comes within the class which must submit to rate fixing. Circumstances which cannot be foreseen from one generation to another may arise which will require certain articles to submit to regulatory prices in order that the public may get them at all or get them in a pure and beneficial state. We cannot always express legislative power in exact formulas nor decide a case before it happens. Experience is the mother of teachers. Under the *Nebbia* Case, for instance (*Nebbia v. New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469), no one would doubt now that New York State would have the power to get milk to the public somehow if any combination of forces threatened to shut off all supply or to deteriorate that which was supplied. The price might be an element to be considered with other things in such case. So we thought in *People v. Nebbia*, 262 N. Y. 259, 186 N. E. 694, but to fix arbitrarily the price of books by legislation and not by agreement comes within the condemnation of the decisions which have heretofore dealt with like legislation. What the Legislature cannot do directly, it cannot do indirectly, nor does it cease to be a price fixed by the Legislature because that body has clothed the publisher with the power or authority to establish it." I think it so fundamental and so well established that the right to sell at any price obtainable by the owner is a part of the property itself and within the protection of the constitutional guaranties that I shall not devote more space to that thought.

However, it must be considered that there is a factor which takes some kinds of businesses outside of the strict protection of the inhibition, and to an ascertainment or rather statement (because it has heretofore been well explained and adhered to) of that element I now turn. What is it? For the purposes of a ready statement we say that where a business is "affected with a public interest". it is subject to regulatory measures. Just what is meant by the expression is well stated in *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 535, as follows: "Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are railroads, other common carriers and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. *State v. Edwards*, 86 Me. 102, *Terminal Taxicab Co. v. District of Columbia*, 241 U. S. 252, 254.

"(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly."

Again it is said therein (p. 536): "In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression 'clothed with a public interest' as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn v. Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public."

Making the meaning of the unanimous court still more clear, the author of the opinion says (p. 537): "An ordinary producer, manufacturer, or shopkeeper may sell or not sell, as he likes *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 320; *Terminal Taxicab Co. v. District of Columbia*, 241 U. S. 252, 256, and while this feature does not necessarily exclude businesses from the class clothed with a public interest, *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, it usually distinguishes private from quasi-public corporations.

"In nearly all the business included under the third head above, the thing which gave the public interest *was the indispensable nature of the service and the exorbitant charges and the arbitrary control to which the public might be subjected without regulation*" (italics added).

To revert to the case of *Tyson & Bro. v. Banton, supra*, for a moment we find apt language describing the expression as follows (p. 430): "The authority to regulate the conduct of a business or to require license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business, *Chesapeake & Potamoc Tel. Co. v. Manning*, 186 U. S. 238, 246, but exists only where the business or the property involved has become 'affected with a public interest' * * *

"A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accomodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting 'a right,' that synonym more nearly than any other expresses the sense in which it is to be understood."

It can hardly be denied that the public is interested in the maintenance and continuity of the oil business, particularly as the same relates to the sale of gasoline and lubricating oils. And yet the Supreme Court of the United States denied the power of the Legislature to regulate the price in the case of *Williams v. Standard Oil*, 278 U. S. 235, 239, saying in part as follows: "It is settled by recent decisions of this court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest' * * * By repeated decisions of this court, beginning with *Munn v. Illinois*, 94 U. S. 113, that phrase, however it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property or services must be measured. As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public. * * * Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. * * *

"In support of the act under review it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the State of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the State. But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the oridinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles

commonly bought and sold by merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the business of dealing in such articles, irrespective of its extent, does not come within the phrase 'affected with a public interest'." I might add other authorities in which the legislative power has been denied, but there has never been a departure from the announced principle. Even in the case of *Nebbia v. New York, supra,* to which reference has been made, the court justifies its conclusion by the fact that milk was indispensable and that it was easily contaminable; that in order to secure pure and wholesome milk for the public during the emergency which the Legislature declared to exist it was necessary for the State to take control. The facts of the case when studied reveal that the comfort claimed to be found by appellant in the opinion does not in truth exist. And here I desire to point out a fallacy involved in the majority opinion. The language quoted is taken from cases involving businesses "affected with a public interest" as hereinbefore defined, or from authorities dealing with the health or public safety. The result is that the language, lifted from its context and placed in a different setting, takes on a meaning altogether foreign to that which it originally possessed.

Nor can it be seriously contended that the amendment is not a price fixing statute. It fixes the price indirectly and it has this additional vice, that it leaves the fixed price to the dictates of the producer —in other words, the Legislature has, as said in the *Doubleday-Doran* case, attempted to delegate authority to the producer of a trademarked article to set the retail price. No one can object to the contract which he may enter into, but to make this contract binding by legislative fiat as to retail price upon persons who are not privy thereto violates every principle guaranteed the individual by the constitutional guaranties. The element of knowledge on the part of the seller is a minor factor, provided very simply by notice on the goods or label. It is manifest that the act here in question was not based upon the public interest, or that the consumer was considered. Its effect is to grant to the producer a privilege and preference unwarranted by the basic law. Not only that—but seeking to justify its enactment upon the theory that it is designed to prevent price cutting which injures a competitor, it reaches all merchants who, though they may be satisfied with a smaller profit than others engaged in the business, or who by reason of a greater efficiency are able to sell at lower prices and yet make the same profit, are still compelled to exact from the consumer a fixed retail price. It strikes at every merchant alike, regardless of intention, who desires to manage and control his own business. It is thus made perfectly clear that the object of the act is not to prevent unfair competition but to fix prices. Such being its purpose and operation, it falls under the condemnation of cases involving similar efforts, such as *Fairmont Creamery Co. v. Minnesota,* 274 U. S. 1 and the other cases already cited.

But the amendment has other fatal defects. A study of the authorities which deal with the regulation of businesses, both those which sustain and those which reject the claim of legislative power, reveals that the question of whether all the surrounding circumstances have operated to change the status of a private business free from legislative regulation into one in which the public has an interest is one for judicial inquiry and determination (*Wolff Packing Co. v. Court of Industrial Relations, supra*). But the act here in question attempts to lump all businesses into a common regulatory basket, provided only that the product is trademarked and is originally in competition.

I have already mentioned the fact that the Legislature has attempted to delegate the price fixing power to the producer or manufacturer. Before concluding, I wish to direct attention to the almost obvious and inescapable fact that there is no authority in the law for such action. A person may not be bound with respect to his property by the action, whim or caprice of another, particularly where the latter is not vested with any official responsibility or duty. The delegation of such power is contrary to the fourteenth amendment to the Federal Constitution. (*Washington v. Roberge,* 278 U. S. 116, *Panama Refining Co. v. Ryan,* 293 U. S. 388, 55 Sup. Ct. Rep. 241.) Of course I concede the producer's right to sell or not to sell at his own price, but when his property has been sold and passed into hands not hampered by contractual covenants the producer's control and right therein has altogether ceased. It takes no great amount of imagination to visualize the discriminatory practices and abuses which might be indulged were the power of the producer to establish a fixed retail price upheld.

Since the preparation of the foregoing opinion I have read the dissenting opinion by Mr. Justice Shenk and desire to express my concurrence therein.

The judgment should be affirmed.

THOMPSON, J.

DISSENTING OPINION

In concurring in the dissent of Mr. Justice Thompson I desire to comment on certain matters not touched upon in his opinion. In the first place let me point out that the particular act under attack should not be confused with the Unfair Practices Act of 1935 (Stats. 1935, p. 1546), which denounces unfair competition and socalled piratical trade transactions, and was designed to afford full relief against such abuses on behalf of any one aggrieved. That act is said to have been passed at the behest of the business interests of the state including the manufacturer, middleman and retailer. While the validity of that statute has not been passed upon by this court it is enough to say for present purposes that it appears to be a painstaking endeavor by the legislature to combat the abuses which the business interests have deemed unfair practices in the competitive field. It appears to have been designed to permit fair competition to function under its own economic laws.

The act now under attack as originally passed in 1931 was confined to the field of contract in the fixing of prices by agreement as between manufacturer, jobber and retailer, and when so limited no valid objection to it has been pointed out. It is the amendment of 1933 which makes the prices so fixed binding on all who are not parties to the contract. In other words it places within the power of the manufacturer or producer to fix the retail price of all commodities regardless of their reasonableness. It does not purport to denounce unfair competition alone but affects fair competition as well. Carried to its length it would enable the manufacturer or producer to destroy all competition and thus place the consumer at their uncontrolled mercy even as to food, clothing and all commodities which are the subject of manufacture or production. This too, without regard to serious marketing problems which have confronted some of the basic industries of the state. It is said that whether these results should follow is an economic problem with which the courts have nothing to do. But it is the business of the courts to see to it that, in carrying out any such program, the fundamental and guaranteed rights of the citizen to deal with his property as he chooses, subject to such reasonable regulations as may properly be imposed, are not destroyed. The statute under attack does not regulate. It prohibits. It is essentially a price fixing statute. To me it is beyond question that the legislature itself could not fix the retail prices of all or any commodities not affected with a public interest or clothed with a public use. We are bound by the decisions of the supreme court of the United States on that subject, as pointed out in the opinion of Mr. Justice Thompson. If the legislature itself is without power to fix the retail price of such commodities, how then can it delegate that power to one who is governed by no power except his own self interest?

It is said in the majority opinion that the statute under attack is confined to retail prices of trademarked or branded commodities; that this is a valid classification and that the legislature has the right to single out commodities so marked as a proper subject of preferment. This is not so, for the reason

that there is no limitation on the acquisition of trade-marks and brands, except the ingenuity, or lack of it but aid by prize contests, on the part of the manufacturer or producer in conjuring up names to suit his purposes. He then may acquire an exclusive right to the *name* under sections 3196-3202 of the Political Code. Under this easy plan all commodities, essential or otherwise, may be trade-marked or branded. It does not follow that because the right to the use of the name is exclusive, the right to shackle the commodity with a retail price is vested in the owner of the name, regardless of where the commodity may find itself in the channels of trade, divorced from any contractual relation with the owner of the name.

As to the price fixing feature of the statute the highest court in the land has spoken in terms which I feel bound to respect. Also, the state of New York enacted the same statute now under attack. The highest court of that state recently and correctly held it void under the federal constitution. In deference to what I deem to be the established law I arrive at the same conclusion.

SHENK, J.

[¶ 55,101] Pyroil Sales Company, Inc., a corporation, v. The Pep Boys, Manny, **Moe & Jack of California, a corporation.**

Supreme Court of the State of California. Filed February 28, 1936.

A judgment sustaining a demurrer to a complaint seeking to enjoin violation of the California Fair Trade Act is reversed on the ground that the Act is constitutional.

By the Court: By stipulation of counsel and order of court, the above entitled cause was ordered submitted, and to be decided concurrently with *Max Factor & Co., et al. v. Kunsman,* L. A. 14,662, decision in which cause has been this day filed.

The appeal here, as in the *Factor* case, is by the plaintiff from a judgment of dismissal entered after demurrer to the complaint sustained without leave to amend. Although not as extensive in its allegations as the complaint in the *Factor* case, the complaint is sufficient to raise the same general question of the constitutionality of the 1933 amendment to the "Fair Trade Act" (Stats. 1931, page 583; Stats. 1933, page 793). Plaintiff herein seeks an injunction, pursuant to the provisions of the act, restraining the defendants from selling Pyroil, a branded and trade-marked article, at retail prices lower than those sought to be maintained by the plaintiff. As in the *Factor* case, defendants have not bound themselves by any form of contract to resell the commodity at any specified price, but an obligation to so resell is sought by the plaintiff to be imposed on defendants (by the application of section 1½ of the Fair Trade Act—amendment of 1933) by virtue of the fact that other dealers have agreed with plaintiff not to resell at less than certain prices.

As the questions on appeal are identical in the two actions, the decision in the *Factor* case is decisive of the general question on appeal in this case. Because of that fact, we do not deem it necessary to consider certain specifications urged in the demurrer that the complaint was uncertain, ambiguous and unintelligible. Therefore, on the authority of the decision in *Max Factor & Co. et al v. Kunsman,* this day filed, the judgment herein is reversed.

Mr. Justice Shenk and Mr. Justice Thompson dissent. (See their opinions filed in *Max Factor & Co. et al. v. Kunsman,* L. A. 14662, filed today.)

[¶ 55,102] Federal Trade Commission v. C. J. Ozment, Etc.

United States Circuit Court of Appeals for the Eighth Circuit. February 10, 1936.

The Court affirms the Federal Trade Commission's order directing respondent, engaged in selling correspondence courses, to cease misrepresentations as to existence of Government civil service positions, salaries, examinations, etc.

Affirming Federal Trade Commission Complaint No. 1872.

Decree

The Federal Trade Commission, Petitioner herein, having filed with this Court its application for the enforcement of an order to cease and desist issued by it against the Respondent, under date of May 11, 1931, under the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act to Create a Federal Trade Commission, to define its powers and duties, and for other purposes" (38 Stat. 719, 15 U. S. C. A. Sec. 45); and said Petitioner, having also certified and filed herein, as required by law, a transcript of the entire record in the proceeding lately pending before it, in which said order to cease and desist was entered, including agreed statement of facts in lieu of testi-

mony, and the report of said Petitioner; and Respondent having subsequently filed his answer to said application for enforcement, in which answer Respondent stated he was not willing to contest said application for enforcement or the proceedings based thereon, and in which answer said Respondent consented that this Court might, upon said application and Respondent's answer thereto, and upon the pleadings, agreed statement of facts in lieu of testimony, and proceedings set forth in the transcript aforesaid, make and enter its decree affirming said order to cease and desist and commanding Respondent, his agents, representatives, and employees to comply therewith—

Now, therefore, it is hereby ordered, adjudged and decreed, that said order to cease and desist, issued by the Federal Trade Commission, Petitioner herein, under date of May 11, 1931, be and the same hereby is affirmed.

And it is hereby further ordered, adjudged and decreed, that Respondent, C. J. Ozment, his agents, representatives and employees, do cease and desist from making statements and representations in advertisements in newspapers, magazines, and periodicals, and in letters, printed circulars, pamphlets, booklets and other advertising literature, circulated and distributed in connection with the offering for sale and sale in interstate commerce of courses of instruction for positions in the government service of the United States, as follows:

(1) That the salaries established for the positions are higher than they actually are and that the positions are available to persons over fifty years of age when such is not the fact;

(2) That the examinations for all positions for which respondent offers courses of instruction are to be held immediately or within a short time, when such is not a fact;

(3) That civil service examinations are held at almost all towns and cities of 3,000 population upward, and that it is not necessary for anyone to go far in order to enter such an examination, when such is not the fact:

(4) That examinations for United States Government stenographers and typists are announced to be held in almost all large cities throughout the United States about every sixty days, when such is not the fact;

(5) That there are good government positions available, and that in the larger cities there are thousands and thousands of such places, when such is not the fact;

(6) That appointments to the position of forest ranger are available and that it is not necessary to be a resident of the state within which the forest ranges are located in order to secure appointments to such positions, when such is not the fact;

(7) That railway mail clerks immediately upon appointment are allowed to travel with allowances for meals or hotel or other expenses, and that they are off duty half the time with full time pay, when such are not the facts;

(8) That the respondent agrees to refund the full tuition paid by applicants or subscribers without specifying the time in which such money will be repaid.

And it is hereby further ordered, adjudged and decreed, that the Respondent, C. J. Ozment, shall, within sixty (60) days after the service upon him of a copy of this decree, file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which he has complied with and conformed to this decree.

Kimbrough Stone, Presiding United States Circuit Judge.

I hereby consent to the entry of the above decree: *C. J. Ozment.*

I hereby acknowledge service of a copy of the above and foregoing Decree of said United States Circuit Court of Appeals, at St. Louis, Missouri, this 15th day of February, 1936. *C. J. Ozment.*

[¶ 55,103] Terminal Warehouse Company v. Pennsylvania Railroad Company and Merchants Warehouse Company.

Supreme Court of the United States. Decided March 2, 1936.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Discriminatory privileges and payments given by a railroad to a terminal warehouse are held not to violate the Anti-Trust Laws in the absence of a conspiracy in restraint of commerce.

The Anti-Trust Laws are held inapplicable to carriers by rail or water as to suits for damages by reason of discriminatory acts of such carriers, or suits to enjoin such acts, where relief from such acts falls within the jurisdiction of the Interstate Commerce Act. But if a carrier knowingly confederates with a manufacturer to foster a monopoly or to restrain commerce in the manufacturing industry, then the carrier incurs a liability under the Anti-Trust Laws.

Mr. Justice CARDOZO delivered the opinion of the Court.

In this action under the Anti-Trust Laws (15 U. S. C., §§ 1, 15) for the recovery of treble damages, the Terminal Warehouse Company, petitioner in this court, accuses a competitor, the Merchants Warehouse Company, and the Pennsylvania Railroad Company, an interstate common carrier, of an unlawful combination in restraint of trade and commerce.

The business of Merchants Warehouse Company, which for brevity will be spoken of as Merchants, began in January, 1887. Its site was the City of Philadelphia. At the beginning there were two warehouses, both in convenient proximity to the Pennsylvania's tracks and terminals. Other buildings were added from time to time by purchase or by lease to serve other sections of the city. From the outset Merchants had contracts with Pennsylvania for privileges and payments special to itself. These are the contracts of which Terminal complains. They were renewed as they ran out from 1887 to 1931, a separate contract being made with reference to each building. For present purposes a summary of one contract will serve as a summary of all, though they differ in particulars. For illustration we choose the contract of January 25, 1917, which has to do with the warehouse at Water and Chestnut Streets. By this contract Pennsylvania agrees to maintain tracks adjacent to the warehouse and to make payments at stipulated rates for services rendered by the warehouse in the receipt and delivery of freight. While the contract is in force, there is to be no allowance for such services to any other warehouse company in the City of Philadelphia. In return Merchants agrees to give a preference to Pennsylvania over other lines in the use of its facilities; to load and unload freight promptly and efficiently; to collect charges due for incoming freight, and to be responsible to the railroad company therefor.

No secret was made of the existence of this contract or of any of the others. On the contrary, the substance of the whole arrangement was set forth in the tariffs of the railroad filed with the Interstate Commerce Commission and open to the public. Pennsylvania there showed that it had designated the warehouses of Merchants as stations for the receipt and delivery of freight. It also showed the amount of the payments and allowances to be made to Merchants for services in handling freight at the stations so designated. For many years the practice went unchallenged by any agency of government. The assumption was that the warehouses, though not owned by Pennsylvania, were, none the less, public freight stations supplied by a contractor (*United States v. Baltimore & Ohio R. Co.*, 231 U. S. 274, 288), and that the railroad in making payments or allowances for the handling of the freight was paying for transportation services rendered by an agent. Decisions of the Interstate Commerce Commission bring this out in clear relief. *Keystone Warehouse Co. v. Pennsylvania R. Co.*, 53 I. C. C. 335; *Keystone Elevator & Warehouse Co. v. Director General*, 73 I. C. C. 273, 274; *McCormick Warehouse Co. v. Pennsylvania R. Co.*, 95 I. C. C. 301. Those cases stood unquestioned until 1928, when one of them (*McCormick Warehouse Co. v. Pennsylvania R. Co., supra*) was reheard and overruled (148 I. C. C. 299), earlier decisions to the same effect falling along with it. The conclusion was then announced that a warehouse company doing business under such a contract was a consignor or consignee, acting on its own behalf and not as agent for the carrier. With this change in its relation discrimina-

tory payments or allowances became forbidden and unlawful. 49 U. S. C., § 3 (1).

Terminal, a rival warehouse, organized in 1904, was quick to occupy the vantage-ground left open by that ruling. It laid before the Interstate Commerce Commission a complaint charging Pennsylvania with unjust discrimination in the practices described. It asked that a restraining order protect it for the future, and that there be an award of reparation for losses suffered in the past. There were separate complaints as to the acts of other railroads (the Baltimore & Ohio and the Reading), which had terminal arrangements with warehouses of their own selection. Neither of these other roads had given a preference to Merchants, and none of the three was acting in concert with any other. The Commission, adhering to its ruling in the *McCormick Warehouse* case, held that the designated warehouses were in truth not public freight stations, however the carriers might style them. From this it followed that allowances and special privileges accorded on the footing of an agency relation would have to be abandoned. *Gallagher v. Pennsylvania R. Co.*, 160 I. C. C. 563. The railroads were required to cancel any tariff provisions whereby "the facilities of the contract warehouses" were made "a part of the respective station facilities" of the lines affected by the order. They were required to "cease and desist" from publishing or making the discriminatory privileges and allowances growing out of the attempt to treat the warehouse companies as agents. On the other hand, the Commission refused an award of reparation. "The evidence is far too vague and indefinite to warrant the conclusion that complainants have suffered actual pecuniary loss attributable directly to the alleged unlawful practices."

The carriers, together with Merchants and other warehouse companies interveners in the proceeding, brought suit in a federal court (three judges sitting) to vacate the order of the Commission. The bills of complaint were dismissed, one judge dissenting. 44 F. (2d) 379. Upon appeal to this court the decree was affirmed. *Merchants Warehouse Co. v. United States,* 283 U. S. 501. The opinion there rendered is so exact in its description of the nature and effect of the unlawful practices as to make elaboration useless now. In particular the court points out that a warehouse designated as a station was in a position to receive package freight in less than carload lots, and ship it at carload rates without charge to the customer for assembling the packages and loading them, this by reason of the fact that the warehouse had been paid by the railroad for doing that very work. To that extent it could afford to underbid competitors. For the same reason it had a position of superiority over against its rivals in unloading carload lots, for it could distribute and re-ship in packages at the expense of the carrier. This advantage as to package freight, if permitted to continue, would have taken the life out of rules designed to limit the character of transportation services. By rule 23 of the Consolidated Freight Classification a carrier may not distribute carloads of freight in less than carload lots, nor assemble smaller lots into carloads. 283 U. S. at p. 510. Thus the opinion makes it clear that the whole system of warehouse stations, with its payments and allowances, including the incidental saving of demurrage, had been built upon a false foundation. Adherence to the statute called for its suppression.

We have seen that Terminal asked for reparation as well as for a restraining order at the hands of the Commission. There is no doubt that the Commission had jurisdiction in response to that request to make an award against the railroad for damages suffered by the complainant as a result of the unlawful practices. 49 U. S. C., §§ 8, 9, 16 (1) (2); *Interstate Commerce Commission v. United States,* 289 U. S. 385; *Louisville & Nashville R. Co. v. Ohio Valley Tie Co.,* 242 U. S. 288; *Pennsylvania R. Co. v. Jacoby & Co.,* 242 U. S. 89; *Meeker v. Lehigh Valley R. Co.,* 236 U. S. 412; *Pennsylvania R. Co. v. International Coal Mining Co.,* 230 U. S. 184. The Commission found, however, that no damages had been proved, and its ruling as to that was final, not subject to review by this court or any other. *Interstate Commerce Commission v. United States, supra,* at p. 388; *Baltimore & Ohio R. Co. v. Brady,* 288 U. S. 448; *Standard Oil Co. v. United States,* 283 U. S. 235; *Alton R. Co. v. United States,* 287 U. S. 229; *Procter & Gamble Co. v. United States,* 225 U. S. 282. True, the complainant might have confined itself to a request for a restraining order, and after thus invalidating the preference have asked a court for reparation. 49 U. S. C., § 9. It had a choice, in other words, between a remedy at the hands of the Commission and a remedy by suit, but by express provision of the statute it could not have them both. *Baltimore & Ohio R. Co. v. Brady, supra.* Reparation under the Commerce Act was thus permanently barred by the ruling of the Commission as against the offending carrier. The situation was altogether different, however, in respect of the liability of Merchants and other aiders and abettors. As to wrongdoers other than the carrier the complainant had not asked the Commission to fix the quantum of the damages.

thus relieving us of the duty to inquire whether jurisdiction would have existed if such relief had been demanded. 49 U. S. C., §§ 9, 16 (1), and compare 49 U. S. C., § 42. Merchants would not have been affected by an award of reparation if the Commission had found the evidence sufficient for that relief, and it gains nothing from the fact that reparation was refused. In saying this we are not unmindful that it intervened in the proceeding. It was interested in the event, for it would be harmed by a restraining order. 49 U. S. C., § 42. Intervention, though permitted, did not broaden the complaint, nor add to the range of enumerated powers. Accordingly the framers of the statute were careful to provide that aiders and abettors should not go unwhipped of justice. In a suit under the Commerce Act, all persons soliciting or procuring the allowance of a forbidden preference were to be liable, jointly or severally, to make good the damage suffered. 49 U. S. C., § 10, (4).* Cf. 49 U. S. C., § 41 (3). Here was an ample remedy to reach a guilty participant in an unlawful discrimination, whether reparation against the carrier had been granted or refused.

Petitioner, not satisfied to proceed under the Commerce Act, put that remedy aside and brought suit under the Sherman and Clayton Acts, hoping by that manoeuvre to charge both carrier and warehouse, and to charge them with treble damages. Every act of wrongdoing proved in the new suit to have been committed by the defendants was proved against them also (with unsubstantial exceptions) in the case before the Commission. Now as before, the head and front of their offending is the use of the warehouses as stations for the carrier with the allowances and privileges, such as exemption from demurrage, growing out of that relation. What is true of the offense is true also of its consequences. There has been no proof of any loss that would not be provable in equal measure in proceedings under the Commerce Act upon a claim for reparation. *Interstate Commerce Commission v. United States, supra; Louisville and Nashville R. Co. v. Ohio Valley Tie Co., supra.* Terminal does not show that there was a conspiracy to establish a monopoly either of transportation by Pennsylvania or of storage by Merchants, much less that a monopoly was actually attained. There was no monopoly of transportation, for the statistics make it plain that the competing lines in Philadelphia had a large percentage of the business of carrying storage freight. Moreover, Terminal is not here as the representative of the railroads, and may not vindicate their grievances, if grievances there are. More important is the consideration whether there has been a monopoly of storage. There are many warehouses in Philadelphia for the storage of railroad freight. Neither Merchants nor any other company has been able to engross the business or has even attempted to engross it. During the years of the unlawful practices, Merchants' business declined proportionately to the whole, and Terminal's increased, as did also that of other warehouses, so far as the record supplies us with the relevant statistics. Indeed, petitioner does not even claim that by reason of the defendants' acts, it failed to get business that would otherwise have come to it. If there was any claim for such damages at the beginning it was explicitly renounced. What petitioner contends and has contended for is this and nothing more, that to hold and attract customers it had to keep its charges down below the normal rate, diminishing its profit to the extent of the reduction. In a word, its only damages are those resulting, in its view, from the allowances for loading and unloading or like discriminatory acts, and not from any conspiracy transcending these particulars, a conspiracy of which allowances and privileges are a symptom or an incident.

Upon the basis of that evidence the trial judge left it to the jury to say whether Terminal was a sufferer from an unlawful combination in restraint of trade and commerce. The jury found a verdict for $136,125 against both defendants. This verdict was trebled by the court, with the addition of a counsel fee ($27,000), the whole judgment thus amounting to $437,338.81. There was an appeal to the Circuit Court of Appeals for the Third Circuit where the judgment was reversed. The ground of the reversal was that the decision of the Commission refusing repa-

* "*Inducing unjust discrimination; penalty; liability for damages.* If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this chapter, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom."

ration was a bar to any claim for damages against either of the defendants in a suit under the Anti-Trust laws as well as under the Commerce Act. 78 F. (2d) 591. This court granted a writ of certiorari to determine the scope and operation of important acts of Congress.

The order of the Commission denying reparation, though it be assumed to be conclusive evidence in favor of the carrier, is plainly not such evidence for the carrier's confederate. We think it better to rest our judgment on grounds applicable to both defendants. Whether such grounds exist is the question next in order.

First: Discriminatory privileges and payments given by a carrier to a consignor or consignee are unavailing without more to make out a combination in restraint of trade or commerce within the meaning of the Anti-Trust Laws. To lead to that result the privileges or payments must be the symptoms or incidents of an enveloping conspiracy with its own illegal ends. In the absence of such a showing a sufferer from discriminatory charges and allowances has his remedy under the Commerce Act for any damage to his business, and that remedy is exclusive against all the parties to the wrong.

Two cases in this court, though not indeed decisive, are apposite and helpful. The first, *Keogh v. Chicago & Northwestern Railway Co.,* 260 U. S. 156, was a suit under the Anti-Trust Laws against railway companies and others who were charged to have combined in establishing uniform rates and thus destroying competition, all to the plaintiff's damage. True the rates had been approved after complaint to the Commission, but this was not enough, or Keogh so contended. He was entitled in his view to the benefit of competitive rates, quite apart from any finding that the rates established by concerted action were reasonable in amount and without discriminatory effect. In upholding a dismissal of the suit, the court called attention to the provisions of the Commerce Act whereby a remedy in damages was given for rates illegally exacted. "If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings. *Louisville & Nashville R. Co. v. Ohio Valley Tie Co.,* 242 U. S. 288. Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust Act? See *Meeker v. Lehigh Valley R. Co.,* 162 Fed. 354. And if no remedy under the Anti-Trust Law is given where the injury results from the fixing of rates which are illegal because too high or discriminatory, may it be assumed that Congress intended to give such a remedy where, as here, the rates complained of have been found by the Commission to be legal and while in force had to be collected by the carrier?" 260 U. S. at p. 162. These queries were coupled with a warning of the practical inconvenience attendant on any answer different from the one that they suggest. "If a shipper could recover under § 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors." *Id.* at 163.

A second case pointing the same way is *United States Navigation Co., Inc. v. Cunard Steamship Co., Ltd.,* 284 U. S. 474. The suit was for an injunction under the Sherman Anti-Trust Act and the Clayton Act to restrain a group of steamship companies from continuing a conspiracy in restraint of trade and commerce. The acts charged to be illegal fell within the express prohibitions of the Shipping Act of 1916 as amended, or were in effect, even if not in terms, a component part thereof. 284 U. S. at p. 485; 46 U. S. C., § 801, 812, 815, 816, 876. The decision was that the plaintiff must seek redress by application to the Shipping Board. True, the Anti-Trust Laws, since the enactment of the Clayton Act, have been explicit in providing that any one injured by an unlawful combination might have relief by injunction against threatened damage to his business. 15 U. S. C., § 26; *Duplex Printing Press Co. v. Deering,* 254 U. S. 443; *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association,* 274 U. S. 37. To this there is an exception where the subject matter of the complaint is a wrong within the jurisdiction of the Interstate Commerce Commission, in which case an injunction, if granted, must be at the instance of the government. 15 U. S. C., § 26; *Central Transfer Co. v. Terminal Railroad Association of St. Louis,* 288 U. S. 469, 474. The exception does not apply, at all events in terms, to wrongs within the jurisdiction of any other board. Even so, the right to sue, however explicit on its face, was held to have been partially superseded in respect of private suitors by the adoption of the Shipping Act, which as to transactions within its range gave the only remedy available. The conclusion was reinforced by a reference to *Keogh's* case and to the need for a uniformity difficult of attainment when jurisdiction is divided.

What was said in these opinions is precisely applicable here. If a sufferer from

the discriminatory acts of carriers by rail or by water may sue for an injunction under the Clayton Act without resort in the first instance to the regulatory commission, the unity of the system of regulation breaks down beyond repair. *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452; *Robinson v. Baltimore & Ohio R. Co.*, 222 U. S. 506; *Northern Pacific R. Co. v. Solum*, 247 U. S. 477, 483; *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 291; and see 15 U. S. C., § 26, construed in *Central Transfer Co. v. Terminal Railroad Association, supra.* On the other hand, if the regulatory commission has issued a "cease and desist" order, an injunction under the Clayton Act is inappropriate and needless. 49 U. S. C., § 16 (7), (8), (12). The same considerations are applicable, and with undiminished force, where the suit under the Clayton Act is not for an injunction but for damages. There too a finding of undue discrimination by the regulatory board is a necessary preliminary to a suit against the carrier. See cases *supra.* Certain then it is that the Anti-Trust Laws are inapplicable in all their apparent breadth to carriers by rail or water. A consignor or consignee aggrieved by such a wrong must resort to the appropriate administrative agency, at least for many purposes. If he is remitted to the Commerce Act or the Shipping Act to cancel the illegal preference, may he pass over those acts and revert to the Clayton or the Sherman Act for the purpose of recovering damages? The Commerce Act like the Shipping Act embodies a remedial system that is complete and self-contained. It provides the means for ascertaining the existence of a preference, but it does not stop at that point. As already shown in this opinion, it gives a cause of action for damages not only against the carrier, but also against shippers and consignees who have incited or abetted. For the wrongs that it denounces it prescribes a fitting remedy which, we think, was meant to be exclusive. If another remedy is sought under cover of another statute, there must be a showing of another wrong, not canceled or redressed by the recovery of damages for the wrong explicitly denounced. The opinions of this court in their fair and natural extension point to that conclusion. *Keogh v. Chicago & Northwestern Railway Co., supra; United States Navigation Co. v. Cunard Steamship Co., supra.* The opinions of other federal courts point the same way with equal, if not greater certainty. *United States Navigation Co. v. Cunard S. S. Co.*, 50 F. (2d) 83, 86, 89, reviewing the decisions; *Meeker v. Lehigh Valley R. Co.*, 162 Fed. 354, 363; *United States v. Atchison, T. & S. F. Ry. Co.*, 142 Fed. 176, 184, 185; *Glenn Coal Co. v. Dickinson Fuel Co.*, 72 F. (2d) 885, 888. We follow these signposts to the goal they seem to mark.

In thus holding we do not intimate that never in any circumstances can a carrier become a party to a conspiracy in restraint of trade or commerce with liability for treble damages. This has been made plain already. We enlarge on it for greater certainty. Wherein the case is now deficient will be made clearer by example. One may suppose a business of a manufacturer which has assumed the form and size of a monopoly, or if not already at that stage, is well upon the road thereto. Cf. *Standard Oil Co. v. United States*, 221 U. S. 1, 51, 61; *United States v. American Tobacco Co.*, 221 U. S. 106; *United States v. United States Steel Corp.*, 251 U. S. 417; *United States v. Swift & Co.*, 286 U. S. 106, 116. One may add a situation in which a carrier has knowingly confederated with the owner to preserve such a business or foster it. Whatever liability grows out of that alliance is untouched by this decision. For present purposes we may assume that if such a situation should develop, the carrier would make itself a participant in the monopoly which it had conspired to produce, though its only overt act was a discriminatory rate of carriage. Again, a group of manufacturers, whose business in combination would not amount to a monopoly, might unite among themselves to lay a burden upon commerce by concerted action as to prices. *Swift & Co. v. United States*, 196 U. S. 375; *United States v. American Linseed Oil Co.*, 262 U. S. 371; *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U. S. 600. If a carrier were to give a preference in furtherance of that conspiracy, it would become a participant therein, or so we may assume, the damages being measured not merely by the consequences flowing from the preference, but by those flowing from the conspiracy in all its comprehensive unity.

None of these assumptions affects the case at hand. For reasons already stated there was no conspiracy to monopolize the storage business to the destruction of Terminal or of others similarly situated. There was no conspiracy to impose upon that business a burden of any kind, except to the extent that the enjoyment of a preference might increase the opportunities for profit of the warehouse so preferred. Of any combination more far-reaching, more inclusive in its aims, there is silence in the record after every reasonable inference has been drawn from its pages. On the contrary, the history of the relation between Pennsylvania and Merchants indicates

strongly that the illegal discrimination, far from being a symptom of a larger combination, was the product of a mistake of law, which was shared for many years by the regulatory commission till the decision in McCormick's case laid down another rule. The mistake does not relieve the carrier from liability for the concession of a privilege which has turned out to be forbidden. It serves, however, as a reminder that the liability must be kept within reasonable limits, and that a preference innocent in purpose should not be magnified into a token of a circumambient conspiracy.

We conclude that for Merchants as well as for Pennsylvania whatever liability was incurred through the forbidden discrimination was under the act to regulate commerce and not for treble damages.

Second: The case having been submitted to the jury on the theory that apart from the unlawful preference there was evidence of a conspiracy in restraint of trade and commerce, and the complaint having been framed on that theory and no other, the suit should have been dismissed as to each of the defendants.

The judgment of the Court of Appeals reversing the judgment of the District Court is accordingly

Affirmed.

Mr. Justice McReynolds concurs in the result.

Mr. Justice Roberts took no part in the consideration or decision of this case.

[¶ 55,104] Clark Blade & Razor Company v. Gillette Safety Razor Company and Otto Roth, Inc.

Clark Blade-Selling Corporation v. Gillette Safety Razor Company and Otto Roth, Inc.

United States Circuit Court of Appeals for the Third Circuit. Filed March 4, 1936.

Appeals from the District Court of the United States for the District of New Jersey.

Proof made by plaintiffs in a private damage suit against a competitor, charging violation of the Anti-Trust Laws, is held insufficient to warrant submission of the case to the jury, and a directed verdict for the defendant is affirmed.

Opinion

Before Buffington, Davis and Thompson, Circuit Judges.

Per Curiam: In the court below the Clark Blade & Razor Company and the Clark Blade-Selling Corporation each brought suit against the Gillette Safety Razor Company and Otto Roth, Incorporated, charging them with violations of the Sherman Anti Trust Laws and the Clayton Act to the damage of said plaintiffs.

The cases involve common questions of law and fact and were tried together. At the close of testimony, the trial Judge directed a verdict in favor of the defendants. Thereupon this appeal was taken and the questions involved are the giving of such binding instructions and the rulings of the court on the admission and refusal of evidence.

A vast amount of evidence was given and the case turns on its own particular facts and, as we view it, no principle of law, procedure or practice is involved, but the briefs of both sides are loaded with references and extracts from the cases involving the much litigated and much discussed questions arising under the statutes here involved. We see no useful purpose to be served by our adding to this volume of legal literature. Suffice to say the basic question is whether the facts proven were such as constrained the Judge to submit the cases to the jury.

After due consideration had, we are of opinion the proofs of the plaintiffs did not warrant submission to the jury and as the rulings of the court as to the admission would not have so affected the case as to have warranted the submission of the causes, we find no reversible error and accordingly limit ourselves to affirming the judgments below.

The briefs of both appellant and appellee violate rule of court No. 24 (4) prohibiting the printing of arguments in excess of fifty pages. The rule is violated by the practice followed in this case of incorporating what is in fact argument under the misleading heading "Statement of the Case." The practice is not to be overlooked, but will, if persisted in, result in the suppression of briefs in violation of the rule.

[¶ 55,105] Robert Hofeller, Trading as Bob Hofeller Candy Company v. Federal Trade Commission.

United States Circuit Court of Appeals for the Seventh Circuit. Decided March 25, 1936.

Petition for Review of Order of the Federal Trade Commission.

The Federal Trade Commission's order that respondent cease selling candy in packages containing prizes is affirmed on the ground that there was sufficient evidence to sustain the Commission's findings that distributors of straight candy were deprived of possible business, and that the method used was unfair.

Affirming Federal Trade Commission Complaint No. 2187.

Before EVANS and SPARKS, Circuit Judges, and BRIGGLE, District Judge.

This appeal is from an order of the Federal Trade Commission directing petitioner to cease and desist unfair trade practices, viz., the selling in interstate commerce to concessionaires, of candy so packed as to be a lottery or gift enterprise. Because of the importance of the findings of the Federal Trade Commission, we have set forth the findings of said commission, deleting the immaterial portions.[1]

EVANS, Circuit Judge. Briefly stated, the facts are:

Petitioner sells candy in packages which retail for five to twenty-five cents and contain various prizes ranging in value from one cent to three dollars. The consumer in purchasing a package does not know which prize he will receive nor its value. The packages are generally sold in burlesque theatres, at carnivals, and like places, where "straight" candy is not generally sold, but the Commission found that the potential competition of "straight" candy was eliminated by the sale of this prize candy. It also held that the sale of prize candy injuriously affected the business of the straight candy dealers and constituted unfair competition and violated section 5 of the Federal Trade Commission Act.

[1] FINDINGS AS TO THE FACTS.

"* * * Hofeller, is an individual doing business as Bob Hofeller Candy Company * * * in * * * Chicago * * *. He * * * has been, engaged in the sale and distribution of packaged candy to concessionaires * * * burlesque theatres, traveling shows, tent shows, medicine shows, circuses and carnivals. Such purchasers are located in the various states * * * and respondent causes said candy packages * * * to be shipped * * * to the purchasers * * * in (other) states * * *. * * * respondent has been engaged in interstate commerce and is * * * in *active and substantial competition with others* * * * engaged in the sale * * * in interstate commerce, of candy * * *.

"* * * Respondent does not manufacture the candy * * * but buys certain kind of caramel * * * and chocolate covered cream candy * * *. He places this candy in boxes bearing various brand names, together with prizes * * * of * * * merchandise or coupons * * * (for) merchandise.

"These assortments vary according to * * * direction of * * * customers, but *they all make use of the same chance feature,* and a description of one * * * assortment is descriptive of the principle involved in all. One such assortment * * * (of) respondent * * * has the brand name 'Oriental Love Drops.' This assortment consists of a number of boxes, each containing * * * five pieces of caramel candy and another article of merchandise as a prize. A list of prizes in said boxes includes: stick-pins, paper watches, transfer pictures, snap games, moving picture books, water flowers, eyeglasses, tops, strip pictures, lamps, wall decorations, blankets, stockings, bed spreads and pillows. * * * (the prizes) are concealed in said boxes and the nature of the prize * * * can not be ascertained until the box has been purchased and opened. The retail value of the prizes ranges from 1¢ to $3.00.

"* * * The articles of prize merchandise are thus distributed wholly by lot or chance. * * *

"* * * The packages of candy containing * * * prize merchandise are * * * variously described in the candy trade as: 'Prize packages,' * * *. Candy sold without any prize or without any lot or chance feature is referred to * * * as 'Straight' Candy.

"* * * The majority of the packages of candy * * * retail at 10¢ each, * * * a few * * * at 5¢, a few at 16¢ and a few at 25¢. *The candy contained in said packages is not the equivalent in value of 'straight' candy sold at corresponding prices.*

"* * * Numerous concessionaires * * * purchase the assortments * * * from respondent or * * * from others distributing similar types * * * and such concessionaires * * * offer the same for resale to * * * patrons of such * * * places of amusement * * *

"* * * The packages are * * * packed in such manner that they can be offered for sale by respondent's customers to the consuming public * * * without alteration. * * * The testimony clearly indicates that the packages * * * can not be resold to the public by respondent's customers, *except as a lottery or gaming device* * * *

"* * * (Respondent) packs and assembles such candy in the way and manner described so that it shall be resold to the public by lot or chance.

"* * * Respondent's merchandise is sold as 'Prize Candies' in burlesque theatres, traveling shows, tent shows, medicine shows, circuses and carnivals. * * * (where) * * * with the exception of the burlesque theatres, *no other candy is ordinarily offered for sale.* In burlesque theatres some 'straight' candies are occasionally offered for sale and sold. The evidence discloses and the Commission finds that in theatres other than burlesque theatres candy bars and small packages of candy are quite often offered for sale and sold. Candy manufacturers and candy jobbers testified and the Commission finds that, *if this 'prize' candy was not offered for sale, 'straight' candy in bars or small packages could be sold in substantial quantities in burlesque theatres, traveling shows, etc.* * * * and carnivals, *the sale of said 'novelty package' candy prevents the sale of 'straight' candy and thus eliminates competition of manufacturers and jobbers selling such 'straight' candy.* The Commission finds that such manufacturers and *jobbers of 'straight' candy are potential competitors of the respondent insofar as the sale of the 'straight' candy in the aforementioned places of amusement* * * *

Petitioner argues that (1) the complaint is insufficient to show unfair methods of competition upon which a valid cease and desist order might be predicated, (2) there was no tendency to suppress substantial competition, exploit or deceive the public (most all of the consumers not being children), and (3) the Federal Trade Commission Act is unconstitutional if it be construed to cover practices not deemed unfair at the time of its adoption.

The instant case is controlled by *Federal Trade Commission v. Keppel & Bros.*, 291 U. S. 304. Petitioner agrees that his appeal turns upon the applicability or nonapplicability of the *Keppel* case. He differentiates the *Keppel* case on the ground that sales to children was there the determining factor, but was here absent. It, too, was an unfair competition case involving the sale of prize candy, the sale being most generally to children.

This court followed the *Keppel* case, in a recent opinion, *Walter H. Johnson Candy Co. v. Federal Trade Com.*, 78 F. (2d) 717, where we upheld a cease and desist order dealing with the sale of a prize lottery scheme in connection with the sale of candy, mostly to children.

It cannot be denied that the persuasive argument in the *Keppel* case was based on the fact that the consumers of the candy were, in the main, children. We are not satisfied, however, that the conclusion there reached is not here applicable. It will be noted that the Supreme Court emphasized the factor of lottery and chance in determining what constituted an unfair method of competition, and it spoke in general terms, at times without limitation to instances where the consumers were children. The practice there disclosed was deemed offensive to some manufacturers who refrained from adopting it and therefore suffered loss. In the *Keppel* case there are many facts indicative of unfair trade methods there pointed out by the court which are present in the instant case. Among such similarities are: Inferior candy sold in the prize packages; a relatively negligible amount of the candy was given in return for the price; substantial diversion of trade from actual or potential competitors; sale of the candy with the lottery feature in violation of local law; and competing manufacturers damaged by refraining from such practices.

It is quite impossible to escape the conclusion that where a competitive method employs a device whereby the amount of the return is made to depend upon chance, such method is condemned as being contrary to public policy.

Two matters in this field of law are well settled: (a) What constitutes unfair methods of competition is a question of law for the court. *Fed. Trade Commission v. Balme*, (23 F. (2d) 615, *Fed. Trade Commission v. Raladam Co.*, 283 U. S. 643; *James S. Kirk & Co. v. Fed. Trade Com.*, 59 F. (2d) 179; *Fed. Trade Com. v. Gratz*, 253 U. S. 421. (b) The findings of the Federal Trade Commission are to be accepted if supported by evidence. *Armand Co. v. Fed. Trade Com.*, 78 F. (2d) 707; *E. Griffiths Hughes v. Fed. Trade Com.*, 77 F. (2d) 886; *Fed. Trade*

"* * * The sale and distribution * * * by the sales plan described herein is the sale * * * of said packages by lot or chance and constitutes a lottery or gaming device.

"* * * Competitors and potential competitors of respondent * * * testified and the Commission finds as a fact that many competitors and potential competitors regard such method of sale and distribution as morally bad and encouraging gambling, and particularly where these packages are offered to audiences made up in part of children; as injurious to the candy industry, because it results in the merchandising of a chance or lottery instead of candy; and as providing the vendors thereof with a means of violating the laws of the several states. Because of these reasons, some competitors and potential competitors of respondent refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance. Other competitors are opposed to such method of sale for the reasons just above stated and testified, and the Commission finds as a fact, that they are nevertheless compelled to adopt such methods in order to meet the competition of respondent and others indulging in like methods, in order to prevent the loss of their business or a substantial part thereof. The competitors and potential competitors of respondent who refuse to sell their merchandise by such methods are thereby put to a disadvantage in competing. Certain concessionaires, operators, * * * who find that they can dispose of more candy by using the method of sale as described, buy respondent's products and the products of others employing the same methods of sale and thereby trade is diverted to respondent and others using similar methods from respondent's competitors and potential competitors. Said competitors and potential competitors can compete on even terms only by giving the same or similar devices to their customers. This they are unwilling to do, and their sales of 'straight goods' candy is injuriously affected.

"The use of the method by respondent as described herein in the sale and distribution of his candy is prejudicial and injurious to the public and to respondent's competitors and potential competitors, and has resulted in the diversion of trade to respondent from his said competitors and potential competitors, and thus is a restraint upon, and a detriment to, the freedom of fair and legitimate competition in the candy industry.

"* * * The sale of 'straight goods' candy has been injuriously affected by the sale of 'novelty prize' candy, and this effect is principally due to the gambling or lottery feature indicated with the 'novelty prize' candy.

"* * * Respondent began the sale * * * of the (prize) assortments * * * in 1932, and has continuously * * * (sold them).

"* * * The exact amount of respondent's annual volume of business is not shown, but the respondent testified, and the Commission finds, that the *volume of his business involving the sale and distribution of candy by lot or chance is substantial.*

"* * * The sale and distribution of candy by lot or chance is against the public policy of the United States and of many of the states thereof, and some of the said states have laws making the operation of lotteries and gambling devices penal offences."

Com. v. Curtis Pub. Co., 260 U. S. 568. The statute provides:

"* * * The findings of the Commission as to facts, if supported by testimony, shall be conclusive." (15 U. S. C. A. Sec. 45.)

The issue is therefore narrowed to whether there was evidence to support the findings of the Commission and, if so, whether the facts found were such as to fall within the purview of the legal conception of "unfair methods of competition." As the Supreme Court has interpreted that phrase, the dominant factor seems to be the element of competition, actual or potential, and the specificity and substantiality of the effect of such unfair methods upon such competition.

Our study of the record has caused us to reach this conclusion. Although we do not find the evidence overwhelmingly establishes either the presence of substantial existing competition, or of potential competition between the sale of straight candy and the novelty candy here under scrutiny, there is sufficient evidence to sustain the findings of the Commission. The testimony tended to disclose that in the field of burlesque theatres, free open air shows, carnivals, show boats, and the like, the sale of prize or novelty candies constituted a very substantial, if not a major part of the receipts from candy sales and that little other candy was sold in such places, except bar candies. There was testimony which tended to show that the distributors of straight candy were deprived of possible business. They either refrained from entering that sort of business because of moral compunctions, or they were unable to compete with the prize candy business because of the appeal of the lottery features. It was also shown that the candy in the prize package was much inferior in quality to straight candy; that the quantity given was negligible in view of price charged; and that the prizes often varied greatly in value. The profit on these packages exceeds 50%.

We are of the opinion that the present investigation was begun in the interest of the public for the protection, encouragement, and maintenance of competition and for the elimination of unfair trade methods involving the use of lottery and methods generally held by the community to be contrary to public policy. There was evidence to the effect that 60% to 70% of the receipts from the free shows was from the sale of this novelty candy; 35% to 50% of show boat receipts resulted therefrom; and 30% to 35% of tent show receipts was from novelty packages. 95% of petitioner's business was in the sale of prize packages. Although complete evidence was lacking, it was sufficient to show that the prize candy industry is a substantial industry.

The order is affirmed.

[¶ 55,106] American Lead Pencil Company v. Musgrave Pencil Company, Inc., et al.

Tennessee Supreme Court. Decided March 7, 1936.

A patentee can lawfully limit a licensee in the exercise of the right to sell patented devices, and a contract between a patentee of an eraser attachment for lead pencils and a pencil manufacturer, wherein the manufacturer agrees not to sell pencils embodying the device at prices lower than those authorized by the patentee, is held not to be in violation of the Anti-Trust Laws.

Opinion

GREEN, C. J.—From a decree overruling their demurrers in part, the chancellor permitted an appeal by defendants to this court.

The complainant avers that it is a New York corporation engaged in the business of manufacturing and selling pencils. That it was the owner of a patent covering an eraser attachment for lead pencils known as the Oversize or Reckford tip. That on April 11, 1933, complainant entered into a license agreement with defendant J. R. Musgrave permitting said Musgrave to manufacture at his factory in Shelbyville, Tennessee, for a term of three years, lead pencils embodying said patented device and to sell the same. A copy of the agreement was filed with the bill reciting a certain cash consideration and a certain license fee based on the quantity of pencils embodying said device manufactured and sold by Musgrave. The agreement also provided that Musgrave should not sell pencils embodying this device at prices lower than authorized by complainant and complainant undertook to furnish Musgrave from time to time with a scale of prices at which such pencils should be sold.

Under the terms of the agreement the license granted to Musgrave was personal and non-assignable. The bill charges that without the consent or knowledge of complainant, about the first of the year 1934, Musgrave Pencil Company, Inc., bought all the assets of defendant J. R. Musgrave used

in the manufacture of lead pencils and that defendant J. R. Musgrave, in violation of the express terms and provisions of his contract with complainant, undertook to assign all his rights under said contract to manufacture and sell pencils embodying complainant's patent to Musgrave Pencil Company, Inc. That following said attempted assignment defendant Musgrave Pencil Company, Inc., began manufacturing and selling pencils carrying complainant's patented device and continued such manufacture and sale up to and probably after December 19, 1934.

The complainant charged various breaches of the terms of its contract with defendant Musgrave and set out a notice of termination of said contract given said Musgrave on or about December 19, 1934, which right to terminate the complainant claimed by reason of particular provisions of the license agreement. There were other allegations in the bill which it is not necessary to detail at this time, and the bill prayed:

That the license agreement between complainant and defendant J. R. Musgrave be declared terminated; that said defendant be required to answer and set out a full and detailed statement of all pencils manufactured and sold by him embodying complainant's patent up to the date that he undertook to assign his license to defendant Musgrave Pencil Company, Inc.; that defendant Musgrave Pencil Company, Inc., be required to set out in its answer a like statement of all pencils manufactured and sold by it embodying the aforesaid device; "that your complainant may be awarded said sum of $25,000 as damages for said breach and violation of the license agreement;" that an injunction issue enjoining defendants from the further manufacture and sale of any pencils bearing the Oversize or Reckford tip; and that complainant be granted general relief.

The defendants filed separate demurrers, each demurrer, however, resting largely on the same grounds. The demurrers contained three propositions.

First: That the bill undertakes to join a suit on a contract against J. R. Musgrave with a suit for infringement of a patent against Musgrave Pencil Company, Inc., and that the bill should accordingly be dismissed as multifarious and for a misjoinder of parties.

Second: That Musgrave Pencil Company, Inc., not being a party to the license agreement and the attempted assignment to it of any rights under such agreement being without effect, the suit against said Musgrave Pencil Company, Inc., must necesarily be regarded as one not based on contract but purely for infringement of a patent and that jurisdiction of such suit is in the federal courts alone under Title 28, Section 371, Subsection 5, U. S. C.

Third: That the bill and the license agreement exhibited therewith showed an attempted contract not enforceable because in restraint of trade and competition contrary to the laws of Tennessee and of the United States.

The chancellor sustained the demurrers insofar as the bill sought to recover damages against defendant Musgrave Pencil Company, Inc., and insofar as it sought to procure an injunction against that defendant restraining it from the further manufacture and sale of pencils bearing the Oversize or Reckford tip, being of opinion that in such aspects the bill presented a case beyond the jurisdiction of the chancery court. The chancellor, however, did not dismiss the bill as to the Musgrave Pencil Company, Inc.

[The Court then determines that the bill should have been dismissed as to defendant Musgrave Pencil Co., that it should have been sustained as to defendant J. R. Musgrave, and that the attempted assignment was unlawful and void.]

This brings us to the defendants' contention that the contract embodied in the license agreement is void and unenforceable as one in restrain of trade and competition contrary to section 5880 of the Code of Tennessee and contrary to the Federal Anti-Trust Statutes, Title 15, Sections 1 and 2, U. S. C.

We take it that a monopoly, insofar as it is lawful and authorized under the patent laws of the United States, cannot be penalized by the statutes of Tennessee.

It is not necessary to set out the license agreement entered into between the complainant and defendant Musgrave. It is sufficient to say that the contract involves no sale and resale of patented articles and the authorities relied on by defendant dealing with unlawful restrictions with respect to the resale of patented articles are not in point.

The contract before us is a license by complainant to defendant Musgrave to manufacture and sell pencils carrying the patented device. Musgrave was entitled under this license to make the Oversize or Reckford tips himself or he could buy such tips from others authorized to make and sell them. The complainant did not undertake itself to sell the tips to Musgrave. The contract contained no restriction as to the variety of pencils on which Musgrave might place these tips. He was entitled to make his own pencils or to buy the pencils from anyone else and attach the tips thereto Neither did the contract contain any limitations with respect to Mus-

grave's sale of pencils not bearing the Oversize or Reckford tip. These things take the case before us out of the authority of other decisions relied on by defendants that struck down agreements with respect to patented articles.

In the case before us the complainant owning the patent covering the Oversize or Reckford device controls the manufacture and sale of pencils embodying that device. Its license to defendant Musgrave to manufacture and sell pencils embodying the patented device imposed a condition that Musgrave's sales of such pencils should be at prices fixed by the complainant and subject to change upon notice from complainant.

Such being the facts the case falls directly within the authority of *United States v. General Electric Co.*, 272 U. S. 476, 71 L. ed. 362. In that case the General Electric Company, as the owner of the patents, entirely controlling the manufacture, use and sale of the tungsten incandescent lamps, licensed the Westinghouse Company to make, use and sell lamps under such patents. The licensor imposed the condition that sales by the Westinghouse Company should be at prices fixed by the licensor and subject to change according to its discretion.

The agreement between the General Electric Company and the Westinghouse Company was assailed by the Government as being contrary to the Anti-trust Statutes of the United States but the Government's contention was overruled and the Supreme Court said:

"It is well settled, as already said, that where a patentee makes the patented article and sells it, he can exercise no future control over what the purchaser may wish to do with the article after his purchase. It has passed beyond the scope of the patentee's rights. *Adams v. Burke*, 17 Wall. 453, 21 L. ed. 700; *Bloomer v. McQuewan*, 14 How. 539, 14 L. ed. 532; *Mitchell v. Hawley*, 16 Wall. 544, 21 L. ed. 322; *Hobbie v. Jennison*, 149 U. S. 355, 37 L. ed. 766, 13 Sup. Ct. Rep. 879; *Keeler v. Standard Folding Bed Co.*, 157 U. S. 659, 39 L. ed. 848, 15 Sup. Ct. Rep. 738. But the question is a different one which arises when we consider what a patentee who grants a license to one to make and vend the patented article may do in limiting the licensee in the exercise of the right to sell. The patentee may make and grant a license to another to make and use the patented articles but withhold his right to sell them. The licensee in such case acquires an interest in the articles made. He owns the material of them and may use them. But if he sells them he infringes the right of the patentee, and may be held for damages and enjoined. If the patentee goes further and licenses the selling of the articles, may he limit the selling by limiting the method of sale and the price? We think he may do so provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory. When the patentee licenses another to make and vend and retains the right to continue to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, 'Yes, you may make and sell articles under my patent but not so as to destroy the profit that I wish to obtain by making them and selling them myself.' He does not thereby sell outright to the licensee the articles the latter may make and sell or vest absolute ownership in them. He restricts the property and interest the licensee has in the goods he makes and proposes to sell." *United States v. General Electric Co., supra.*

The court in this case approved and repeated one of its earlier statements as follows:

"The very object of these laws (patent laws) is monopoly and the rule is with few exceptions that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal." *E. Bement & Sons v. National Harrow Co.*, 186 U. S. 70, 46 L. ed. 1058.

We think the two decisions of the Supreme Court of the United States, from which we have just quoted, are decisive here. In *United States v. General Electric Company, supra*, the latter owned certain patents covering the use of tungsten filaments and a patent for the use of gas in an electric light bulb. Its agreement with its licensee reserved to it control of the price at which electric light bulbs embodying these patents should be sold. In *E. Bement & Sons v. National Harrow Co.*, the latter owned certain patents covering appliances used in the manufacture of harrows and in its contract with its licensee it reserved control of prices at which harrows embodying such patented appliances should be sold. In the case before us the American Pencil Company owns a patent covering an eraser attached to lead pencils and it is undertaking to reserve control of the prices at which its licensee shall sell lead pencils carrying this patented device.

The three cases are not to be distinguished. The Supreme Court in *United States v. General Electric Company* has considered and differentiated all of its own decisions which the defendants herein press upon our attention in this connection.

The decree of the chancellor will be modified as herein indicated and this cause remanded for further proceedings against defendant J. R. Musgrave. The bill is dismissed as to defendant Musgrave Pencil Company, Inc. The costs of appeal will be divided between American Pencil Company and J. R. Musgrave. The costs below will be fixed by the chancellor.

It may be added that we do not construe the prayer of the bill as do the defendants. We do not understand the bill to limit its prayer for the recovery of damages against J. R. Musgrave to damages only that accrued prior to the attempted assignment of the license to Musgrave Pencil Company, Inc.

[¶ 55,107] The Sugar Institute, Inc., The American Sugar Refining Company, Margaret A. Jamison, et al., v. The United States of America.

Supreme Court of the United States. March 30, 1936.

Appeal from the District Court of the United States for the Southern District of New York.

The decree enjoining the Sugar Institute from effectuating any general plan to give like terms to all customers and from adhering to prices announced in advance is modified to permit the circulation of information as to future prices.

A cooperative enterprise otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities, citing *Appalachian Coals v. United States,* 288 U. S. 344, 373, 374.

The freedom of concerted action to improve conditions has an obvious limitation. The end does not justify illegal means. The endeavor to put a stop to illicit practices must not itself become illicit. As the statute draws the line of unreasonable restraints, a cooperative endeavor which transgresses that line cannot justify itself by pointing to evils afflicting the industry or to a laudable purpose to remove them.

"The unreasonable restraints which defendants imposed lay not in advance announcements, but in the steps taken to secure adherents, without deviation, to prices and terms thus announced. . . . But, in ending that restraint, the beneficial and curative agency of publicity should not be unnecessarily hampered. . . . If the requirement that there must be adherence to prices and terms openly announced in advance is abrogated and the restraints which followed that requirement are removed, the just interests of competition will be safeguarded and the trade will still be left with whatever advantage may be incidental to its established practice."

Mr. Chief Justice HUGHES delivered the opinion of the Court.

This suit was brought to dissolve The Sugar Institute, Inc., a trade association, and to restrain the sugar refining companies which composed it, and the individual defendants, from engaging in an alleged conspiracy in restraint of interstate and foreign commerce in violation of the Sherman Anti-Trust Act. 15 U. S. C. 1. Final decree was entered which, while it did not dissolve the Institute, permanently enjoined the defendants from engaging directly or indirectly in forty-five stated activities. Defendants bring a direct appeal to this Court under the Act of February 11, 1903, 15 U. S. C. 29.

The record is unusually voluminous.[1] The court rendered an exhaustive opinion and made detailed findings of fact (218 in number) with conclusions of law, describing and characterizing the transactions involved. Numerous assignments of error broadly challenge its rulings and the case has been presented here in extended oral arguments and elaborate briefs. We shall attempt to deal only with the salient and controlling points of the controversy. These involve (1) the special characteristics of the sugar industry and the practices which obtained before the organization of The Sugar Institute, (2) the purposes for which the Institute was founded, (3) the agreement and practices of the members of the Institute, and (4) the application of the Anti-Trust Act and the provisions of the decree.

First.—The sugar industry and practices prior to the formation of The Sugar Institute.—Domestic refined sugar, beet sugar, and foreign and insular refined sugar, known in the trade as "off-shore" refined, constitute about 99 per cent. of the nation's supply. The remainder, consisting of domestic cane sugar, refined particularly in Louisiana, does not appear to be an important factor in the national markets. The fifteen defendant companies, members of the Institute, refine practically all the imported raw sugar processed in this country. Their product is known as "domestic refined." Prior to the organization of the Institute in 1927, they provided more than 80 per cent. of the sugar consumed in the United States, and they have since supplied from 70 to 80 per cent. Their proportion of the supply is even greater in the New England and Middle Atlantic States, being more than 90 per cent., while in all but a few States their share is more than 55 per cent. Each of the refiners is engaged extensively in interstate commerce. Their refineries are in the vicinity of Boston, New York, Philadelphia, Baltimore, Sa-

[1] The court states: "The testimony is transcribed in over 10,000 typewritten pages; more than 900 exhibits covering many thousands of pages were introduced in evidence."

vannah, Indianapolis, Galveston and San Francisco. The raw cane sugar which they use is imported principally from Cuba and to some extent from the insular possessions.

Beet sugar for many years has been an important factor in the domestic market. It is produced and sold chiefly in the middle and far West, providing in some States over 75 per cent. of the supply, and it competes with other sugars in a number of Southern and Middle Atlantic States. Off-shore sugar is refined principally in Cuba and to some extent in the insular possessions. Its important trade areas have been the Middle, Atlantic and Southern States; in some States it constitutes from 25 to 40 per cent. of the total supply. Both beet sugar and off-shore sugar are sold at a small differential below defendants' sugar. The trial court found that there was no agreement between defendants and the beet sugar manufacturers, or with the off-shore interests, to maintain any differential.

The court found that the defendants' refined cane sugar "is a thoroughly standardized commodity in physical and chemical properties." In exceptional cases and localities, certain of the defendants had built up a preference for brand names "sufficient before and after the Institute was organized to enable such brands to command a higher price than the sugar of the other defendants in sales from sugar dealers to their trade." In sales by refiners to manufacturers of products containing sugar—about one-third of the sugar consumed—"price, not brand, was always the vital consideration." And in the other sales, "one refiner could not ordinarily, by virtue of preference for his brand, obtain a higher price except insofar as another refiner might be giving a lower price by secret concessions."

The court further found that the "basis prices,"[2] quoted by the several refiners in any particular trade area, "were generally uniform both before and after the Institute, because economically the defendants' sugar, save for exceptional instances was and is a thoroughly standardized product."

It is a fundamental and earnest contention of defendants that the occasion for the formation of the Institute was the existence of grossly unfair and uneconomical practices in the trade, and that a proper appraisal of the motives and transactions of defendants cannot be made without full appreciation of the sorry condition into which the industry had fallen.

During the years 1917 to 1919, when the industry was under governmental control, prices were fixed and all forms of concessions and rebates were forbidden. The court found that, perhaps as early as 1921 and increasingly thereafter, the practice developed on the part of some, but not all, refiners of giving secret concessions. There were five refiners[3] who never indulged in that practice, but the others, called "unethical" refiners, did so to such an extent that at least 30 per cent. of all the sugar sold by the refiners in 1927 carried secret concessions of some kind. The need of secrecy was urgent, for as soon as it was known that a specific concession was granted it would be generally demanded. That concessions were widely granted was generally known in the trade, and while each refiner was able to find out in a general way the approximate prices and terms of his competitors, it was impossible to know with any degree of accuracy the actual prices and terms granted in the innumerable transactions. The court also found that various causes contributed to the development of these selling methods on the part of the unethical refiners, chief among which was an overcapacity since the war of at least 50 per cent. Other probable causes were the lack of statistical information as to amount of production, deliveries and stocks on hand, leading to over production, the uncertainties prevailing in the market for raw sugar which made the refined sugar industry highly speculative, the fact that, since 1922, most sugar has been sold through brokers, and the standardization of defendants' products which made their sales almost entirely dependent upon prices, terms and conditions. The concessions granted were largely, although not entirely, arbitrary. They were given principally to large buyers, but no system was followed in that respect. Even though there may not have been extensive resort to misrepresentations, "defendants entertained genuine fears that purchasers were falsely representing prices which they said they could procure from competing sellers."

Consumption of sugar in the United States decreased in 1927. The public "slimness campaign" of that year had substantial effect in discouraging the use of sugar. Certain distributors refrained from pushing sales because they could not sell profitably, but others were aggressive and sugar was generally available. While certain smaller distributors suffered because of the advantage enjoyed by some larger ones, that advantage was attributable in the

[2] The "basis price" is the price quoted at so much per pound per one hundred pound bag of "fine granulated" or "granulated" sugar. Contracts are closed with reference to this price but the purchaser has the option at stipulated differentials to specify for delivery an assortment of grades and packages.

[3] It appears that these five refiners accounted for 25.45 per cent of all sugar produced by defendants; in 1931, for 28.54 per cent.

greatest measure to efficiency, and the larger distributors did not obtain monopolies. The court found that there was "no substantial evidence that the situation caused, or would cause, substantial injury to the 'ethical' refiners as a class," although they may have been inconvenienced and probably believed that the sales methods of their competitors were harmful. The declining profits for the year 1927 were attributable at least in large part, the court found, to causes other than the secret concession system, such as the "slimness campaign," over-production and dumping.

But whatever question there may be as to particulars, the evidence and findings leave no doubt that the industry was in a demoralized state which called for remedial measures. The court summed up the facts in the following finding:

"29. The industry was characterized by highly unfair and otherwise uneconomic competitive conditions, arbitrary, secret rebates and concessions were extensively granted by the majority of the companies in most of the important market areas and the widespread knowledge of the market conditions necessary for intelligent, fair competition were lacking. The refiners were disturbed economically and morally over the then prevailing conditions. At least one refiner, American[4] was concerned about the possibility of liability under the Clayton Act because of the discriminations resulting from the various concessions."

Second.—The purposes for which the Institute was founded.—Defendants emphasize the nature of the proceedings taken in the formation of the Institute. The court found that the refiners held a series of meetings, beginning in the summer of 1927, for a discussion of conditions "with particular reference to undesirable practices and secret concessions." In September of that year, there were submitted to the Department of Justice a proposed certificate of incorporation and by-laws for a trade association, together with a number of suggestions respecting trade practices. A "Code of Ethics" was likewise submitted to the Department of Justice and discussed with its officials, with the result that some changes were made, and the Code as concertedly adopted in January, 1928, was substantially identical with that worked out when those discussions were held. The court found that "with the exception of two minor changes, the Code has retained its original form." It has been supplemented from time to time by "Interpretations" that is, rulings interpreting or amplifying the provisions of the Code. The Department of Justice made three investigations of the Institute in 1928, 1929 and 1930 and had complete access to the files of the Institute. As new issues of the "Code" and "Interpretations" were printed, copies were forwarded to the Department.

Defendants stress their dealings with the Department of Justice as evidence of their good faith and of the propriety and legality of their purposes. "The functionings of the Institute," they insist, "were always under the eye of the Department." The court, however, found that the Department "was not notified of various important steps taken by the Institute in connection with illegal restraints," nor was it notified "as to those activities charged by the Government and denied by defendants in this case." The Department did not conduct a comprehensive investigation of the restraints here involved until the end of 1930.

Defendants urge that the abolition of the vicious and discriminatory system of secret concessions, through the adoption of the principle of open prices publicly announced, without discrimination, was their dominant purpose in forming the Institute, and that other purposes were the supplying of accurate trade statistics, the elimination of wasteful practices, the creation of a credit bureau, and the institution of an advertising campaign. The court recognized the existence of these purposes in its finding:

"35. Among the purposes of the defendants in organizing the Institute were: (a) the selling of sugar on open, publicly announced prices, terms, and conditions; (b) the gathering of trade statistics not previously available; (c) the elimination of practices which they deemed wasteful; and (d) the institution of an advertising campaign to increase consumption. But these purposes were for the most part only incidental to defendants' actual dominant purposes in forming and operating under the Institute."

The "dominant purposes" were found to be as follows:

"36. I find that defendants' dominant purposes in organizing the Institute were: to create and maintain a uniform price structure, thereby eliminating and suppressing price competition among themselves and other competitors; to maintain relatively high prices for refined, as compared with contemporary prices of raw sugar; to improve their own financial position by limiting and suppressing numerous contract terms and conditions; and to make as certain as possible that no secret concessions should be granted. In their efforts to accomplish these purposes, defendants have ignored the interests of distributors and consumers of sugar."

Defendants charge that the finding as to the illegality of their dominant purposes was "wholly without foundation." They charge that the finding was built upon an "inherent suspicion" and not upon the evidence. The Government answers by pointing to the elaborate review of the evidence in the court's opinion and findings. We think that it is manifest that the findings as to dominant purposes was not based upon any assumption *a priori*, but was an inference of fact which the court drew from the facts it deemed to be estab-

[4] The American Sugar Refining Company, which, in 1927, had 25.06 per cent of all sugar produced by defendants.

lished with respect to the scope of the agreement between the members of the Institute and the actual nature and effect of their concerted action. The court found that the defendants "in most of their activities" had "gone much further than was reasonably necessary to accomplish their professed aims of eliminating fraud, waste and secret, unfair or illegal discrimination." The pith of the matter is in the following finding:

"37. At the inception of the Institute, defendants adopted a general agreement ostensibly to abolish all discriminations between customers but which in general purpose and effect amounted to an agreement not to afford different treatment to different customers, regardless of the varying circumstances of particular transactions or classes of transactions and regardless of the varying situation of particular refiners, distributors or customers or classes thereof. Under the guise of performing the agreement, against discriminations, defendants limited and suppressed numerous important contract terms and conditions in the particulars herein set forth, chiefly for the purpose and with the effect of accomplishing the objectives described in finding 36."

We turn to the transactions from which the inference of purpose is drawn.

Third.—The agreement and practices of the members of the Institute.—The evidence consists of the "Code of Ethics" and "Interpretations," oral testimony, the minutes of the Institute, and correspondence. Eliminating charges not sustained, the findings of restraints of trade rest upon the basic agreement of the refiners to sell only upon prices and terms openly announced, and upon certain supplementary restrictions.

1. *The "basic agreement."*—The "Code of Ethics" provided as follows:

"All discriminations between customers should be abolished. To that end, sugar should be sold only upon open prices and terms publicly announced."

There was nothing new in the mere advance announcement of prices. The court found that prior to the Institute, "general price changes were listed on the Refiners' Bulletin Boards, and brokers, customers and news agencies were notified, and frequently, as a curtesy, competitors would be telephoned. Except for notifying the Institute, price changes during the post-Institute period have been announced in this way. . . . Before the Institute, general price changes, including general changes in the selling bases of the 'unethical' refiners, were disseminated and became known to the entire trade very quickly."

These price announcements must be considered in the light of the trade practice known as "*Moves.*" The great bulk of sugar, as the court found, "always was and is purchased on what is known in the trade as 'Moves,' although very substantial quantities are sold from time to time apart from moves." A "move" takes place when the refiners make public announcements that at a fixed time they will advance their selling price to a named figure, either higher than the presently current selling price or higher than a reduced price which the announcements offer before the advance. Some period of grace was always allowed during which sugar could be bought at the price prevailing before the advance. And in order to obtain their sugar at the lower price, the trade, unless it was felt that the move occurred at too high a price, would then enter into contracts covering their needs for at least the next thirty days. Defendants point out that in actual practice the initial announcement might be made by any one of the refiners and that the move actually takes place only if all refiners follow a similar course. If any one fails to follow with a like announcement, the others must withdraw their advance, since sugar is a completely standardized commodity.

Under the system of the Institute, there was no obligation to give the Institute the first notice of a change in price. The open announcements to the trade were to be made in the customary manner and notified to the Institute which would relay the announcements. Prior to the Institute, when an advance in price was announced, the period of grace allowed for purchasing at the old price was uncertain. Sometimes it was very short, a matter of hours; sometimes sugar buyers who did not learn of the move in time, sent their orders in too late to buy at the old price. By an "interpretation," the Institute recommended that the members "announce changes in price not later than three o'clock." In its earlier form, this hour was to be that "of the day before the changed price becomes effective." But these words were deleted in 1929, and thereafter the announced price advances could be made effective at once. In practice, however, price advances continued to be announced to become effective the following day or even later. The court found that the effect of the "Three o'clock Rule," in and of itself, "seems to have been advantageous to the trade in case of a price advance in that the uncertain period of grace has been replaced by a definite one."

The court further found that the refiners "did not consult with one another after an advance had been announced by one of them and that the grace period was not in fact used by them to persuade a reluctant member to follow the example set, despite the business necessity of withdrawing in advance unless it were followed by all." The court found "no agreement among defendants on basis prices in the sense of an agreement to adopt a certain basis price from time to time and to maintain it during any period. Frequently an announce-

ment by one refiner of an advance would result in a series of announcements by others, ultimately leading to a decline. Often, too, the advance would be withdrawn because one refiner would refrain from following the announcement. Except in a few instances, a decline announcement was followed by all." "Data respecting price changes have been circulated by the Institute without comment" and there appear to have been no "price discussions" at Institute meetings.

There had been a practice in the trade called "Repricing",—of "making price declines retroactive to sales made at previous higher price." That occurred usually when a decline was announced late in the day and was applied to all of that day's business. The court found that during the first few months of the Institute, defendants attempted to prevent repricing but the prohibition proved impracticable and was abandoned. By a ruling in November, 1928, it was provided that "the custom of the trade permits the customer the benefit of the refiner's lowest price during the day, that is, a contract entered into or sugar delivered in the morning may be repriced at any lower price announced during the day." The court in its finding on this point stated that the ruling was evidently intended to prevent repricing beyond the period stated and "must have had some effect in discouraging it." Defendants challenge this criticism in view of the fact also found that refiners occasionally have repriced beyond the stated period, a practice which defendants say "had never prevailed in the pre-Institute period," and defendants insist that what the Code actually did was "to insure that repricing should be done publicly, with the benefit extended to all customers alike, and not done secretly for the benefit only of the concessionaires."

The distinctive feature of the "basic agreement" was not the advance announcement of prices, or a concert to maintain any particular basis price for any period, but a requirement of adherence, without deviation, to the prices and terms publicly announced. Prior to the Institute, the list prices which many of the "unethical" refiners announced, "were merely nominal quotations and bore no relation to the actual 'selling bases' at which their sugar was sold. . . The selling price was the price at which they purported to sell; the secret concessions were from this basis." And, in the case of some of the "unethical" refiners, changes in selling bases were made from time to time without formal public announcement in advance. The Institute sought to prevent such departures. As defendants put it: "Having adopted the principle of open prices and terms, without discrimination among customers, as the means of remedying the evils of the secret concession system, the defendants lived up to the principle." The court found:

"40. Under the Institute, defendants agreed to sell, and in general did sell sugar only upon open prices, terms and conditions publicly announced in advance of sales, and they agreed to adhere and in general did adhere without deviation, to such prices, terms and conditions until they publicly announced changes."

It was because of the range and effect of this restriction, and the consequent deprivation of opportunity to make special arrangements, that the court found the agreement and the course of action under it constituted an unreasonable restraint of trade. The court deemed it to be reasonably certain that "any unfair method of competition caused by the secret concession system" could have been prevented by "immediate publicity given to the prices, terms and conditions in all closed transactions," without an agreement to sell only on the basis "of open public announcement in advance of sales." A "purpose and effect" of that agreement, the court found, was to aid defendants in preventing and limiting "certain types of transactions in which private negotiations are essential." Its operation "tended in fact, as it naturally would tend, toward maintenance of price levels relatively high as compared with raws."

The court found that "the number of price changes for refined as compared to raw sugar" had been relatively less since the Institute than before. This was "too marked to be explained by the drop in raw prices." There was "a marked increase in margin and a substantial increase in profits despite a concededly large excess capacity." The relatively higher price level for the refined sugar, as compared with raw, was such "as to negate the prevalence of free competition." Factors "largely responsible" for this relative stability of prices "and for the maintenance of price levels regardless of supply and demand, observable since the Institute," were the dissemination among the refiners of statistical information, "while withholding it in large part from the buyers," and the steps taken by defendants "to eliminate the possibilities of price variations to distributors or ultimate purchasers at any given time and thereby to deprive them of the opportunity, by underselling, to disturb the price structure." Other factors were "the friendly cooperative spirit which the Institute brought to the Industry" and the assurance to each refiner that he need meet only the prices, terms and conditions announced by his competitors in advance of sales.

The court also took note of the fact that the Institute, in connection with practically all of its activities, had obtained a high de-

gree of cooperation "with the Domestic Sugar Bureau," the trade association of the domestic beet sugar manufacturers. That association had its "code of ethics," substantially identical with that of the Institute. There was also cooperation with the "offshore interests." But in neither case was there any agreement as to prices or price differentials.

Contending that the trial court fell into "fundamental error," defendants assert that the Institute made no change in the historic marketing system of the sugar industry. They say, first, that the code and its interpretations did not *in terms* call for price announcements in advance of sales. As to sales on "moves," they say that the code principle and price announcement interpretations "of course worked out in actual practice into sales only on prices and terms announced in advance of sales, because of the very nature and conditions of a sugar move." As to the "small day-to-day sales between moves," they say that while it was probably "the general understanding" that strict observance of the principle required public announcements of a lowered price or better terms before sale, there was no evidence as to the actual practice in that regard. They explain that the Institute continued to operate "under the move system" because it is "a natural growth essential to the economical conduct of the sugar business." The cost of raw sugar makes up about four-fifths of the cost of the refined sugar. Raw prices fluctuate widely from day to day and substantially control the price of refined. Wholesale and retail distributors sell on a narrow margin of five or ten cents a bag. They cannot afford to stock large supplies because of storage costs, dangers of deterioration and the hazardous nature of the business. But, on the other hand, distributors have to buy considerable quantities in order to take advantage of carload freight rates and handling costs. The result of all these forces is the system "of buying on moves every month or two." To this, both large and small dealers have adapted themselves. By reason of the general practice, they are all on an equal footing as to the periodic fluctuations in price. On each move they have laid in a supply for a month or more. Having bought their current supplies at the same general market level the distributors must "sell out their current supplies with due regard to that level in order to avoid crippling losses from an intervening decline." This, defendants say, is "one of the greatest economic advantages of the move system."

Defendants concede the correctness of the statement of the trial court that if immediate publicity had been given to prices and terms in all "closed transactions," competitive pressure would have been so great that the refiners "would either have had to abandon the discriminatory concessions or extend them to all." They concede that it is *"publicity"* that prevents such concessions and "not the sequence in time between the sale and the publicity." But they raise the fundamental objection that the proposal is not adaptable to the sugar industry. They say that in an industry which "has traditionally, and for good reason, sold its products on 'moves,' through the mechanism of announcing price changes in *advance* of sales in order that buyers may have an opportunity to buy before the price rises, it is not helpful to suggest a system of announcing price changes *after* sales."

Defendants' argument on this point is a forcible one, but we need not follow it through in detail. For the question, as we have seen, is not really with respect to the practice of making price announcements in advance of sales, but as to defendants' requirement of adherence to such announcements without the deviations which open and fair competition might require or justify. The court below did not condemn mere open price announcements in advance of sales. The court was careful to say in its opinion that it found it "unnecessary to pass upon the legality of the use of the Institute" for relaying such announcements, "if each refiner entirely independently of the others voluntarily made his own announcements without obligation to adhere thereto."

Defendants also review at length the relative prices and profits in the periods before and during the Institute. They insist that it is unfair to include in the comparison the earnings for either 1927 or 1928, because each year was abnormal, and they contend that if a truly representative comparison of results were obtained by using the years 1925 and 1926 as the pre-Institute years, and those for 1929 and 1930 as the post-Institute years, it would appear that the increase in the later period of the net earnings of the refiners was less than one-half of one per cent. Accordingly they reach the conclusion that their activities did not actually restrain, or tend to restrain, effective competition.

But we are not left to inferences from trends of prices and profits. The "basic agreement" cannot be divorced from the steps taken to make it effective, and the requirements of the Institute must be viewed in the light of the particular opportunities which they cut off or curtailed. The crucial question—whether, in the ostensible effort to prevent unfair competition, the resources of fair competition have been impaired—is presented not abstractly but in connection with various concrete restric-

tions to which the decree below was addressed.

2. *Supplementary restrictions.* — The requirements and practices designed to support the basic agreement, and which the trial court condemned, relate to the employment of brokers and warehousemen, transportation, consignment points, long-term contracts, quantity discounts and other contract terms and conditions, and to the withholding of statistical information.

(a) *Brokers and warehousemen.*—Most of defendants' sales are negotiated through brokers who receive their commissions from the refiners. The court found that prior to the Institute, a broker and a warehouseman "were frequently one," and might also be "a merchant or other sugar user"; that concerns which thus combined distribution functions frequently performed a valuable service to the industry; that defendants required an election of but one of these activities and the complete cessation of each of the others; that defendants made and rigorously enforced an agreement that refiners should refuse to deal with a broker, warehouseman or customer who acted directly or indirectly for any of them, or for any other sugar interest, "in other than the one elected capacity"; that each refiner submitted to the Institute lists of its brokers and warehouses which were then circulated among the refiners, and those disqualified were dropped from the lists; that this policy was carried out in a harsh and arbitrary manner without regard to the effect upon third parties; that the commissions to be paid brokers were agreed upon, but there was no substantial evidence that the commissions were not fair, the object being to prevent a growing competition in bidding for brokers' services; that defendants agreed that they would not deal with any broker or warehouseman who did not sign a contract according to a form recommended by the Institute; that the warehouse agreement provided that if the warehouseman granted any concession or rebate, secret or otherwise, to any customer without granting it to all, an equal amount should be forfeited to the employing refiner; that the brokers' agreement prohibited concessions and imposed an obligation to uphold the Institute's code and its interpretations. This course of dealing, the court held, unreasonably restrained trade.

Defendants urge that the broker is the refiner's agent to sell to customers and the warehouseman is the refiner's agent for storage and delivery; that these agents act as a check on each other; that the refiners' concerted adoption of the principle against storing in customers' and brokers' warehouses was essential both to prevent discrimination among customers and to avoid impositions and frauds upon the refiners; that if the warehouseman is himself the purchaser of the sugar, the refiner is deprived of his independence and disinterestedness and the purchaser has control of the sugar with the power of withdrawing it at will and reporting that withdrawal at his pleasure; that similarly storage with brokers facilitated fraudulent practices, and that where the warehouseman and the broker were the same, neither was under any supervision and the broker-warehouseman could do practically what he pleased with the refiner's property and business.

To a considerable degree the court recognized the force of these contentions. The court found that a combination of distribution functions facilitated secret concessions, difficult of detection, and created opportunities for double dealing. But, despite this, it had been common for refiners, before the Institute, to employ brokers and warehousemen engaged in other distribution functions, and that such arrangements from the renfiers' viewpoint were not infrequently entirely successful; and that concerns in substantial numbers, which combined distribution functions, maintained entire good faith in their dealings with the refiners. The court concluded that there was a definite possibility of lower prices to ultimate consumers as a result of combination of functions, because the increased income thus made possible, even apart from advantages obtained through secret concessions and fraudulent practices, gave opportunity "to outsell competitors who engage in only one occupation." The most important purpose of defendants, the court found, in compelling the separation of occupations was to aid in preserving "the uniformity of price structure," which would otherwise be threatened. The court deemed it reasonably certain that defendants could have secured adequate protection against illicit practices by means far less drastic, that is, through investigations, inspections, and publicity for which the Institute had unlimited resources.

The finding of purpose and of the adequacy of alternative measures is sharply contested. But, while the parties present their respective views as to the details of evidence, there is no room for doubt as to the nature and effect of the restrictions actually imposed through the Institute. The findings of the court as to agreement and practice are fully supported.

(b) *Transportation.*—The custom of the trade was to quote sugar f. o. b. refinery. Since the price was usually the same or varied but slightly, individual refiners sold in areas enjoying lower freight rates from other refineries by paying or absorbing

part of the transportation charges. That is, the refiner added to the refinery price the amount of his "ruling freight basis" or "freight application," which was the amount the customer was to pay as distinguished from the actual cost of the transportation. The freight situation was complicated by the existence of differential routes, involving all-water or a combination of water and rail transportation. Traditionally in the industry, refiners' freight applications on sugar delivered at Great Lakes ports openly broke down during the season of open navigation to the Philadelphia lake and rail rate, and during 1926 and 1927 the freight application on sugar sold in the Warrior River area (Alabama, Tennessee, Kentucky and parts of Indiana) had openly broken down to New Orleans barge rates, regardless of the way in which the sugar actually moved. The areas affected by these breakdowns were of vital importance, as competition there was especially keen.

In the effort to prevent the "sale" of transportation below "cost," the Code of Ethics, paragraph 3(c), condemned "The use of differential rates on consignments, or otherwise than on direct shipments over differential routes at customers' request." This policy was amplified by an interpretation. The trial court found that but "slight effort was made to enforce Code 3(c) after the summer of 1928," that it "was abandoned at least by the fall of 1929 and probably much earlier," and that the code interpretation was finally rescinded in September, 1930.

The court found that the transportation problems in the Great Lakes and Warrior River areas were finally solved by a system of delivered prices, with denial of the privilege of purchasing f. o. b. refinery. The court did not find that there was an agreement in introducing the delivered prices, but did find that defendants "agreed to maintain and concertedly maintained the system of delivered prices" in both the areas above mentioned; also that through the Institute defendants "concertedly policed delivered prices and investigated alleged departures therefrom"; and that these prices were "patently unreasonable." Defendants vigorously deny that delivered prices were either introduced or maintained through any concert of action. They submit that the evidence not only does not warrant that finding, but shows affirmatively that delivered prices were introduced independently by individual refiners and resulted solely from unrestrained competition.

As the court said in its opinion, the controversy was chiefly about what defendants had actually done during the Institute period, and the facts were frequently "bitterly disputed." We need not discuss the rival contentions. The court found that defendants' "adoption of Code 3(c), their actions pursuant thereto, and their concerted maintenance of delivered prices constituted undue and unreasonable restraint of trade." Defendants have waived their assignment of error as to this finding in order to reduce the issues presented on this appeal. And defendants have also waived their assignments of error as to the provisions in the decree enjoining concerted action in "Determining transportation charges or freight applications to be collected from customers, or limiting freight absorptions" and in "Selling only on delivered prices or on any system of delivered prices, including zone prices, or refusing to sell f. o. b. refinery."

Questions are presented with respect to miscellaneous "transportation activities." They relate to defendants' agreement to prevent transiting and diversion by customers when these would defeat freight applications; to concerted action in obtaining an agreement from transportation companies operating on the New York State Barge Canal that they would carry sugar only on the basis of openly announced rates and terms from which they would not deviate without open announcement; to recommendations of the Institute, concertedly observed, that none of the members should ship sugar on his own account by private charter except when the charter was arranged directly between refiner and carrier and refiner was satisfied that no broker, buyer or warehouseman was participating in the rate, and that the terms of every such private charter should be submitted to the scrutiny of the executive secretary of the Institute; to defendants' concerted refusal to participate in pool shipments, with sugar shipped on their own account, in order to aid customers in making up the required minima for cargo or carload rates; and to defendants' agreement "to use only trucking concerns not affiliated with any buyer, broker, or warehouse and then only under non-rebating contracts." The court found that defendants' action went further than was necessary to prevent secret rebating and amounted to unreasonable restraints. We see no reason for disturbing the findings on these subjects.

(c) *Consignment points.*—Prior to 1925, the refiners maintained, on their respective accounts, stocks at a few strategic points from which sugar was distributed to the surrounding areas. During the period 1925 to 1927, refiners placed stocks at numerous points solely for the local trade. Defendants regarded this increase as an outstanding evil and made a con-

certed effort to bring about reductions. To this end the Institute obtained the cooperation of the Domestic Sugar Bureau and other non-members. In recommending consignment points in the South, ports of entry like reconsignment points were separately classified, and Wilmington, North Carolina, was eliminated.

Defendants insist that the expense involved in maintaining an excessive number of consignment points was an economic waste without any substantial compensating advantage to the consuming public, and that the effort at reduction was a legitimate function of the Institute. The economic questions were fully considered by the trial court which found that the refiners' consignment service "was valuable and beneficial to substantial elements in the trade"; that limitation of ports of entry was more serious than elimination of ordinary consignment points insofar as it shut a competitor out of a particular territory; that while the cost of increased consignment points might well be reflected in a higher general basis price, there was no assurance that the savings through some reductions would be passed on to consumers generally; that the result in either case was "largely speculative"; that communities eliminated as consignment points "suffered as against neighboring ones" because of the advantage accruing to the latter; and that there were also eliminated from distributing agencies one type of jobber called the "desk jobber" who was able to do business without any stock of his own. In summary, the court found that defendants' "concerted conduct with respect to elimination and reduction of consignment points, reconsignment points and ports of entry" unreasonably restrained trade. The controlling facts are established, and the question again is one of justification.

(d) *Various contract terms and conditions.*—One question relates to *"long term contracts,"* that is, those permitting the buyer to take delivery more than thirty days after date. Prior to the World War, thirty day contracts were customary for all except manufacturers who were granted sixty days. While there was no definite practice after the war, long term contracts were not infrequent. They were granted by California refiners to Pacific Coast canners. The court found that long term contracts had "a real economic value to refiner and to consumer"; that some of them tend to bring about greater evenness of production through the year, thus effectuating economies and enabling manufacturers promptly to know the cost of this element of their finished products.

Defendants contest the finding of the court that they engaged in concerted action "in prohibiting all long term contracts," and assert that "they never have had and do not now have any desire to prohibit them." Hence, they add, the court's injunction against such action "does not disturb them." But they object to the finding that concerted action in insisting upon open announcement in advance of entering into such contracts was without justification. This, as defendants say, is but a condemnation of a particular application of their basic principle that sugar should be sold only upon open prices and terms without discrimination. In the view of the trial court, this application is an illustration of its point that an obligation to adhere to such advance announcements "would tend to prevent many entirely fair contracts." Of similar import is the finding that defendants were not justified in acting concertedly to determine whether and to what extent "the rigid enforcement of the thirty day contract" should be relaxed.

Another question which has received extended consideration is that of *"quantity discounts."* Prior to the Institute, there was no systematic practice in this respect. The majority of discounts were given to the large buyer but they were often granted to the smaller buyer as well, and the amount of the discount "bore little relation to the amount of the purchases or the method of taking delivery." This, the court found, was the natural result of the "secret concession system" which had prevailed. Carrying out its policy as to discriminations, the Institute condemned "as unbusinesslike, uneconomic and unsound, concessions made to purchasers on the basis of quantity purchased." The court found that this agreement and the practice under it prohibited not only "unsystematic and secret quantity discounts," but also discounts "systematically graded according to quantity." The court examined defendants' contention that quantity discounts would effect no economies. If, said the court, the facts were as defendants insisted, the question would arise whether such a concerted restraint was reasonable. But the court considered the actual facts to be "entirely inconsistent with defendants' position." As to direct costs, the court found that the refiners got no discount for quantity purchases of raws which constitute about 80 per cent. of the cost of refined; that quantity sales effected no appreciable direct savings in manufacturing costs and no savings in brokerage; but that in sales to those who could take deliveries in carload lots direct from the refinery, there were substantial savings "in delivery, storage, bookkeeping and other incidental expenses." And as to indirect

costs, the court found that sales which distribute production more evenly through the year effect substantial savings to the refiners and that the demand for sugar is elastic, so that encouragement of large sales through quantity discounts might reasonably be expected to build up total production and thus effect economies. Also that a quantity discount to wholesalers selling to manufacturers as well as to manufacturers buying directly from refiners, might well result in a substantial increase in sugar consumption.

Defendants contest these economic conclusions. But we are not convinced that the findings are contrary to the evidence. Moreover, the limited provision of the decree should be regarded. In this relation, the decree enjoins defendants from concerted action in "Preventing, restraining or refusing to grant quantity or other discounts where such discounts reflect, effect, or result in economies to refiners either in direct or indirect costs."

With a single exception, defendants do not ask the court to review the findings with respect to credit arrangements known as "the four payment plan," "split billing" and "cash discount"; or as to "price guarantee" and "second hand sugar or resales." They say that in each case questions of fact alone are raised and they disclaim having taken, or having any desire to take, any action with respect to these subjects which is enjoined by the decree. The exception refers to the practice of "requiring buyers to elect and specify at the time of entering contract, without privilege of change, the prices and/or terms in cases where the refiner had more than one price or different terms in different or the same territories." This restriction is defended as a necessary corollary of the principle of open prices and terms without discrimination, and the question is as to the legality of the restraint in the application of that principle.

Other questions concern practices in relation to "damaged sugar and frozen stocks," "tolling," "used bag allowances," and "private brands." The court found that the restraints imposed in these matters were unreasonable. They appear to be of minor importance and we think it unnecessary to state the particular facts.

(e) *Statistical information.*—Some statistical information collected by the Institute was supplied only to its members; some was supplied as well to representatives of offshore refiners. The data disseminated by the Institute to the purchasing trade consisted of weekly statistics as to the total melt (production) and total deliveries, and monthly statistics of total deliveries, of all sugar, divided so as to show the amount of domestic cane, imported cane, and beet sugar delivered during the period. These statistics were widely distributed through news agencies, banks and brokers. The total refined stocks on hand could be computed by subtracting from the total melt of each week the total deliveries. During recent years when refined stocks were greatly increasing, defendants continued to supply to the trade weekly statistics on melt and deliveries from which the trade could readily calculate the increase. Data as to the capacity of the several refiners were available to the public in substantially similar form to that obtained by the Institute. It also appeared that in May, 1931, after the present suit was begun, statistics were released to the trade showing the total consumption of cane, beet, foreign and insular refined sugar by States, for the years 1928, 1929 and 1930, together with figures showing the *per capita* consumption of each State during the same years.

The trial court found that none of the other statistics supplied to members or offshore refiners were available except through the Institute and none were supplied or available to the trade. What the court considered to be "vital data" relating to production and deliveries of individual refiners, to deliveries by States, to deliveries by States by all the important differential routes, to consigned and in-transit stocks for the several States, "which would have illuminated the situation in the several trade areas where the competitive set-ups differed widely," were withheld from purchasers. The court concluded that, by collecting and circulating only among themselves that information, defendants obtained an unfair advantage with respect to purchasers and effected an unreasonable restraint.

The court took the view that the statistics relating to total production, total deliveries, and calculable stocks, which defendants did make available, could have had only limited significance for the individual purchaser and were even likely to mislead him. Such information reflected only the general situation for the country as a whole and for all refiners. Defendants challenge this criticism and emphasize the value of the information they gave. And with respect to the statistics not disseminated, they say that it did not appear how buyers were prejudiced and that the sole reason that the information was not published was "because the refiners had no reason to believe that the buyers wanted it." We cannot say, however, that the finding of the trial court, in connection with its exhaustive examination of conditions in the trade, is without adequate support. We

shall presently consider the criticism from a legal standpoint of the breadth of the provision in the decree relating to the duty of dissemination.

Fourth.—The application of the Anti-Trust Act and the provisions of the decree.—The restrictions imposed by the Sherman Act are not mechanical or artificial. We have repeatedly said that they set up the essential standard of reasonableness. *Standard Oil Company v. United States,* 221 U. S. 1; *United States v. American Tobacco Company,* 221 U. S. 106. They are aimed at contracts and combinations which "by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restraining competition or unduly obstructing the course of trade." *Nash v. United States,* 229 U. S. 373, 376; *United States v. American Linseed Oil Company,* 262 U. S. 371, 388, 389. Designed to frustrate unreasonable restraints, they do not prevent the adoption of reasonable means to protect interstate commerce from destructive or injurious practices and to promote competition upon a sound basis. Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes. And cooperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law. Nor does the fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, require that abuses should go uncorrected or that an effort to correct them should for that reason alone be stamped as an unreasonable restraint of trade. Accordingly we have held that a cooperative enterprise otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. *Appalachian Coals v. United States,* 288 U. S. 344, 373, 374. Further, the dissemination of information is normally an aid to commerce. As free competition means a free and open market among both buyers and sellers, competition does not become less free merely because of the distribution of knowledge of the essential factors entering into commercial transactions. The natural effect of the acquisition of the wider and more scientific knowledge of business conditions on the minds of those engaged in commerce, and the consequent stabilizing of production and price, cannot be said to be an unreasonable restraint or in any respect unlawful. *Maple Flooring Association v. United States,* 268 U. S. 563, 582, 583. In that case, we decided that trade associations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate costs of transportation, without reaching or attempting to reach an agreement or concerted action with respect to prices or production or restraining competition, do not fall under the interdiction of the Act. *Id.,* p. 586; See, also, *Cement Manufacturers Association v. United States,* 268 U. S. 588, 604, 606.

The freedom of concerted action to improve conditions has an obvious limitation. The end does not justify illegal means. The endeavor to put a stop to illicit practices must not itself become illicit. As the statute draws the line at unreasonable restraints, a cooperative endeavor which transgresses that line cannot justify itself by pointing to evils afflicting the industry or to a laudable purpose to remove them. The decisions on which defendants rely emphasize this limitation. In *Chicago Board of Trade v. United States,* 246 U. S. 231, the Court found the assailed rule to be a reasonable regulation in a limited field. In the case of *Appalachian Coals, supra,* p. 375, the Court found that abundant competitive opportunities would exist in all markets where defendants' coal was sold, and that nothing had been shown to warrant the conclusion that defendants' plan would have an injurious effect upon competition in those markets. In *Standard Oil Company v. United States,* 283 U. S. 163, relating to contracts concerning patents for cracking processes in producing gasoline, an examination of the transactions involved led to the conclusion "that no monopoly of any kind or restraint of interstate commerce" had been effected "either by means of the contracts or in some other way." *Id.,* p. 179. And, while the collection and dissemination of trade statistics are in themselves permissible and may be a useful adjunct of fair commerce, a combination to gather and supply information as a part of a plan to impose unwarrantable restrictions, as, for example, to curtail production and raise prices, has been condemned. *American Column Company v. United States,* 257 U. S. 377, 411, 412; *United States v. Linseed Oil Company, supra; Maple Flooring Association v. United States, supra,* pp. 584, 585.

We have said that the Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions. Thus in applying its broad prohibitions, each case demands a close scrutiny of its own

facts. Questions of reasonableness are necessarily questions of relation and degree. In the instant case, a fact of outstanding importance is the relative position of defendants in the sugar industry. We have noted that the fifteen refiners, represented in the Institute, refine practically all the imported raw sugar processed in this country. They supply from 70 to 80 per cent of the sugar consumed. Their refineries are in the East, South and West, and their agreements and concerted action have a direct effect upon the entire sugar trade. While their product competes with beet sugar and "offshore" sugar, the maintenance of fair competition between the defendants themselves in the sale of domestic refined sugar is manifestly of serious public concern. Another outstanding fact is that defendants' product is a thoroughly standardized commodity. In their competition, price, rather than brand, is generally the vital consideration. The question of unreasonable restraint of comeptition thus relates in the main to competition in prices, terms and conditions of sales. The fact that, because sugar is a standardized commodity, there is a strong tendency to uniformity of price, makes it the more important that such opportunities as may exist for fair competition should not be impaired.

Defendants point to the abuses which existed before they formed the Institute, and to their remedial efforts. But the controversy that emerges is not as to the abuses which admittedly existed, but whether defendants' agreement and requirements went too far and imposed unreasonable restraints. After a hearing of extraordinary length, in which no pertinent fact was permitted to escape consideration, the trial court subjected the evidence to a thorough and acute analysis which has left but slight room for debate over matters of fact. Our examination of the record discloses no reason for overrruling the court's findings in any matter essential to our decision.

In determining the relief to be afforded, appropriate regard should be had to the special and historic practice of the sugar industry. The restraints, found to be unreasonable, were the offspring of the basic agreement. The vice in that agreement was not in the mere open announcement of prices and terms in accordance with the custom of the trade. That practice which had grown out of the special character of the industry did not restrain competition. The trial court did not hold that practice to be illegal and we see no reason for condemning it. The unreasonable restraints which defendants imposed lay not in advance announcements, but in the steps taken to secure adherence, without deviation, to prices and terms thus announced. It was that concerted undertaking which cut off opportunities for variation in the course of competition, however fair and appropriate they might be. But, in ending that restraint, the beneficial and curative agency of publicity should not be unnecessarily hampered. The trial court left defendants free to provide for immediate publicity as to prices and terms in all closed transactions. We think that a limitation to that sort of publicity fails to take proper account of the practice of the trade in selling on "moves," as already described, a practice in accordance with which the court found that "the great bulk of sugar always was and is purchased." That custom involves advance announcements, and it does not appear that arrangements merely to circulate or relay such announcements threaten competitive opportunities. On the other hand, such provision for publicity may be helpful in promoting fair competition. If the requirement that there must be adherence to prices and terms openly announced in advance is abrogated and the restraints which followed that requirement are removed, the just interests of competition will be safeguarded and the trade will still be left with whatever advantage may be incidental to its established practice.

The decree.—The court below did not dissolve the Institute. The practices which had been found to constitute unreasonable restraints were comprehensively enjoined. The injunction restrains defendants "individually and collectively, in connection with the sale, marketing, shipment, transportation, storage, distribution or delivery of refined sugar," from engaging with one another or with any competitor through any *"program"* in any of the activities separately described. The decree defines "program" as "any agreement, understanding or concerted action, including, but without limiting the generality of the foregoing, any rule, policy or code provision or interpretation, concertedly adopted or maintained."

Then follow forty-five specifications of prohibited action. As to seventeen of these paragraphs, defendants have withdrawn their assignments of error.

Paragraphs one and two of the specifications enjoin the carrying out of the open price plan so far as it seeks to compel uniform terms, regardless of circumstances, and an adherence to prices, terms, etc. announced in advance. These paragraphs cover any agreement or concerted action in

"1. Effectuating any general plan to give the same terms, conditions, or freight applications to customers, regardless of the varying circumstances of particular transactions or classes of transactions or regardless of the varying situation of particular refiners, distributors or customers or classes thereof;

"2. Selling only upon or adhering to prices, terms, conditions or freight applications announced, re-

ported or relayed in advance of sale or refraining from deviating therefrom."

In view of those provisions, and of the other forty specified restrictions, we think that paragraphs three, four and five with respect to the reporting or relaying of information as to current or future prices should be eliminated. These paragraphs are as follows:

"3. Effectuating any system for or systematically reporting to or among one another or competitors or to a common agency, information as to current or future prices, terms, conditions, or freight applications, or lists or schedules of the same;

"4. Relaying by or through The Sugar Institute, Inc., or any other common agency, information as to current or future prices, terms, conditions or freight applications or any list or schedule of the same;

"5. Giving any prior notice of any change or contemplated change in prices, terms, conditions or freight applications, or relaying, reporting or announcing any such change in advance thereof."

Such reporting or relaying, as we have said, permits voluntary price announcements by individual refiners, in accordance with trade usage, to be circulated, and subject to the restrictions imposed by the decree does not appear to involve any unreasonable restraint of competition.

Paragraph seven relates to the collection and dissemination of statistical information, as follows:

"7. Effectuating any system of gathering and/or disseminating statistical information regarding melt, sales, deliveries, stocks on hand, stocks on consignment, stocks in transit, volume of sugar moved by differential or other particular routes or types of routes, new business or any other statistical information of a similar character, wherever and to the extent that said information is not made, or is not readily, fully and fairly available to the purchasing and distributing trade."

This provision was based upon the finding that "Perfect competition and defendants' professed policy of fostering such competition require that the purchasing trade as well as the sellers have the full, detailed information which defendants withheld." That ruling has appropriate reference to the statistical data which are specified in paragraph seven and to the withholding of which we have referred. In those data the purchasing and distributing trade have a legitimate interest. But it does not follow that the purchasing and distributing trade have such an interest in every detail of information which may be received by the Institute. Information may be received in relation to the affairs of refiners which may rightly be treated as having a confidential character and in which distributors and purchasers have no proper interest. To require, under the penalties of disobedience of the injunction, the dissemination of everything that the Institute may learn might well prejudice rather than serve the interests of fair competition and obstruct the useful and entirely lawful activities of the refiners.

In this view we think that the clause in paragraph seven "or any other statistical information of a similar character" should be eliminated. The preceding specifications as to melt, sales, deliveries, stocks on hand, on consignment, or in transit, and as to transportation and new business, appear to be adequate. The words "of a similar character" have no clearly defined meaning and would place the defendants under an equivocal restriction which may do more harm than good. With the removal of that clause and the placing of the word "and" before the words "new business," paragraph seven is approved.

Following the provisions for injunction, the decree properly provides that jurisdiction is retained for the purpose of "enforcing, enlarging or modifying" its terms. It is further provided that the injunction is without prejudice to application by any party for modification in order to permit the adoption of any "program" that may be permissible under "the National Industrial Recovery Act" of June 16, 1933, or the "Emergency Farm Relief Act" of May 12, 1933, or "any other present or future statutes of the United States." This subdivision of the decree should be modified so as to refer simply to "any applicable Act of Congress."

The decree is modified in the particulars above stated and, as thus modified, is affirmed.

It is so ordered.

Mr. Justice SUTHERLAND and Mr. Justice STONE took no part in the consideration and decision of this cause.

[¶ 55,108] Bristol-Myers Company, a corporation, v. E. A. Tischauser, Union Drive, Cut-Rate Drugs, Inc., a corporation, Mary Dahlquist, Union Drive Pharmacy, a partnership composed of E. A. Tischauser, Mary Dahlquist, First Doe, and Second Doe, A Company, a corporation, B Company, a corporation, Third Doe, Fourth Doe, Fifth Doe, individuals, Sixth Doe, Seventh Doe, and Eighth Doe, a partnership composed of Sixth Doe, Seventh Doe and Eighth Doe.

United States District Court, Southern District of California, Central Division. Decided February 28, 1936.

The California Fair Trade Act is held to be constitutional, on the ground that the presumption of the constitutionality of legislative acts has not been effectually overcome. The Court holds "that the statute must remain generally unenforced * * * until the diversity of judicial action is cured by an appellate court decision, which decision shall be binding upon the trial courts."

Memorandum Opinion

STEPHENS, District Judge: Complainant asks that a temporary injunction issue under the provisions of the so-called California Fair Trade Act (Statutes of California, 1931, Chapter 278, amended 1933, Chapter 260).

In brief and very generally the statute in question strikes at the below cost "leader" sale by prohibiting the retailing of factory marked goods in competition, through regular course of business at less than factory fixed prices, either by one contracting to maintain the price or by one who has secured the goods from other than factory sources.

Respondent E. A. Tischauser objects to the issuance of the writ upon several grounds, which raise, among others, the same constitutional questions relating to the Fifth and Fourteenth Amendments to the U. S. Constitution that have been passed upon—but not in agreement—by several eminent Judges of the California Superior Court in exhaustive written opinions. I shall not add another opinion for the reason that it would settle nothing and could afford but doubtful aid to an appellate tribunal.

I willingly yield, however, to my own temptation to reassert and reaffirm the wholesome doctrine that legislative acts are presumed to be constitutional. This presumption, it seems to me, has sometimes been accorded too little consideration, whereas it is one of the most important of all the presumptions.

The suspension of enacted laws in some districts and not in others, or as to some litigants and not as to others, or the enforcement of such laws and the annullment of such laws in the same district through decrees of different judges should be reduced to the irreducible minimum. Strict adherence by trial courts, at least, to the stated rule is one important way toward this desired end.

Laws enacted to meet new conditions in our complex and changing civilization come in contact with judicial minds long accustomed to certain economic practices and conceptions and are very apt to be pressed to the ordeal of squaring with such practices and conceptions in their tests of constitutionality. This practice constitutes nothing less than extra-judicial exercise of the veto power.

Of course, nothing is more precious to a free citizenry than an independent judiciary jealous of all power assumed without constitutional sanction, but fundamental constitutional rights cannot suffer under a strict adherence by the courts to the presumption rule. On the other hand, the carving away through judicial decree of the right of a people to meet existing conditions with enforceable legislation may be seriously "subversive" of our constitutional principle of self government. The strict observance of the presumption rule may most effectively prevent the annullment of enacted law through the necessity of meeting the economic bent of the judicial mind.

Freely acknowledging the presence of difficult questions in the present cause, I can but say that I see no convincing reason for holding that the presumption of constitutionality of the act in question is effectually overcome.

The issuance of a temporary injunction always lies in the sound discretion of the chancellor and as its power is effective before the issues are tried, should be issued with great caution.

I am denying the requested relief under this principle and for the reason that the statute must remain generally unenforced and the end sought by the statute unobtainable until the diversity of judicial action is cured by an appellate court decision, which decision shall be binding upon the trial courts.

The motion for preliminary injunction is denied without prejudice to its renewal after an appellate decision has been rendered upon the subject matter of the cause, if this case is not tried upon its merits before such decision is handed down.

Exception to complainant.

[¶ 55,109] E. F. Griswold v. The President of the United States.

United States Circuit Court of Appeals for the Fifth Circuit. Decided March 30, 1936.

Appeal from the District Court of the United States for the Western District of Louisiana.

The Court holds constitutional the provision of the Connally Oil Control Act which authorizes District Courts, upon allegation and proof that persons are dealing or about to deal interstate in contraband oil, to enjoin them from doing so.

The Connally Oil Control Act is held not to invade state powers, but is held to be a true regulation of interstate commerce.

Before FOSTER, SIBLEY and HUTCHESON, Circuit Judges.

HUTCHESON, Circuit Judge: This is an appeal from an interlocutory injunction issued under the authority of the Connally Act of February 22, 1935, Chap. 18, 49 Stats. 30.

It is not claimed that the facts were not rightly found, nor, if the law under which it was issued is valid, that the discretion was abused in issuing the temporary order. No claim is made to a reversal on the balancing of conveniences or the abuse of discretion, as in *Ohio Oil Co. v. Conway,* 279 U. S. 813.

The attack is a frontal one on the validity of the Act itself and the regulations issued under its authority. It is therefore insisted that the consideration of this interlocutory appeal is governed not by the rule of *Rogers v. Hill,* 289 U. S. 582; *Alabama v. United States,* 279 U. S. 231; *Butler v. Schutte,* 67 Fed. (2d) 632, but by that of *Meccano v. Wanamaker,* 253 U. S. 136. That where on the pleadings and the face of the record the case is without merit, this court should say so and order its dismissal.

We cannot agree with appellant that this appeal presents a case of that kind. We think it plain that the Act validly authorizes District Courts, upon allegation and proof that persons are dealing or about to deal interstate in contraband oil, to enjoin them from doing so. The bill in this case alleged and the court on sufficient evidence found, that appellant had been dealing, and that he was planning to deal interstate in contraband oil, and it enjoined him from doing so.

We cannot agree with appellant's argument that the Act under which the injunction issued is an invasion of state powers, that it is not a true regulation of interstate commerce, but an attempt by indirection, to control the production and marketing of a natural product of a state. We cannot agree with the subtleties of his view, that the Act abdicates the power of Congress over interstate commerce, and delegates it to the states. Nor can we agree with the implications of his argument that contraband oil, that is, oil made forfeit to the state and prohibited by state law from being moved or transported, is a lawful product, and therefore beyond the power of Congress to exclude from interstate commerce. These arguments overlook, they disregard, the dominant, the controlling fact that the Act, though passed in aid of state purposes and powers, deals with and only with commerce interstate. It takes up where state power ends, and by supplementing state legislation it makes completely effective the general will of the people of the State of Texas, expressed in its conservation laws. Congress has validly done this same thing in

connection with the transportation into dry states, of intoxicating liquor. *Clark Distilling Co. v. Western Maryland R. Co.,* 242 U. S. 311; into states which prohibit such goods, of goods made by convict labor; *Whitfield v. State of Ohio,* — U. S. —. It has done it as to the transportation out of states of birds or wild game killed there contrary to its laws; *Bogle v. White,* 61 Fed. (2d) 930, and as to motor cars stolen in violation of state laws. *Brooks v. U. D.,* 267 U. S. 432.

In *Ryan v. American Petroleum Corp.,* 71 Fed. (2d) 1, on the assumption that there were no infirmities in the particular Act under examination, we on full consideration held that Congress could validly prohibit the transportation in interstate commerce, of oil which state laws have made contraband. We approve and reaffirm that holding. We think appellant's arguments disregard the verities, the realities of the situation as it exists in law and in fact. These are: That in the interest of conserving its greatly valuable and irreplacable natural resources of oil, the State of Texas has undertaken to make and has made complete provision against its wasteful production and handling. Those laws prohibit the purchase, acquisition or sale, the transportation, the refining, processing or handling in any way of "unlawful oil."[1] Those laws make contraband and forfeit to the State, oil produced in violation of them. By its laws, in order to more surely prevent waste, the State has undertaken minutely to regulate and control the production, handling and marketing of oil within the State. In addition, for their effective administrative application and enforcement, it has charged the Commission with the duty, and has given it power, to adopt regulations having the force of law to make the statutes effective. These laws and regulations extend to, they control, the production, the movement and the marketing of contraband or unlawful oils, and contraband or unlawful products of oil.

The Forty-fourth Legislature, Acts of 1935, p. 624, Chap. 246, Vernon's Ann. Civ. Stats. of Texas, 1935, Art. 6066(a), has particularly made comprehensive provision on these points. In Subs. (d) and (e) of Sec. 1 of that Article, "Unlawful Oil" and "Unlawful Products" are defined:

(d) "Unlawful oil" as that term is used herein, shall include oil which has been produced within the State of Texas from any well or wells in excess of the amount allowed by any order of the Commission, and oil which has been produced within said State in violation of any law of said State, or in violation of any order of the Commission, and shall include any oil transported in violation of any such law or in violation of any such order.

(e) "Unlawful product" shall be construed to include any product any part of which was processed or derived in whole or in part from unlawful oil, or from any product of unlawful oil, or from unlawful gas, or which is transported in violation of any order of the Commission or in violation of any law of Texas."

Sub. (6) defines a tender as "a permit or certificate of clearance for the transportation of oil or products approved and issued or registered under the authority of the Commission." It provides that the Commission shall prescribe the form of the tender and application, and what it shall contain and show and the agents who shall provide it. It concludes "No tender shall be approved or registered by such agent authorizing the shipment or transportation of any unlawful oil or unlawful products."

Section 2 governs transportation under tenders and manifests and declares that oil or products shipped or transported in violation of the Section shall be deemed to be unlawful oil or products.

Section 3 provides for the arrest of persons unlawfully transporting oil, and Section 4, for penalties. Section 5 provides for the promulgation of regulations by the Commission. Section 9 provides for court review of the action on application for tenders. Section 10(a) provides—

"All unlawful oil and unlawful products, regardless of the date of production or manufacture thereof, are hereby declared to be a nuisance, and shall be forfeited to the State as hereinafter provided"

and Subs. (b) (c) and (d) of that Section provide for the filing of suits *in rem* against unlawful oil or unlawful products, to enforce the forfeiture.

The paramount public interest of the State in the conservation of these natural resources, the right of the Legislature to enact reasonable laws having reasonable relation to that end, and of the Commission under the authority of those laws to make regulations to carry them into effect, have been uniformly recognized and sustained in the numerous litigations that have arisen in State and Federal courts, in connection with State enforcement.

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[1] Art. 6049 (e) Act of 1935, 44th Legislature Chap. 76 p. 180 in part provides:

Sec. 10. "The purchase, acquisition or sale, or the transportation, refining, processing, or handling in any other way, of crude petroleum oil or natural gas produced in whole or in part in violation of any oil or gas conservation statute of this state or of any rule, regulation or order of the Commission thereunder, is hereby prohibited."

The purchase, acquisition or sale, or the transportation, refining, processing, or handling in any other way, of any product of crude petroleum oil or natural gas which product is derived in whole or in part from any crude petroleum oil or natural gas, or any product of either, which crude petroleum oil or natural gas or product was in whole or in part produced, purchased, acquired, sold, transported, refined, processed, or handled in any other way, in violation of any oil or gas conservation statute of this state, or of any rule, regulation or order of the Commission thereunder, is hereby prohibited."

In *Brown v. Humble,* 83 S. W. (2d) 935, the Supreme Court of Texas in an exhaustive opinion has gathered up and approved the views of these authorities, that the State has validly legislated respecting the conservation of oil and gas, and that the Commission is the authorized administrator of those laws. Federal cases are *Amazon Petroleum Corp. v. R. R. Comm.,* 5 Fed. Supp. 633; *Peoples Petroleum Products v. Sterling,* 60 Fed. (2d) 1041; *Danziger Oil & Ref. Co. v. Smith,* 4 Fed. Supp. 236. In *R. R. Commission v. Morgan,* — S. W. (2d) —, not yet reported, the Third Court of Civil Appeals, which, sitting in the capital of the State where statutory suits to review the Commission's orders are by law required to be filed, has decided most of the cases on the subject, has had occasion to consider and to vigorously affirm and give effect to the statutory prohibitions against the illegal production and the illegal movement of oil and its products. It declared then in effect that the tender provisions of the statute are merely supplementary to and in aid of the general provisions against unlawful production. It held, therefore, that one seeking a Section 9 review of a refusal of a tender application, may not, by merely showing that the Commission's refusal was without a hearing and arbitrary, obtain an injunction. It held that a condition precedent in obtaining a tender or an injunction against its refusal is a showing that the applicant is in possession of oil which has not been illegally produced or handled, and which therefore, in law and in fact, he is entitled to move. Said the Court—

"It is obvious that a mere failure of an agency of the Commission to discharge the duties imposed by law upon it cannot in and of itself grant an applicant, who has himself violated the conservation laws and valid rules of the Commission, immunity from its penalties, or give to him any right to move his oil if in fact and in law it be unlawful oil, as defined by the Act in question."

In this connection the Court called attention to Sub. (g) of Sec. 1 of the Act, absolutely and without qualification "prohibiting the approval or registration by an agent of the Commission, of a tender for the transportation of any unlawful oil or unlawful products." It called attention, too, to the provisions of Sec. 10 of Art. 6049(e) set out in Note 1. Its conclusion was that one may not sell or transport unlawful oil or unlawful products and that the action of the Commission's agent in declining to hear, and arbitrarily refusing the application conferred no right on the possessor of such oil to move it. The effect of the State statutes then under the decisions construing them, is to prohibit and prevent absolutely and at all events, as far as it is in the power of the State to do so, the movement in commerce of unlawful or contraband oil.

By Section 2 of the Federal Act in question here, contraband oil is defined as "Petroleum which, or any constitutent part of which, was produced, transported, or withdrawn from storage in excess of the amounts permitted to be produced, transported, or withdrawn from storage under the laws of a State or under any regulation or order prescribed thereunder by any board, commission, officer, or other duly authorized agency of such state, or any of the products of such petroleum."

Section 3 of that Act prohibits "the shipment or transportation in interstate commerce from any State of contraband oil produced in such State.

The effect of these statutes and regulations is taking up where the State leaves off, to bar these products from interstate commerce. Congress may do this by prohibiting their movement and imposing penalties upon those who violate the prohibitions. But it may, in addition to and in aid of these prohibitions set up means, having due and reasonable relation to, and confined within the powers exerted, to make these prohibitions effective to prevent the forbidden movement.

The District Judge in this case definitely found that appellant is dealing, and intends to deal, in interstate commerce in products made contraband by the laws of Texas, and by those laws forfeit to the State. Section 1 of his order enjoined appellant from continuing its dealings in those products. Certainly as to that prohibition, the injunction was well within the court's powers. Sections (2) and (3) of the order, prohibited dealing in East Texas oil or products, not covered by a Federal tender. If this part of the order is wider than the law or the facts of the preliminary hearing require, or if a case might be imagined under its operation where appellant would be prevented, through the arbitrary action of a Federal tender board, from moving products not contraband, it will be time enough to consider that, at the hearing on the merits, or when such a situation arises. As the matter stands before us on this appeal, it is quite plain that there is no ground for disturbing the order appealed from, for it is based on an express finding that all the products appellant had been moving, were contraband, and that he intended to continue such movement, and it enjoined him from doing so.

The order is affirmed.

[¶ 55,110] Milwaukee Drug Company v. The Reed Drug Company. Yahr-Lange, Inc. v. The Reed Drug Company.

State of Wisconsin, Circuit Court, Milwaukee County. Decided April 9, 1936.

Subsection (5) of the Wisconsin Fair Trade Act, prohibiting the sale of trademarked goods at prices below those established by the manufacturer in a contract with one or more retailers, is held unconstitutional as to non-contracting retailers, in that allowing two individuals to establish a price binding on others amounts to an unlawful delegation of legislative power to individuals.

Opinion and Conclusions

CHARLES L. AARONS, Circuit Judge: These actions are brought under Ch. 52, of the Laws of 1935 (Secs. 133.25 to 133.27, known as the "Fair Trade Act."

The purpose of the actions is to permanently enjoin and restrain the defendant and its agents from advertising for sale, selling or offering for sale any of the commodities produced by certain manufacturers of drugs and kindred products (referred to more specifically in the Findings of Fact herein) at prices less than those contained in certain retail sales contracts fixing minimum retail sales prices of such commodities.

The two above entitled actions were tried together before the court. The facts are, for the most part, established by stipulation or by the undisputed evidence. Such of the facts as are deemed material to the issue presented to and dealt with by the court are contained in the court's Findings, filed herewith. They will therefore not be recited here.

It is the contention of the plaintiffs that the acts of the defendant in advertising and selling the mentioned commodities at prices less than those specified in the contracts referred to constitute "unfair competition" under the provisions of Subsec. (5) of Sec. 133.25; and that such acts are actionable at the suit of the plaintiffs, who, it is claimed, have sustained and will, unless defendant is restrained, continue to sustain damage thereby.

It is the contention of the defendant that said Subsec. (5) of Sec. 133.25 is null and void as an unconstitutional enactment:

(a) Because it is in contravention of Sec. 1 of Art. IV of Wisconsin Constitution (which provides: "The legislative power shall be vested in a Senate and Assembly").

(b) Because it is an unreasonable and arbitrary attempt to exercise "the police power of the state."

(c) Because it is in contravention of the Fourteenth Amendment of the Constitution of the United States.

The statute in question reads as follows: [Not reproduced herein.]

The contention made by the defendant under point (a), hereinabove set forth, is in effect that subsection (5) of said act is an unlawful delegation of the power to make and declare laws vested by the Constitution in our Legislature (Sec. 1, Art. IV, of the Wisconsin Constitution).

This subsection plainly declares that it is unfair competition for any person to advertise or sell any commodity at less than the price stipulated in any contract referred to in Subsection (3), *whether or not the person so advertising, offering for sale or selling is a party to such contract.*

The contracts referred to in Subsection (3) obviously include those made between a producer and his vendee or between any vendor and any vendee. Contracts made by a vendee with another for the purpose of resale are expressly included. (See subdivisions (a) and (b) of Subsection (3)). It is thus quite apparent that the provision is not limited to contracts made *by the producer* with another. The contract may be made by one who purchases from the producer and who, in turn, sells the commodity to another for the purpose of resale. The contracts referred to in Subsection (3) are contracts made between any vendor and any vendee.

When any vendor of the kind of commodity referred to in the Act has made a contract with any vendee, and it has been stipulated in such contract that such commodity cannot be resold "except at the price stipulated," then any third person advertising or selling such commodity, *whether or not he be a party to such contract,* is, by the terms of the Act, guilty of unfair competition, and his conduct in so advertising or selling is actionable at the suit of any party damaged thereby.

This appears to be the plain construction of the provision contained in Subsection (5). That being so, the Legislature has placed it in the power of any two or more individuals to make a contract fixing a price of the commodity of the class covered by the act, which is binding on persons not parties.

In Subsection (7) of the Act it is provided that upon complaint of any person that any contract is unfair and unreasonable as to the minimum resale price therein stipulated, the Department of Agriculture

and Markets may *in its discretion* serve notice of time and place for a hearing on the said complaint. Said Department of Agriculture and Markets may find either that such contract is unfair and unreasonable or may find it fair and reasonable. If it finds it unfair and unreasonable, as to its minimum resale price provisions, the Department may declare such contract to be in restraint of trade.

Unless the provisions thus contained in Subsection (7) operate as a curative provision, Subsection (5) clearly constitutes an unlawful delegation of legislative power.

It is to be noted that the Act does not impose *any duty* upon any one dealing with the commodities of the class covered by the Act to make any contract containing stipulations respecting prices at which such commodities may be resold. It is entirely optional on the part of two or more persons to enter into any such contract. If they choose not to do so there is no provision in the Act which can be properly construed as making it the duty of the Department of Agriculture and Markets to make regulations as to minimum resale prices.

Subsection (5) therefore comes squarely within the condemnation pronounced in the case of *Gibson Auto Co. v. Finnegan,* 217 Wis. 401.

That case involved the question as to whether there was an unlawful delegation of legislative power in the provisions of the Wisconsin Recovery Act of 1933.

That Act provided, among other things, that after a code had "been approved by a preponderant majority of persons engaged in such trade or industry" the governor may approve a code of fair competition and trade practices. It also provided that *upon the approval* of any such code all persons shall be bound by such code and any standards adopted and approved by the governor, etc. It provided that after the governor shall have approved any code and the *same shall have been published,* the provisions of such code shall be the standards of fair competition for the intrastate business of the trade, etc.

For the purpose of determining whether a code or agreement will or does operate to effectuate the purpose of the Chapter, the governor was authorized to issue subpoenas and to take testimony.

These and other provisions as contained in Ch. 110, Statutes of 1933, indicate that the operation of the Wisconsin Recovery Act of 1933 was guarded with numerous restrictions calculated to protect the rights of the persons engaged in trade or industry. Notwithstanding such provisions, the Supreme Court of this state declared that the Legislature had by such Act abdicated its legislative functions, and the law was held unconstitutional as an unlawful attempt to delegate the law making power.

In his opinion in that case, Chief Justice Rosenberry said:

"No provision of the Act can by its terms become effective until some trade or industrial association or group applies to the governor for his approval of a code. After a proposal has once been submitted, the power of the governor to modify, amend or terminate it is aroused; he has no power whatever to initiate a code. His authortiy is dependent upon his finding (1) that the code has beeen approved by a preponderant majority of the persons engaged in the trade or industry as defined in the Act * * *. It is true that the code would have no vitality or legal effect if not approved by the governor. However, the question of whether or not there shall be a code, which is nothing more nor less than a law relating to particular industry, is *wholly dependent upon the initial determination of the members of an industry.* * * * It is difficult to conceive of a more complete abdication of legislative power than is involved in this Act. Not only is the power to determine whether or not there shall be a law at all delegated to an indefinite class or group, but the governor and all other public officers are rendered powerless to act except upon the initiative of a preponderant majority of a group. It must be borne in mind that the power delegated is not the power to organize and adopt self-governing ordinances. The power delegated is the power to frame and adopt a code which, when approved, becomes a law with penal sanctions." *Gibson Auto Co. v. Finnegan,* 217 Wis. 401, 407, 408.

The court then quoted from its opinion in *State ex rel. Wisconsin Inspection Bureau v. Whitman,* 196 Wis. 274, as follows:

"The power to declare whether or not there shall be a law; to determine the general purpose of policy to be achieved by the law; to fix the limits within which the law shall operate,—is a power which is vested by our constitution in the legislature and may not be delegated. When, however, the legislature has laid down these fundamentals of a law, it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose."

In the course of his opinion Chief Justice Rosenberry pointed out that the Act under consideration attempted to do precisely what it was said in the *Wisconsin Inspection Bureau* case the legislature may not constitutionally do

"That is, delegate the power to declare whether or not there shall be a law. Under this statute, that declaration is left to the preponderant majority of the trade. * * * No industry is required to produce a code. * * * What is in the public interests is to be found by the preponderant majority of the trade. * * * These matters of the very highest importance to the general welfare are by Ch. 110 to be dealt with, not by the legislature in whom the power to make laws is vested by the constitution, but by an indefinite, unascertained, self-perpetuating group which may be in existence or may thereafter come into existence." id. 409.

Comparing the provisions of Ch. 101, relating to the regulation of industry, with the Wisconsin Recovery Act, the court further said:

"Compare this legislation with the provisions of Ch. 110. Ch. 110 requires no group or body to do anything. It prescribes no duty. When a prepon-

derant majority as defined in the act of a group thinks the declared purpose of the act will be better achieved if that particular trade or group has a code, they may propose one to the governor. While it is true that by Ch. 110 certain things are to be provided for in a proposed code (Sec. 110.04 (2)), nevertheless the means of achieving the desired end is left to the preponderant majority. The only difference discoverable between the authority vested in the trade group with reference to the provisions of the code and the power vested in the legislature itself by the constitution is that the group may not put the code into effect over the veto of the governor." id. 410.

After the decision in the *Gibson Auto Co.* case, *supra,* the Wisconsin Legislature passed a new Wisconsin Recovery Act by Chapter 182, of the laws of 1935. That act was also attacked on the ground that it attempted to unlawfully delegate power conferred upon the legislature. *In re State ex rel. Attorney General* (Tavern Code Authority), 264 N. W. 633.

It was held in that case that the new Wisconsin Recovery Act did not violate the constitution of the state by an unlawful delegation of power. Such holding was based upon the fact that the new law omitted the provisions of the former law which permitted a code to be initiated by a preponderant majority of a trade or industry.

Speaking of the defect in the former law, and comparing it with the 1935 Act, Chief Justice Rosenberry said:

"It is quite evident that the legislature met this situation in Ch. 182 of the Laws of 1935 *by making it the duty of the governor* 'to investigate, ascertain, declare and prescribe reasonable codes or standards of fair competition and trade practices for the various trades and industries in the state * * *.' Under Ch. 110, Statutes of 1935, initiative is no longer with either the preponderant majority of the industry or the governor. Therefore the defect pointed out in Ch. 110, Statutes of 1933, is not contained in Ch. 110, Statutes of 1935." id. 638.

It is to be observed that Subsection (5) of Sec. 133.25 (The Fair Trade Act) violates the constitutional provision referred to in even greater degree, if possible, than did Ch. 110 of the Statutes of 1933, condemned in the *Gibson Auto Co.* case, for said subsection of The Fair Trade Act contains no provision whatever for notice or hearing prior to the approval of the minimum resale price by the Department of Agriculture and Markets. It does not provide as did Ch. 110, of the Statutes of 1933, that the stipulated price shall become effective only after the approval of such Department and the publication of the regulation. It also leaves such right of review as is given by subsection (7), of Sec. 133.25, to the *discretion* and judgment of the Department of Agriculture and Markets. It thus appears to be even "a more complete abdication of legislative power" than the act which was under review in the *Gibson Auto Co.* case. Nor can it be reasonably contended that the price fixing by private contract between any two or more individuals or corporations, who happen to be vendor and vendee, respectively, of a certain commodity, is warranted under the decision in *State ex rel. Wisconsin Inspection Bureau v. Whitman,* 196 Wis. 472.

In that case the insurance rating law was sustained. That law required that insurers must be members of a rating bureau. It provided for licensing all such bureaus and their regulations. It required the regulations to be filed with the Commissioner of Insurance. It even permitted insurers to deviate from schedule rates, that is, to make a rate different from the bureau rate upon all class of risks, provided said variation shall be uniform for all risks in the class for which the variation is made.

Nor can subsection (5) of The Fair Trade Act be held valid under the principles sanctioning statutes pertaining to the establishment of rates in the railroad and public utility cases. See Chs. 195 and 196, Wisconsin Statutes. Under those statutes schedules of rates are required to be filed with the Commission; hearings are held to determine the reasonableness of the rates; the Commission may initiate and investigate and order a hearing upon its own motion.

So also the Milk Control Laws of New York and Wisconsin—though enacted as "emergency" legislation,—carefully provide for notice, investigation and hearings before the orders of the Board or Commission, prohibiting certain trade practices as unlawful, may become operative. *Nebbia v. New York,* 291 U. S. 502, 518, 78 L. ed. 940, 946; *State v. Lincoln Dairy Co.,* (Wis.) 265 N. W. 197, 198.

There is no provision in any of such statutes by which a private contract—arrived at without notice or hearing and without requirement of the keeping of any record of the standards or methods adopted—may establish the law of the state, binding on all persons unless an administrative department, *in its discretion,* shall hold a hearing and set aside the contract.

It is significant that in matters so deeply affecting the public interest as railroad and public utility rates, insurance rates and practices, and rates and practices affecting the milk industry, the greatest care was taken in the laws to protect the rights of all interested parties, including the public, giving all a voice in the making of the rates, and—in the case of insurance—even permitting variations under certain conditions; while in the matter of fixing prices of commodities in the vast competitive field of products of every kind and description labeled with a trade name, the

"Fair Trade Act" permits the first one who sees fit to do so to initiate sales prices which become binding on all other persons in the trade, without giving the persons so bound, or the public, any voice prior to the time when such prices are initiated.

Considerable discussion was indulged in in the arguments as to whether Sec. 133.25 is primarily a price fixing statute or primarily a statute pertaining to the regulation of trade practices. Some of the decisions cited from other jurisdictions seek to emphasize the distinction.

Apparently plaintiffs believe that their position in seeking to sustain the law is strengthened if it be established that the act is not a price fixing statute but merely seeks to curb the admitted evil of price cutting.

I see no point in the distinction. There is nothing "peculiarly sacrosanct about the price one may charge for what he makes or sells." *Nebbia v. N. Y.*, 291 U. S. 502; 78 L. ed. 940, 954.

In either case—whether the regulation be one pertaining to prices or one pertaining to other trade practices—the question, as it pertains to the objection that legislative power has been unlawfully delegated, is the same.

Does the law, which the regulation effects, become operative at the instance of the people's duly chosen representatives—the legislature,—or by proper delegation, according to legislative standard, at the instance of a duly authorized administrative agency of the state government—or does the regulation, which has the force of law, become operative upon the initiative of any private individual or individuals who see fit in their own judgment to procure signers to an instrument, in the form of a contract, by which the regulation becomes operative and binding upon all persons?

The answer is contained in the Wisconsin decisions above cited. *State ex rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472; *Gibson Auto Co. v. Finnegan*, 217 Wis. 401; *In re State*, 264 N. W. 633.

A number of decisions from other jurisdictions have been cited but in so far as they differ with the doctrines laid down in the foregoing cases they are not controlling. It may be well, however, to point out that the basis of the court's decision in the California case pertaining to The Fair Trade Act of that state—strongly relied upon by plaintiff's counsel—is one which is inapplicable to the facts involved in the case at bar. That is the case of *Max Factor & Co. v. Kunsman*, decided by the Supreme Court of California March 5, 1936. The advance report of the case is contained in Vol. 91, California Decisions, p. 345.

In the California Fair Trade Act, Section 1½ is almost precisely in the language of Subsection (5) of the Wisconsin Fair Trade Act. In that case the *manufacturer* made the contract with a number of retailers. The defendant Kunsman did not purchase from the manufacturer but from other unknown persons. The court said: (p. 356)

"*Section 1½ comes into operation only when the manufacturer or producer has entered into contracts fixing the resale price.* The statute, as its title indicates, by preventing price cutting, is aimed at protecting these valuable property and contract rights of the manufacturer or producer—rights just as valuable and just as much entitled to protection as the right of the retailer, who is attempting, by exercising his claimed right of freedom of action, to injure the property and contract rights of the manufacturer or producer. The statute, in other words, does not merely prohibit price-cutting in order to regulate prices, but prohibits price-cutting in an attempt to protect the validly acquired rights of others. The common law, without statutory authorization, long recognized that unjustifiable interference with contract rights of others constituted a tort. (Citing *Lumley v. Gye*, 2 El. & Bl. 216.) The statute here involved, in a large measure, merely extends that common law doctrine to the transactions enumerated in the statute."

Throughout the discussion contained in the opinion the court emphasized the point that *the primary purpose of the statute was to protect the property and contract rights of the manufacturer and producer.*

The California court referred to and discussed the case of *Doubleday, Doran & Co. v. R. W. Macy & Co.*, decided January 7, 1936, 199 N. E. 409, wherein the Fair Trade Act of the State of New York was held unconstitutional. After attempting to distinguish that decision, the California court says:

"As already pointed out, it is only in reference to those commodities included within the statute *that the manufacturer or producer has a property right* in the nature of good-will, which, in the public interest, should be protected. Such a classification is reasonable." id. 358 (of *Max Factor & Co.* case.)

In connection with these statements it should be recalled that in the case at bar no manufacturer or producer is a party to any contract involved in these actions. Nor does it appear that the plaintiffs are agents of the manufacturers. Furthermore the manufacturers themselves in a number of instances have sold the very commodities to the defendant at prices no greater, and in some cases less, than the prices paid by the plaintiffs to the same manufacturers for the same commodities.

The cases at bar are not brought under the doctrine of *Lumley v. Gye*, 2 E. & B. 216, wherein it was recognized that unjustifiable interference with contract rights of others constituted a tort. See 15 R. C. L., p. 52, et seq.

In the cases at bar no claim is made nor is there any evidence to the effect, that

the defendant induced or sought to induce breach of any of the contracts involved, as in *Singer Sewing Machine Co. v. Lang,* 186 Wis. 530, 536.

Because of the ground upon which the decision herein rests, it becomes unnecessary for the court to pass upon other contentions of the defendant (embodied in contentions (b) and (c) *supra* p. 2)—such as: (1) that the requirements of due process were not met because the Act is arbitrary in its operation and effect. (*Williams v. Standard Oil Co.,* 278 U. S. 235, 73 L. Ed. 287, and cases cited in Note 39 in *Nebbia v. New York,* 291 U. S. 502, 537, 78 L. Ed. 940, 957); (2) that prices of ordinary commodities of an industry not found to be a "paramount" industry, cannot be fixed by legislation (same cases); (3) that even a producer possesses no inherent power to project his control beyond his own sales in the absence of an agreement made between the producer and his vendees (*Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U. S. 373, 405; 55 L. Ed. 502, 518).

It is of course unnecessary to consider the nature of the evil which the legislature sought to remedy by the "Fair Trade Act," or the reasons which impelled its passage—a matter which has been exhaustively discussed in the arguments and briefs of plaintiffs' counsel (and which is purely a legislative and not a judicial question).

Because defendant's contentions (b) and (c), as above indicated, are not here considered, it becomes unnecessary to find the facts relevant to the relation of the commodities here involved to the public good and welfare; or the facts pertaining to the defendant's asserted efficient methods of doing business, as differentiated from other retailers, or facts bearing upon the virtues or vices of said commodities.

Under the act it is irrelevant what losses were sustained or profits made by defendant; what ulterior or other motives actuated it; or whether the price cutting is of a "predatory" nature or is merely designed to share merchandising economies with the consumer. In either event, if the law is valid, the price cutting is actionable if damage is thereby sustained. See Vol. 49, *Harvard Law Review* (Mar. 1936) pp. 817, 818.

The court also considers matters bearing upon the reasonableness or unreasonableness of the minimum prices fixed by the contracts in question as irrelevant to the specific question dealt with here. Such matters would become pertinent were a suit brought to enjoin the enforcement of an order of a governmental administrative body determining the reasonableness of a price, without assailing the law itself.

In order to present the question of the reasonableness of the prices fixed the administrative remedy provided by the act should be utilized before resorting to suit to enjoin the enforcement of the order. *Hegeman Farms Corporation v. Baldwin,* 293 U. S. 163, 79 L. Ed. 259, 264. (So held where the question of the constitutionality of the Act was treated as abandoned. id. 262.)

In the present decision the question passed on pertains solely to the validity of the subsection itself in seeking to delegate to individuals the power to initiate the price by private contract and make it effective as to all persons whether parties to the contract or not. The matter of the reasonableness or unreasonableness of the specific prices involved does not enter into a consideration and disposition of that question.

In view of the fervent appeals made to this court to assist the legislature in eliminating the so called price cutting evil, it may be well to remind counsel of the language used by Chief Justice Rosenberry in the case of *Gibson Auto Co. v. Finnegan,* 217 Wis. 401.

"Under our system of government the court is not called upon to consider the economic, social and political matters dealt with in the act. Whatever conclusion may be reached as the result of our deliberation, it in no way involves the determination by the court of the social value of the objectives sought. Under our constitutional system, in reviewing an act of the legislature, the duties of the court are limited to considering whether or not the act of the legislature contravenes the provisions of the constitution. The duty of the court to do this arises from the fact that the constitution is the supreme law of the state. If the legislature passes an act which is in contravention of the constitution, and a citizen asserts a right under the constitution denied him by the act of the legislature, of necessity the court must determine which controls—the constitution or the act of the legislature. It cannot determine the rights of the parties otherwise. From the beginning the provisions of the constitution have been held to be supreme and therefore controlling." id. 406.

It has often been truly said that every presumption shall be indulged in favor of the validity of an act of the legislature; that it should not be declared invalid as contravening the provisions of the constitution unless it be clear beyond reasonable question that it violates some constitutional limitation or prohibition. And it has frequently been correctly said that the court will not declare the invalidity of an act because of the court's view as to the wisdom of the legislation.

It is not so often said, but it is just as true, that *the court has no authority to override the will of the people as expressed in the supreme law of the state* merely because the court may be of the opinion that it is wise to disregard the constitutional provision. This court has no more power to set aside

or disregard a plain constitutional provision on the ground that it may seem wise or expedient to do so, than it has to set aside a statute which is in accord with the constitution merely because it seems to be an unwise statute. See remarks of Mr. Justice Roberts in *U. S. v. Butler* (A. A. A. decision), 80 L. Ed. Advance Opinions No. 5, at page 293.

Since the doctrine that the welfare of the people as a whole must prevail as against the right of the individual to act without restraint, the determination of what is best for the welfare of the people must, under our system of government, be limited to the people's duly chosen representatives. Those representatives must actually exercise the duty imposed upon them by the constitution. They may exercise it by *making it obligatory* that the details of the execution of the law be carried out by a proper governmental agency, after having provided the necessary standards to guide such agency, and after having laid down the essential fundamentals of the law. (*In re State,* 264 N. W. 633, 638.) But the legislature cannot, as here attempted, leave it to the option of private individuals (or even of an administrative body) *to determine whether, when and under what conditions* a minimum price shall be fixed, and what its standards shall be.

Our Supreme Court has pointed out the danger of the delegation of power to subordinate administrative agencies. *State ex rel. Wis. Inspection Bureau v. Whitman,* 196 Wis. 472, 507. How much greater is the danger of delegating law-making power to private individuals, giving to an administrative agency merely a reviewing power (even though such agency's refusal to approve the acts of the individuals may amount to regulation) where such agency is not authorized to enter into any new field, and may not determine ***whether, when, and under what conditions*** to initiate a minimum price.

This court must therefore conclude that in so far as Subsection (5) of Sec. 133.25 is applicable to the contracts here involved, made by the plaintiffs with certain retailers in Wisconsin, it appears beyond reasonable question that said Subsection (5) seeks to defeat and override the Supreme Law of the State by unlawfully delegating legislative functions to individuals in contravention of Sec. 1, Art. IV of the Wisconsin Constitution.

Hence it becomes the duty of this court to hold that the constitutional provision, and not the subsection repugnant thereto, must prevail.

Based solely upon the ground that Subsection (5), as applied to the facts in these cases, attempts to accomplish an unlawful delegation of a legislative function, and is, for that reason, invalid, the conclusion follows that the complaints of the plaintiffs in both cases must be dismissed. As above indicated, Findings of Fact and Conclusions of Law in accordance with this opinion are filed herewith.

[¶ 55,111] Seeck & Kade, Inc., v. Tomshinsky et al.

Court of Appeals of New York. Decided January 7, 1936.

The New York Fair Trade Act is held unconstitutional insofar as it prohibits non-contracting retailers from selling trademarked articles at prices less than those established in contracts between the manufacturer and other retailers.

Appeal, on constitutional grounds, from a final judgment of a Special Term of the Supreme Court, held in and for the county of Westchester, entered upon an order of such court which granted a motion by defendants for judgment on the pleadings dismissing the complaint, on the ground that section 2 of chapter 976 of the Laws of 1935 is unconstitutional. The action was brought to enjoin and restrain defendants from advertising or offering for sale or selling in the State of New York certain commodities manufactured by plaintiff, or any commodity bearing trade-marks, names or labels controlled in the State of New York by plaintiff, at less than the prices stipulated in certain contracts entered into by the plaintiff with its retail outlets and dealers pursuant to the provisions of the above statute.

Mark Eisner and *James F. Donnelly* for appellant.

Jay Leo Rothschild and *Frances Kneitel* for respondents.

Jay Leo Rothschild for Hearn Department Stores, Inc., *amicus curiae.*

Charles Goldman and *Harold Dublirer* for Cooper & Cooper, Inc., *amicus curiae.*

Judgment affirmed, with costs, on the authority of *Doubleday, Doran & Co. v. Macy & Co.* (269 N. Y. 272). No opinion.

Concur: CRANE, Ch. J., LEHMAN, O'BRIEN, HUBBS, CROUCH, LOUGHRAN and FINCH, JJ.

[¶ 55,112] **International Business Machines Corporation v. The United States of America.**

Supreme Court of the United States. No. 758.—October Term, 1935. Decided April 27, 1936.

Appeal from the District Court of the United States for the Southern District of New York.

A "tying clause" inserted in leasing contracts entered into between an owner of tabulating machines and the lessees of such machines, which clause provides that if cards which are not purchased from the owner of the machines are used in the machines the contract of lease shall be terminated and the whole rental shall become due, is held invalid because it lessens competition in the sale of tabulating cards and tends to create a monopoly in violation of Section 3 of the Clayton Anti-Trust Act.

Section 3 of the Clayton Act, which provides that the insertion in a lease of a condition that lessee shall not use goods of a competitor is unlawful, is interpreted broadly to prohibit also an affirmative condition that the lessee shall use only goods of the lessor.

It appears by stipulation that others are capable of manufacturing cards suitable for use in the lessor's machines. Lessor is not prevented however from proclaiming the virtues of its own cards or warning against the danger of using cards not conforming to certain specifications. Such measures are held capable of protecting its good will in its machines without the creation of monopoly or suppression of competition.

Mr. Justice Stone delivered the opinion of the Court.

This is an appeal, § 238 of the Judicial Code, from so much of a decree of a District Court for Southern New York as enjoins the appellant from leasing its tabulating and other machines upon the condition that the lessees shall use with such machines only tabulating cards manufactured by appellant, as a violation of § 3 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 14.

The Government brought the suit against appellant and three other corporations, all manufacturers of machines performing substantially the same functions as appellant's, to restrain the use by each of the defendants of a specified type of lease of their machines as a violation of the Clayton Act, and to declare void under the Sherman Act a contract into which they had entered, by which each agreed to use that type of lease, and not to solicit the lessees of machines of the others to purchase tabulating cards which it manufactures. The case was tried upon the pleadings and a stipulation of facts, in which the defendants consented to a decree cancelling their agreement with each other. Two of the defendants have been eliminated from the suit, one by dissolution and the other by merger with appellant. A third defendant, Remington Rand Inc., has stipulated that the decree to be entered against it shall conform to that entered against appellant upon this appeal.

Appellant's machines and those of Remington Rand Inc., are now the only ones on the market which perform certain mechanical tabulations and computations, without any intervening manual operation, by the use in them of cards upon which are recorded data which are the subject of tabulation or computation. Appellant manufactures three types of machines, known as punching machines, sorters and tabulators. The punching machines are used to perforate cards, called tabulating cards, in such manner that the positions of the perforations indicate numerical or other data. When the cards are passed through the sorter or tabulator, control of its mechanism is effected by electrical circuits established by contacts through the perforations. The cards are thus made permanent records of information, and by the perforations are given such form that they may be used, as often as required, to control the function of the machines through which they are passed. The sorting machines are used to sort the perforated cards so as to classify them by the selection and segregation, in the desired manner, of those signifying any particular type of information. The tabulating machines are used to record the information denoted by the perforated cards or to make computations based upon it. In the Remington Rand machines the control is not electrical, but is accomplished by the use of cards which admit of the movement, into the perforations, of small pins

which, by linkage, guide the mechanical operation of the machine so as to effect the desired result.

To insure satisfactory performance by appellant's machines it is necessary that the cards used in them conform to precise specifications as to size and thickness, and that they be free from defects due to slime or carbon spots, which cause unintended electrical contacts and consequent inaccurate results. The cards manufactured by appellant are electrically tested for such defects.

Appellant leases its machines for a specified rental and period, upon condition that the lease shall terminate in case any cards not manufactured by the lessor are used in the leased machine. A special form of lease has been granted to the Government by which it is permitted to use cards of its own manufacture upon paying a 15% increase in the rental of the leased machines, but upon condition that the lease shall be terminable if the Government uses such cards without payment of the additional rental.

Appellant insists that the condition of its leases is not within the prohibition of the Clayton Act, and it has assigned as error the conclusion of the district court that the condition tends to create monopoly. But its principal contentions are that its leases are lawful because the protection secured by the conditions does not extend beyond the monopoly which it has acquired by patents on the cards and on the machines in which they are used, and that in any case the condition is permissible under § 3 of the Clayton Act because its purpose and effect are only to preserve to appellant the good will of its patrons by preventing the use of unsuitable cards which would interfere with the successful performance of its machines.

1. Section 3 of the Clayton Act, so far as it is applicable to the present case, provides that "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease . . . machinery . . . whether patented or unpatented, for use . . . within the United States . . . on the condition . . . that the lessee . . . shall not use . . . supplies or other commodities of a competitor . . ., where the effect of such lease . . . or such condition . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." The statute thus in precise terms makes unlawful a condition that the lessee shall not use the supplies or commodities of a competitor of the lessor if the effect of the condition "may be" to lessen competition substantially, or if it tends to create a monopoly.

Little need be said of the contention that the condition of appellant's leases does not infringe these prohibitions. It is true that the condition is not in so many words against the use of the cards of a competitor, but is affirmative in form, that the lessee shall use only appellant's cards in the leased machines. But as the lessee can make no use of the cards except with the leased machines, and the specified use of appellant's cards precludes the use of the cards of any competitor, the condition operates in the manner forbidden by the statute. See *United States Machinery Co. v. United States*, 258 U. S. 451, 457, 458; compare *Federal Trade Commission v. Sinclair Ref. Co.*, 261 U. S. 463, 474. A different question is presented from that in the *Sinclair* case, where a wholesale distributor of gasoline leased gasoline pumps to retail dealers with the stipulation that they should not be used for the pumping of gasoline of the lessor's competitors. As the only use made of the gasoline was to sell it, and as there was no restraint upon the purchase and sale of competing gasoline, there was no violation of the Clayton Act.

The conclusion of the trial court that appellant's leases infringe the monopoly provisions of the section does not want for support in the record. The agreed use of the "tying clause" by appellant and its only competitors, and the agreement by each of them to restrict its competition in the sale of cards to the lessees of the others, have operated to prevent competition and to create a monopoly in the production and sale of tabulating cards suitable for appellant's machines, as the district court found. The commerce in tabulating cards is substantial. Appellant, makes and sells 3,000,000,000 cards annually, 81% of the total, indicating that the sales by the Remington Rand company, its only competitor, representing the remaining 19%, are approximately 600,000,000. It is stipulated that appellant derives a "substantial" profit from its card sales. Its gross receipts from its entire business during the past ten years have averaged $9,710,389 a year, of which approximately one-third, or $3,192,700, has been derived from the sale of its cards. These facts, and others, which we do not stop to enumerate, can leave no doubt that the effect of the condition in appellant's leases "may be to substantially lessen competition," and that it tends to create monopoly, and has in fact been an important and effective step in the creation of monopoly.

2. On the trial appellant offered to prove its ownership of patents which, it asserts, give it a monopoly of the right to manufacture, use and vend the cards, separately,

and in combination with its sorting and tabulating machines, of which, it insists, they are a part. It argues that the condition of its leases is lawful because it does not enlarge the monopoly secured by the patents, and that the trial court erred in refusing to consider appellant's patent monopoly as a defense to the suit.

Appellant's patents appear to extend only to the cards when perforated, and to have no application to those which the lessees purchase before they are punched. The contention is thus reduced to the dubious claim that the sale of the unpunched cards is a contributory infringement of the patents covering the use of perforated cards separately and in combination with the machines. See *Carbice Corporation v. American Patents Development Corp.*, 283 U. S. 27; *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502; *McGrath Holding Corp. v. Anzell*, 58 F. (2d) 205; cf. *Leeds & Catlin v. Victor Talking Mach. Co.*, 213 U. S. 325.

But we do not place our decision on this narrow ground. We rest it rather on the language of § 3 of the Clayton Act which expressly makes tying clauses unlawful, whether the machine leased is "patented or unpatented." The section does not purport to curtail the patent monopoly of the lessor or to restrict its protection by suit for infringement. But it does in terms deny to the lessor of a patented, as well as of an unpatented machine, the benefit of any condition or agreement that the lessee shall not use the supplies of a competitor. The only purpose or effect of the tying clause, so far as it could be effectively applied to patented articles, is either to prevent the use, by a lessee, of the product of a competitor of the lessor, where the lessor's patent, *prima facie,* embraces that product, and thus avoid judicial review of the patent, or else to compel its examination in every suit brought to set aside the tying clause, although the suit could usually result in no binding adjudication, as to the validity of the patent, since infringement would not be in issue. The phrase "whether patented or unpatented" would seem well chosen to foreclose the possibility of either alternative.

When Congress had before it the bill which became § 3 of the Clayton Act, it was familiar with the decision of this Court in *Henry v. A. B. Dick Co.*, 224 U. S. 1, and with the contentions made in *United States v. United Shoe Mach. Co.*, 247 U. S. 33, then pending before this Court—cases in which it was held that a tying clause could lawfully be extended to unpatented supplies for a leased patented machine. Cong. Rec., Vol. 51, Part 14, 63rd Cong., 2d Sess., 14,089 ff.; see Henderson. The Federal Trade Commission, 30. One purpose of § 3 undoubtedly was to prevent such use of the tying clause. *United Shoe Mach. Co. v. United States,* 258 U. S. 451. But the debates on § 3, on the floor of the Senate, disclose that it was well known to that body that one of the contentions in the pending cause, *United States v. United Shoe Mach. Co.*, 247 U. S. 33, was that it was permissible, in any circumstances, for a lessor to tie several patented articles together. They show that the proponents of the bill were as much concerned that that practice should be prohibited as that the tying of nonpatented to patented articles should be ended. Cong. Rec., Vol. 51, Part 14, 63rd Cong., 3r Sess., 14275. The phrase, "whether patented or unpatented" as used in § 3 is as applicable to the one practice as to the other. It would fail of the purpose which it plainly expresses if it did not operate to preclude the possibility of both, and to make the validity of the tying clause a matter to be determined independently of the protection afforded by any monopoly of the lessor. Such, we think, must be taken to be the effect of the section unless its language and history are to be disregarded. Under its provisions the lawfulness of the tying clause must be ascertained by applying to it the standards prescribed by § 3 as though the leased article and its parts were unpatented.

3. Despite the plain language of § 3, making unlawful the tying clause when it tends to create a monopoly, appellant insists that it does not forbid tying clauses whose purpose and effect are to protect the good will of the lessor in the leased machines, even though monopoly ensues. In support of this contention appellant places great emphasis on the admitted fact that it is essential to the successful performance of the leased machines that the cards used in them conform, with relatively minute tolerances, to specifications as to size, thickness and freedom from defects which would affect adversely the electrical circuits indispensable to the proper operation of the machines. The point is stressed that failure, even though occasional, to conform to these requirements, causes inaccuracies in the functioning of the machine, serious in their consequences and difficult to trace to their source, with consequent injury to the reputation of the machines and the good will of the lessors.

There is no contention that others than appellant cannot meet these requirements. It affirmatively appears, by stipulation, that others are capable of manufacturing cards suitable for use in appellant's machines, and that paper required for that purpose may be obtained from the manufacturers who supply appellant. The Remington

Rand company manufactures cards suitable for its own machines, but since it has been barred by the agreement with appellant from selling its cards for use in appellant's machines, its cards are not electrically tested. The Government, under the provisions of its lease, following its own methods, has made large quantities of the cards, which are in successful use with appellant's machines. The suggestion that without the tying clause an adequate supply of cards would not be forthcoming from competitive sources is not supported by the evidence. "The very existence of such restrictions suggests that in its absence a competing article of equal or better quality would be offered at the same or at a lower price." *Carbice Corporation v. American Patents Development Corp., supra,* 32, Note 2, quoting Vaughan, Economics of Our Patent System, 125, 127. Appellant's sale of cards return a substantial profit and the Government's payment of 15% increase in rental to secure the privilege of making its own cards is profitable only if it produces the cards at a cost less than 55% of the price charged by appellant.

Appellant is not prevented from proclaiming the virtues of its own cards or warning against the danger of using, in its machines, cards which do not conform to the necessary specifications, or even from making its leases conditional upon the use of cards which conform to them. For aught that appears such measures would protect its good will without the creation of monopoly or resort to the suppression of competition.

The Clayton Act names no exception to its prohibition of monopolistic tying clauses. Even if we are free to make an exception to its unambiguous command, see *United States v. United Shoe Mach. Co.,* 264 Fed. 138, 167;[1] *Auto Acetelene Light Co. v. Prest-O-Lite Co.,* 276 Fed. 537; *Pick Manufacturing Co. v. General Motors Corp.,* 80 F. (2d) 641; cf. *Radio Corporation v. Lord,* 28 F. (2d) 257, we can perceive no tenable basis for an exception in favor of a condition whose substantial benefit to the lessor is the elimination of business competition and the creation of monopoly, rather than the protection of its good will, and where it does not appear that the latter can not be achieved by methods which do not tend to monopoly and are not otherwise unlawful.

Affirmed.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

[1] In this case the Government sought no review of the determination of the district court that the tying clause was valid so far as it requires lessees to purchase of the lessor supplies and parts of the leased machines. See *United Shoe Mach. Co. v. United States,* 258 U. S. 451.

[¶ 55,113] Straight Side Basket Corporation v. Webster Basket Company, Incorporated.

United States Circuit Court of Appeals for the Second Circuit. Decided February 17, 1936.

A contract under which a licensee agrees to conform to resale prices established by the patentee does not constitute a restraint of trade under the Anti-Trust laws, but is lawful.

After the license and contract were entered into the patentee attempted to make the licensee comply with an "authorized dealer" plan under which patentee could control the prices at which dealers purchasing from licensee might re-sell. As licensee did not consent to this modification, the Court holds that it is unnecessary for it to determine whether this modified contract would have been an unlawful restraint of trade in violation of the Anti-Trust laws.

Before: MANTON, AUGUSTUS N. HAND and CHASE, Circuit Judges.

Appeal from a judgment of the District Court for the Western District of New York in a suit to recover patent royalties. Affirmed.

Edwin T. Bean, Esq., Richard W. Treverton, Esq., Gray & Gray, Esqs., Attorneys for Plaintiff-Appellee.

Van Duser & Liebschutz, Esq., Attorneys for Defendant-Appellant, Samuel B. Dicker, Esq., David H. Shearer, Esq., of Counsel.

CHASE, Circuit Judge: The plaintiff granted licenses to the defendant under patents covering machine attachments, for making baskets of the kind commonly used in packing and selling fruit, and processes of manufacture. The defendant manufactured baskets under the license agreements but has paid only part of the royalties which have accrued in accordance with the terms of the licenses.

There are two causes of action. The first is based upon five licenses each for one machine attachment for making the so-called "Straight Side" type of basket. There is no dispute as to the amount due provided the licenses are not invalid because in unlawful restraint of trade. The

second cause of action is to recover a disputed amount claimed due under another license for making the "E-Z-Pak" basket. The plaintiff recovered on both causes of action which will be discussed separately.

The defenses to the first cause of action are (1) invalidity and (2) breach by the plaintiff in failing diligently to prosecute infringers as agreed. A preliminary motion to strike out the first defense was denied before the case was tried on the merits by the court without a jury.

The plaintiff neither manufactures nor sells baskets but licenses others, of which defendant is one, to do that under its patents. Each of the five licenses to the defendant provided that: "Licensee agrees not * * * to sell any such baskets for less than the fair market price thereof, and on such terms and conditions as Licensor may from time to time, decide are just and equitable." The plaintiff did from the first and until August 29, 1930 issue lists of prices at which the defendant should sell without any attempt to control prices beyond that. On the above date, however, it sent out what was called Bulletin No. 18 in which it proposed to control the prices at which "authorized dealers" purchasing from the defendant might re-sell by requiring its licensees to enter into price fixing contracts with such authorized dealers. It then requested the assent of the defendant to the proposed plan. The defendant did not agree to it and did not make any authorized dealer contracts in accordance with it. Later the plaintiff sent out several notices in which it insisted that the plan proposed for controlling sales by authorized dealers should be adopted and followed but this defendant never did it. The trial court found that the licensee agreements at their inception were not illegal and that they did not become so by virtue of the plaintiff's efforts to have the defendant set up the authorized dealer plan.

The original licenses provided in the portion above quoted for the establishment of prices by the plaintiff at which the defendant might sell the baskets it made thereunder. That was lawful. *E. Bement & Sons v. National Harrow Co.,* 186 U. S. 70; *United States v. General Electric Co. et al.,* 272 U. S. 476. The defendant consented to be bound by the prices established by the plaintiff in so far as its own sales were concerned but it did not expressly agree to hold its purchasers to any price at which they might sell, although it may well be said that its agreement to sell only on such terms and conditions as the plaintiff might impose covered broadly its manner of selling the baskets made under the licenses. The point is that, as the agreement did not call for action by either party in violation of any law, the contract could be lawfully performed in full in accordance with its terms and so is to be taken to have embraced only lawful acts in the absence of proof to the contrary. The presumption is in favor of validity in order that the right of freedom of contract may be maintained. *Steele v. Drummond,* 275 U. S. 199; *Hobbs v. McLean,* 117 U. S. 567; *Valdes v. Larrinaga,* 233 U. S. 705. The defendant was bound to comply with the terms and conditions of sale imposed by the plaintiff only in so far as it was lawful to do so. That limitation upon the plaintiff's right to control the defendant's sales follows from the presumption of validity. Nor could the plaintiff modify the licenses to make the defendant's performance illegal without the defendant's consent either express or implied. *W. T. Rawleigh Co. v. Lemon,* 247 S. W. 683. As the defendant never did consent to any modification it is unnecessary to determine whether the plaintiff's ineffective attempt to have the defendant perform under the authorized dealers plan would, or would not, have made the license agreements unenforceable had the defendant agreed and acted accordingly. It is enough for present purposes that the licenses were valid as executed and remained unchanged.

The defendant's counterclaim for special damages is based upon allegations that the plaintiff failed to prosecute infringers with due diligence. The licenses were granted under patents No. 1,751,728 and No. 1,752,856 which were issued March 25, 1930 and April 1, 1930 respectively. This suit was brought March 4, 1932. Before that the plaintiff had instituted four actions for infringement one of which had resulted in a consent decree for the plaintiff and the others were still pending. The District Court decided that the defendant had failed to show the plaintiff's lack of due diligence in the prosecution of alleged infringers and with that we agree.

The defense to the second cause of action upon the license granted by the E-Z-Pak Corporation which assigned its interest to the plaintiff prior to this suit consists of allegations that (1) the license was cancelled and (2) that the amount of royalty was reduced by a modification of the agreement. The trial court found against the defendant on both points. It is clear that there was no cancellation. There was, however, considerable correspondence between the parties looking toward a reduction in the amount of royalties but that appears to have consisted of proposals and counter-proposals, including conditions

never agreed to, all of which left the original terms in effect during the period involved here. As there was substantial evidence to support the findings below we accept them.

Judgment affirmed.

[¶ 55,114] Oxford Varnish Corporation and the Vance Manufacturing Company v. Ault & Wiborg Corporation.

United States Circuit Court of Appeals, Sixth Circuit. Filed May 8, 1936.

Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division.

Contracts between a patentee and its licensees, under which the licensees lease patented metal graining plates from the patentee and agree to purchase the paint and other graining materials necessary in the operation from the patentee, are held invalid as violative of the Clayton and Sherman Anti-Trust Acts.

A contract under which the licensees agree to pay a royalty of one cent per foot when materials are purchased from the patentee, and three cents per foot when materials are purchased elsewhere is held invalid as the effect is to compel licensees to purchase supplies from the patentee.

Patentee's attempted justification of its practices on the ground that it has developed materials adapted to the particular needs of the patented device is discarded by the Court on its finding that others are able to furnish materials as efficient as those produced by patentee and in no way impairing the usefulness of the patented processes.

Defendant's practices are held monopolistic although its volume of business is only $325,000 in an industry of $66,000,000, so that defendant's business represents approximately only one-half of one per cent of the total volume of the industry. Monopoly of a defined portion of an industry is equally subject to the condemnation of the Anti-Trust laws as is monopoly over an entire industry. The patents themselves, which define the metes and bounds of the monopoly lawfully granted, likewise define the metes and bounds of the monopoly sought and achieved by the assailed contracts.

Before MOORMAN, HICKS and SIMONS, Circuit Judges.

SIMONS, Circuit Judge. The appeal challenges the validity of a final decree in an equity suit granting injunctive relief against the appellants under sec. 16 of the Clayton Act, for alleged violations of sec. 3 of that Act, and secs. 1 and 2 of the Sherman Act.

Section 1 of the Sherman Act declares every contract in restraint of trade or commerce among the states to be illegal. Section 2 imposes a penalty upon every person who shall monopolize or attempt to monopolize any part of the trade or commerce among the several states. Section 3 of the Clayton Act declares it to be unlawful for any person engaged in commerce to lease or make a sale or contract for the sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, "where the effect of such lease, sale or contract for sale, or such condition, agreement or understanding, may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Section 16 of the Clayton Act gives to private persons, firms or corporations the right to sue for injunctive relief against threatened loss or damage by a violation of the anti-trust laws, including the sections herein referred to, when and under the same conditions and principles as injunctive relief against threatened loss or damage is granted by courts of equity.

The appellant, Oxford Varnish Corporation, owns and controls patents for a process of applying to metal or other surfaces a graining simulating the color and appearance of natural wood grains. Chief among these patents is Henry, No. 1,548,465, which is for a process of making graining plates. The appellant, Vance Manufacturing Company, is a wholly owned subsidiary of Oxford, still retaining its corporate identity but now dormant. The appellee is a corporation engaged in the manufacture of standard paints, varnishes, lacquer, and the like, and as plaintiff below invoked sec. 16 of the Clayton Act.

It was Oxford's practice to manufacture the plates and lease them to licensees under its patents upon a royalty based upon the amount of finished product produced by them. The materials used in the graining process consist of a primer, or bottom coat of varnish or paint, a graining ink or paste, and a top or finishing coat. These materials Oxford manufactures, and in its several forms of contract with licensees it included covenants to compel or to make desirable the purchase of its own graining materials. It is the validity of these covenants that the plaintiff assails, on the ground that they substantially lessen competition and tend

to create monopoly, to its irreparable damage as a competitor.

Oxford justifies its business practice on the ground that in the use of its patented plates by licensees the materials must be adapted to the requirements of each individual customer; that there is something special in each installation; that to meet this need, encountered at the outset, it organized a technical staff which by experiment and research developed the particular technique and treatment found to be necessary in each operation; that it has developed hundreds of different kinds of graining pastes, ground coats and top coats; that it does not charge its customers for the service, but receives compensation for its development work through the lease of the graining plates and the sale of the materials developed for each particular need; that in any event its business in relation to the total volume of the paint and varnish business of the country is so infinitesimal that it cannot be said by its practice to substantially lessen competition or tend to create a monopoly, and so does not offend against the statute.

The court found, however, that the plaintiff and others in similar business are able to furnish priming coats, graining pastes, and finishing coats as efficient as those produced by Oxford, accomplishing the same purposes and in no way impairing the usefulness of the patented processes or plates. We are unable to say upon this record that such finding is not supported by preponderance of evidence,[1] and giving it such weight as is usually given to the factual conclusions of the court which hears and sees the witnesses, it is accepted as the basis for considering the legal issues involved.

Four forms of license agreement were employed. The first three are substantially identical. While the wording varies, the licensee in each expressly binds himself to purchase supplies from Oxford exclusively during the term of the agreement. The fourth form is a departure from the others. By it the licensee agrees to pay Oxford a royalty of one cent for each square foot of surface finished by the use of the patented processes, machinery or equipment, when all materials utilized are purchased from Oxford, but a royalty of three cents for each square foot when it desires to use the patents with material purchased from others. The significance of the increased royalty, aptly designated below as a penalty royalty, is demonstrated by unchallenged evidence to add $2.07 to the cost of each gallon of material used in the licensed process. The court found such penalty to be so prohibitive in its effect as to compel licensees to purchase supplies from Oxford. With this conclusion we must agree, and so agreeing, we find no material difference in the various forms of contract employed. They are either all valid or equally invalid.

It is clearly settled that the limited monopoly granted by a patent to make, use and vend an article may not be "expanded by limitations as to materials and supplies necessary to the operation of it." *Motion Pictures Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502, 515; *Carbice Corp. v. American Patents Corp.*, 283 U. S. 27, 31; *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 433; *Sturgis Register Co., et al., v. Autographic Register Co.*, 73 Fed. (2d) 883, 885 (C. C. A. 6). *Cf. Kodel Electric Co. v. Warren*, 62 Fed. (2d) 692 (C. C. A. 6). But that which the patent law does not authorize the Clayton Act specifically forbids. It applies to goods, wares, machinery, etc., whether patented or unpatented. "This provision was inserted in the Clayton Act with the express purpose of preventing rights granted by letters patent from securing immunity from the inhibitions of the act." *United Shoe Machinery Co. v. United States*, 258 U. S. 451, 460; cf. *Standard Fashion Co. v. Magrane Houston Co.*, 258 U. S. 346; *Lord v. Radio Corp. of America*, 24 Fed. (2d) 565, affirmed, 28 Fed. (2d) 257 (C. C. A. 3), cert. denied 278 U. S. 648.[2]

The appellant, however, contends that it may not be brought within the condemnation of the Clayton Act unless the contracts complained of substantially lessen competition or tend to create monopoly, and that the proofs have failed to establish either result, as existing or threatened. The total business of the appellant in graining supplies during 1933 was $325,000, while the total paint and varnish business of the United States for the same year was over $66,000,000, so it is insisted that accepting the plaintiff's assumption that the defendant's products are standard, its business represents approximately one-half of one per cent of the total volume of the industry. Obviously, it urges, this is neither monopoly nor the slightest indication of tendency toward monopoly. No case has been found, it insists, where a business has been held monopolistic which did not control at least 40% of the total business of the industry. Nor may a business of $325,000 be held to substantially lessen competition in an industry with a volume of $66,000,000.

[1] Besides, the very existence of the assailed covenants suggests that in their absence competing articles of equal or better quality would be offered at the same or a lower price. Vaughn, Economics Our Patent System, 125, 127, cited in *Carbice Corp. v. Am. Patents Corp.*, infra.

[2] See *International Business Machines Corp. v. U. S.*, 298 U. S. 131, decided April 27, 1936.

While the Supreme Court in cases involving the Clayton Act has upon occasion adverted to the size of the assailed manufacturer or vendor in relation to the business of the industry we are aware of no pronouncement that proportions are conclusive. Conceivably a business practice may tend to create monopoly though barely entered upon. Neither the Sherman Act nor the Clayton Act defines monopoly, and neither charts the field with respect to which a given practice may be adjudged monopolistic, or be deemed to lessen competition. The patent law recognizes limited monopoly, often in an extremely narrow and restricted field. Manifestly there may be monopoly of a defined subdivision of an industry, as of the industry itself. The possible though impermissible partial monopolies sought by the owner of a patent are clearly pointed out in the *Carbice* case, *supra.*

The ratio borne by the defendant's volume of business to the paint and varnish industry is not, we think, the measure by which monopolistic tendency of its contracts is to be determined. While the plaintiff did not produce figures for the volume of business done in graining pastes and the like because none are available, yet the most ordinary observation must convince us that the volume of business in such materials is but a small fraction of the total business of the paint and varnish industry. But even this is not necessarily the measure by which monopoly or monopolistic tendency is to be measured. The defendant is possessed of patents. Such patents grant it a limited monopoly, limited as to time and as to the articles or processes precisely covered by the claims. Within such limitations its monopoly is exclusive and complete—there is no unoccupied area. It seeks by contract to extend within that restricted field the monopoly of the patent to supplies not covered by patent. The record shows it to have been wholly successful. Competitors may not negotiate with its licensees on an equal trading basis—they are wholly and completely shut out. If we may assume, as we do, that monopoly of a defined portion of an industry is equally subject to the condemnation of the anti-trust laws as is a monopoly over an entire industry, then it requires in this case no statistical demonstration of monopolistic practices, for the patents themselves, which define the metes and bounds of the monopoly lawfully granted, likewise define the metes and bounds of the monopoly here sought and achieved by the assailed contracts. No more was desired—no less was obtained.

We are referred by the plaintiff to the recent case of *Pick Manufacturing Co. v. General Motors Corp.*, 80 Fed. (2d) 641 (C. C. A. 7) [affirmed by the U. S. Supreme Court, 299 U. S. 3], and the decision therein merits consideration.[3] It is not in conflict with the views here expressed. A manufacturer of motor cars bound its dealers by contract not to use second hand parts or parts not genuine for replacement in its automobiles. Attack upon the agreements under sec. 3 of the Clayton Act was unsuccessful. But the manufacturer not only gave express warranties for a period to the dealers' customers, but it was shown that the replacement parts were generally not supplies consumed in operation, but operating parts of a complex mechanism, the origin of which is inevitably attributed to the manufacturer, and the failure of which is inevitably placed at his door, with resulting impairment of good will and damage to the reputation of his product. So the case was distinguished from *Lord v. Radio Corp., supra* (the radio tube case). A more fundamental distinction between the cases appears to us. The association in the public mind between the manufacturer and the efficient operation of its cars being what it is, even in the absence of misrepresentation, the primary purpose and resultant effect of such contracts are rather to guard against unfair competition than to lessen legitimate competition, or create monopoly, and the clear purpose of the Clayton Act is to preserve legitimate competition, not to penalize efforts reasonably directed to safeguard against unfair competition. It is the proverbial "shield" of the fair trader, not the "sword" of his unfair competitor. There is in this case no such association of ideas as was found to exist in the *General Motors* case. Our conclusion is that the assailed contracts in the respects indicated are invalid, and that the injunction should be sustained.

The decree below likewise enjoins performance of a contract made by the appellant with the A. C. Horn Company, and held invalid under secs. 1 and 2 of the Sherman Act. That company was not a processor, but was given an exclusive territory within which to grant sub-licenses to processors. The agreement, however, bound the Horn Company to charge more royalty for the use of the plates by processors who purchased supplies elsewhere than by those who bought from the appellant. Horn was made a defendant in the suit below, but after the commencement of the action modified its course of business, afforded the plaintiff the relief it sought, and suit was dismissed as to Horn

[3] See *International Business Corp. v. U. S.*, infra.

without prejudice. Since the record shows only one contract of the Horn character, and no others in contemplation, and since Horn has left the unlawful combination and a single party may not conspire, we think the issues as to the Horn contract have become moot. Insofar as the decree grant injunction against the enforcement of th Horn contract, it will be modified, and as modified,

The decree below is affirmed.

[¶ 55,115] United States v. Textile Refinishers Ass'n, Inc., et al.

United States District Court, Southern District of New York. Filed May 1, 1936.

Superseded by 1955 TRADE CASES ¶ 68,126.

A consent decree enjoins defendant associations and members from preventing millers and manufacturers from shipping cloth to non-members of defendant association, from fixing prices, terms and conditions for servicing of cloth, from attempting to enforce a scheme of allotment for the examining and sponging of cloth, and related activities.

Decree

This cause coming on to be heard this 30th day of April, 1936, and the several defendants having accepted service of process and having appeared and filed their answer to the petition;

And the Petitioner and the defendants having filed a stipulation with the Clerk of the Court wherein and whereby they consent to the making and entering of this decree;

And the Petitioner by its counsel having represented to the Court that this decree will provide suitable relief concerning the matters which the Petitioner charges in said petition and having requested that this decree be made and entered;

And it appearing that by reason of the consent of the defendants to this decree and the acceptance of the same by the Petitioner, it is unnecessary to proceed with the trial of the cause or to take testimony therein or that any adjudication be made by the Court of the issues presented by the pleadings herein;

Now, THEREFORE, without taking any testimony or evidence and in accordance with such stipulation, which is made a part hereof, and upon the petition, the answer of the defendants, and the stipulation, all of which are being filed herewith in the Office of the Clerk of this Court, it is hereby ordered, adjudged and decreed as follows:

I. That the Court has jurisdiction of the subject matter hereof and of all the parties hereto with full power and authority to enter this decree; and that the petition states a cause of action under the Act of Congress approved July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," commonly known as the Sherman Anti-Trust Act.

II. That the defendants and each and all of them and each and all of their respective officers, directors, members, representatives, delegates, agents, servants, employees, and all persons acting or claiming to act on behalf of defendants or any of them be and they hereby are perpetually enjoined and restrained from carrying out, directly or indirectly, expressly or impliedly, by any means whatsoever, any combination or conspiracy to restrain interstate trade and commerce in cloth or the finishing thereof; and from combining to perform or to continue to perform any of the following acts, conditions or things:

(1) Preventing millers or manufacturers located in states other than the State of New York from shipping, transporting, and delivering or causing the shipment, transportation, and delivery of cloth to examiners located within the State and Southern District of New York other than particularly specified members of defendant Association and at prices and upon terms or conditions dictated, fixed, and agreed upon by the defendants; provided however, that defendants shall not be precluded from entering into or enforcing any lawful arrangement with manufacturers located within the State of New York relating to the servicing by particularly specified members of defendant Association of cloth, the interstate movement of which has ceased;

(2) Restraining manufacturers located within the State and Southern District of New York from shipping, transporting and delivering cloth to examiners located in states other than the State of New York; provided however, that defendants may enter into any lawful agreements with such manufacturers for the exclusive servicing of their cloth within the State of New York;

(3) Restraining examiners located in states other than the State of New York from receiving, accepting, examining, sponging, transporting or delivering cloth to or for manufacturers located within the State and Southern District of New York; provided however, that defendants may enter into any lawful agreements with such manufacturers for the exclusive servicing of their cloth within the State of New York;

(4) Restraining any persons who are not members of defendant Association from entering into or continuing to conduct in

interstate commerce an examining and sponging business;

(5) Restraining any persons who are not members of defendant Association from entering into or continuing to conduct in interstate commerce an examining and sponging business except at prices or upon terms and conditions dictated, fixed and agreed upon by the defendants;

(6) Carrying on the business of examining and sponging cloth in interstate trade and commerce in accordance with or pursuant to any understanding or agreement among themselves as to prices and terms for examining and sponging cloth to be charged to or imposed upon manufacturers located in states other than the State of New York, and from fixing by agreement uniform and non-competitive prices to be charged for examining and sponging such cloth for such manufacturers; and from quoting or charging such prices so fixed and from refraining from quoting and charging prices other than those so fixed with regard to examining, finishing or sponging such cloth for such manufacturers.

(7) Enforcing the scheme of allotment described in the petition herein with regard to cloth shipped directly from mills located in states other than the State of New York to examiners located within the State and Southern District of New York and consigned to manufacturers within the State and Southern District of New York by means of refusals to relinquish possession of such cloth to such manufacturers, provided however, that this shall not prevent the enforcement by other means of the collection rules and agreements in effect at the date of entry of this decree and the price and allotment rules and agreements by defendant Association in regard to the relationships between such examiners and such manufacturers referred to in the decision of the Appellate Division of the Supreme Court of the State of New York, First Department, dated June 2, 1933, in an action by *New York Clothing Manufacturers' Exchange Inc. et al. v. Textile Finishers Association Inc.* reported in 238 App. Div. 444:

(8) Allotting or attempting to allot manufacturers located in states other than the State of New York to members of defendant Association conducting examining and sponging businesses within the State and Southern District of New York and from compelling any such manufacturers to furnish their cloth to any such members for purposes of examining and sponging or otherwise and from enforcing or attempting to enforce against such manufacturers the scheme of allotment described in the petition herein or any similar scheme of allotment in the manner or by any of the means following or in any similar manner or by any similar means, to wit:

A. Following and spying upon or causing others to follow or spy upon manufacturers located in states other than the State of New York or their employees;

B. Concerted refusals of members of the defendant Association to examine and sponge cloth for manufacturers located in states other than the State of New York;

C. Concerted refusals of the defendant Examiners Union or its members to work upon or handle cloth for manufacturers located in states other than the State of New York;

D. Concerted refusals of defendant Teamsters Union or its members to load, unload, transport or deliver cloth for manufacturers located in states other than the State of New York.

(9) Aiding, abetting or assisting individually or collectively, others to do any of the things which the defendants are herein restrained from doing.

III. That the terms of this decree shall be binding upon and shall extend to each and every one of the successors in interest of any and all of the corporate defendants herein and to any and all corporations, copartnerships and individuals who may acquire the ownership and control directly or indirectly of the property, business and assets of the corporate defendants whether by merger, consolidation, reorganization or otherwise.

IV. That this decree shall not apply to the shipments from millers located in states other than the State of New York directly to manufacturers located within the State of New York, or to shipments of cloth from millers to examiners located within the State of New York for the account of manufacturers located within the State of New York, the interstate movement of which has ceased by reason of storage or otherwise before the same are serviced for such manufacturers or to relationships between defendants and manufacturers located in the State of New York insofar as the same do not restrain interstate commerce, and shall not in any way impair the rights of defendants to continue and enforce the program, agreement and by-laws sustained by the Appellate Division of the Supreme Court of the First Department in a decision dated June 2, 1933, in the action by *New York Clothing Manufacturers' Exchange Inc. et al. v. Textile Finishers Association, Inc. et al.* reported in 238 App. Div. 444, insofar as the same relate to intrastate business and are not subject to the provisions of the Federal Anti-Trust Laws.

V. That jurisdiction of this cause be and it is hereby retained by the Court for the purpose of taking such other action or adding to the foot of this decree such other relief, if any, as may become necessary or appropriate to enforce this decree and for the purpose of entertaining and acting upon at any time hereafter any application for modification or otherwise which any of the parties may make with respect to this decree.

Dated, New York, April 30, 1936.

Julian W. Mack, United States Circuit Judge.

[¶ 55,116] La Chappelle v. United Shoe Machinery Corp'n.

District Court of Massachusetts. Decided February 25, 1936.

In an action for treble damages under the Clayton Act, the plaintiff is bound to allege a specific violation of a prohibition contained in the anti-trust laws before recovery can be had, and it is not enough to state a series of acts which are not violative of either the Clayton or Sherman Act, but which violate the spirit of such laws.

La Rue Brown, W. W. Hart, and Horace P. Moulton, all of Boston, Mass., for plaintiff.

John L. Hall (of Choate, Hall & Stewart), of Boston, Mass., for defendant.

Sweeney, District Judge.

The plaintiff brings this action for treble damages under 15 U.S.C.A. § 15, setting forth that he is an inventor of shoe-bottoming machinery which is valuable to industry, but that he is unable to market his invention because of a monopoly existing in the defendant, and because of a condition, agreement, and understanding between the defendant and its lessees that the latter shall not use the machinery of a competitor of the defendant.

In the case of *Baran v. Goodyear Tire & Rubber Company* (D. C.) 256 F. 570, which is relied upon by the defendant as a ground of demurrer, the complainant set out in one cause of action facts which in reality constituted two causes of action; had intermingled violations of the Clayton Act (38 Stat. 730) with violations of the Sherman Act (15 U. S. C. A. § 1-7, 15 note); and the court ordered a separation of these causes of action. See *Baran v. Goodyear Tire & Rubber Company* (D. C.), 256 F. 571. In the instant case the plaintiff sets forth in one cause of action a series of acts, which in and of themselves do not purport to violate the Sherman or the Clayton Act, but contends that such acts are but a part of the whole general plan which is the basis of this cause of action. At page 3 of the memorandum of law filed by the plaintiff, he states:

"The plaintiff cannot recover because the defendant has a monopoly of inventors, he cannot recover because the defendant has conspired to monopolize trade, he cannot recover because the defendant is in a position of absolute dominance in his particular line; but unite all these allegations in a uniform whole and add to it that he is an inventor of the machines involved in the monopoly and has been deprived of his business by reason of the various steps of the defendant in acquiring and maintaining its monopoly, and we have the single cause of action upon which this suit is based."

While there is some question whether the statute under which this action is brought is penal in character [see *American Banana Co. v. United Fruit Co.* (C. C.), 153 F. 943] or not [see *Baush Mach. Tool Co. v. Aluminum Company of America* (C. C. A.), 63 F. (2d) 778-780], nevertheless it is an action for treble damages and ought to be strictly construed. I am inclined to believe that the plaintiff is bound to allege a specific violation of a prohibition contained in the anti-trust laws before recovery can be had, and that it is not enough to merely state a series of acts which in and of themselves are not violative of either the Clayton or the Sherman Acts, and add to this one or two other elements which are clearly outside the Sherman and Clayton Acts and have a resulting cause of action which may violate the spirit of the anti-trust laws.

In *Swift & Co. v. United States,* 196 U. S. 375, 25 S. Ct. 276, 49 L. Ed. 518, which is cited by the plaintiff in support of his bill, after the plaintiff had set forth all his specific charges, there was a general allegation that the defendants were conspiring with one another, the railroads, and others to monopolize the supply and distribution of fresh meat throughout the United States. This alleges a distinct violation of the anti-trust laws, and when all these specific charges are read in the light of that allegation, the bill was maintainable.

I do not feel that the plaintiff has set forth a cause of action concisely and with substantial certainty, and the demurrer is therefore sustained.

[¶ 55,117] Warner Bros. Pictures, Inc., v. United States.

Supreme Court of the United States. May 25, 1936.

On appeal from the District Court of Missouri.

A decree dismissing a suit to enjoin a conspiracy in restraint in trade in violation of the Sherman Act, without prejudice to the right of the United States to bring any similar proceeding against the same defendants with respect to the same subject matter, is affirmed.

PER CURIAM: The motion of the appellee to affirm is granted and the decree is affirmed. *Chicago & Alton R. R. Co. v. Union Rolling Mill Co.,* 109 U. S. 702, 713-715; *Pullman's Car Co. v. Transportation Co.,* 171 U. S. 138, 145-146; *McGowan v. Columbia River Packers' Ass'n,* 245 U. S. 352, 358; *Ex parte Skinner & Eddy Corp.,* 265 U. S. 86, 93-94; *Jones v. Securities & Exchange Comm'n,* — U. S. — (decided April 6, 1936).

[¶ 55,118] Bernard R. Gogel v. American Telephone & Telegraph Company, Western Electric Company, Incorporated and Electrical Research Products Inc.

United States District Court, Southern District of New York, May 23, 1936.

In a private suit for damages because of defendants' violations of the Anti-Trust laws, plaintiff must show affirmatively and in what manner he was injured by defendant's acts.

Memorandum

KNOX, D. J. Assuming for the purposes of the instant motion that the acts of defendants, as alleged by plaintiff, were violative of both the Sherman and Clayton Acts, the complaint, in my opinion, fails to set forth a cause of action. Were the United States complainant, it is conceivable that the pleading might be sufficiently strong to withstand a motion to dismiss. But, plaintiff sues not in a public, but private, capacity. Consequently, he must show affirmatively, and in what manner, the defendants' acts have injured his assignor. So far as I am able to discern, his allegations in such behalf are confined to paragraphs 4, 25, and 37 of the complaint. Giving them the full scope of their respective contents, they fall short of showing a casual connection to the wrongs in which defendants engaged.

If, as must be granted, that plaintiff's assignor was engaged in the business of leasing sound recording equipment, it does not follow necessarily that defendants are responsible for its inability to continue therein. A variety of circumstances, quite unconnected with defendants, may have been productive of such disaster as came about. Whether plaintiff's assignor suffered the loss of a single contract, or many that were outstanding over the period of defendants' alleged unlawful conduct, is not revealed. The mere averment of his own conclusion that he "was prevented and forclosed from carrying on (the business alleged in paragraph four of the complaint) due to the acts and conspiracy complained of herein" falls short of a "plain and concise statement of the facts" as required by the Civil Practice Act. The monopolistic characteristics of defendants' business operations are set forth graphically, and at length, but the pleading under attack is singularly free of revelation as to what the assignor was doing, as well as the manner in which its operations were curtailed and frustrated by defendants

Three million dollars, the sum alleged as plaintiff's damage, is a sizeable amount. From all that is declared, there is no reasonable relationship between the damages demanded and the acts of defendants. Conceivably, the damages asked may be out of all proportion to the injury sustained.

For the reasons specified, I shall grant the instant motion with leave to plaintiff to amend his complaint in such manner as will adequately state the manner in which he has suffered injury, and with such particularity as to inform defendants of the facts against which they must defend

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[¶ 55,119] Walter R. Mayo, et al. v. J. Clyde Dean.

United States Circuit Court of Appeals, Fifth Circuit. May 22, 1936.

Sherman Act—Conspiracy—The court held that the evidence sustains the conclusion that a number of persons acted in concert to prevent the unloading of a vessel engaged in interstate commerce by threats, intimidation and acts of violence. There was no contract and no dispute between the vessel owner and the union as to hours or wages or working conditions. There was simply an attempt by the union to compel by drastic means the making of an initial contract. This was sufficient to show a conspiracy in violation of the Sherman Act and warranted the issuance of an injunction.

Appeal from the District Court of the United States for the Western District of Louisiana.

Before Foster, Sibley and Walker, Circuit Judges.

FOSTER, Circuit Judge: In this case the following facts appear from the record. Appellee, J. Clyde Dean, plaintiff below, is the owner of the towboat Corinne Dean and a number of barges and is engaged in transporting freight on regular schedules between points in Louisiana and Texas, through the Intercoastal Canal. He carries a crew for the purpose of loading and unloading freight and at some landings employs extra help if needed. On July 11, 1934, the tug with a barge arrived at the port of Lake Charles, Louisiana. When the master of the tow attempted to unload freight he was stopped by a crowd of men on the wharf, some of whom announced they were members of the International Longshoremen's Union and demanded that they be employed to unload the boat. The master refused to accede to their demands and unloading was prevented by this crowd by threats and intimidation and acts of violence. An appeal for protection was made in vain to the sheriff of the parish and to the mayor of the city. W. R. Mayo, president of local union No. 1214 of the International Longshoremen's Association at Lake Charles and the representative of the parent organization was present at the conference with the mayor and on the wharf when unloading of the barge was prevented but disclaimed knowledge of any acts of violence. However, he made demand on Dean that the International Longshoremen's Association be employed, telling him that the barge would not be unloaded until the union did the work. Appellee made other efforts to unload his boat but was always prevented by intimidation from doing so and the voyage was delayed for a considerable time. Dean then filed this bill praying for interlocutory and final injunctions, alleging violation of the Sherman Anti-Trust Law by a conspiracy between the named defendants and others unknown to interfere with interstate commerce. Appellants objected to the issuance of the injunction on the ground that the court was without jurisdiction because plaintiff had not complied with the provisions of the Act of March 23, 1932, sometimes referred to as the Labor Injunction Act and the Norris-LaGuardia Act, which denies injunctive relief in labor disputes where the complainant has failed to make reasonable effort to settle the dispute with the aid of available governmental machinery for mediation or by voluntary arbitration. The District Court sustained this objection and denied the preliminary injunction but retained the bill to allow plaintiff to comply with the act. Thereafter plaintiff solicited mediation by the Department of Labor and a mediator was sent to Lake Charles. Approximately a week was spent by both sides with the mediator trying to reach an agreement but nothing was accomplished because Dean would not make a closed shop agreement and pay wages at the rates demanded and the unions would not recede from their position.

The court heard the evidence in open court and found facts specifically as required by section 7 of the act. Judgment was then entered in favor of plaintiff and a final injunction issued restraining the defendants, Walter R. Mayo, Frank Graham, Arthur McCurtis, W. M. Stewart, the International Longshoremen's Association, locals Nos. 1214 and 1180 of that organization, their employees and agents and all other persons combining and conspiring with them, from trespassing on the private wharves of complainant; from stopping the loading or unloading of his vessels by intimidation, threats, abuse or physical force or endeavoring to do so; but permitting the unions to maintain two pickets from each organization, in the street, not less than 50 feet from plaintiff's warehouse, and to use peaceful means of persuasion in furtherance of their cause.

Appellants contend: (1) that the evidence was not sufficient to show a conspiracy to interfere with interstate commerce; (2) that the court was without jurisdiction because plaintiff had not agreed to submit to arbitration; and (3) that the injunction could not run against defendants McCurtis and Stewart because there was no evidence of actual participation in or actual authorization of the commission of the overt acts.

There is conflict in the evidence but a clear preponderance sustains the conclusion that a number of persons, including members of the International Longshoremen's Association of Lake Charles, acted in concert to prevent the unloading of a vessel engaged in interstate commerce by threats, intimidation and acts of violence and that the work of unloading the vessel and the continuation of the voyage were delayed. From time immemorial it has been the right of a vessel owner to employ her crew to load and unload her and to carry a sufficient crew for that purpose. There was never any contract between Dean and the labor union. There was nc dispute between them as to hours or wages or working conditions. There was simply an attempt by the union to compel by drastic means the making of an initial contract. The result was an invasion of plaintiff's right of property which would have resulted in irreparable injury, for which he had no remedy at law, and was a direct interference with interstate commerce. This was sufficient to show a conspiracy in violation of the Sherman Act and warranted the issuance of an injunction.

The second contention is based on section 8 of the act. Appellee contends the act has no application. So far as we are advised, neither the Supreme Court nor any Federal Court of Appeals has had occasion to construe the Act of March 23, 1932. We are not required to do so in this case. Appellants invoked the act. The District Court ruled with them. Since he prevailed, appellee is not now in a position to complain. We express no opinion as to the applicability of the act. The provision of the section is that injunctive relief shall not be granted to any complainant who has failed to make every reasonable effort to settle the dispute with the aid of available governmental machinery of mediation or by voluntary arbitration. Conceding, without so deciding, that the act applies, we consider it was fully complied with by complainant by availing himself of the services of the mediator of the Department of Labor. He was not obliged to propose both mediation and arbitration. One or the other would be sufficient.

As to the third contention of appellants it is true there is no direct evidence that appellants, McCurtis and Stewart, who are respectively president and secretary of a local union No. 1180 of the International Longshoremen's Association, were present when any of the overt acts were committed. The contention that the injunction should not run against them is based on the provisions of paragraph 6 of the act. Again conceding, purely for the purpose of argument, that the act applies, the provision of the section is that no officer or member of any association participating or interested in a labor dispute shall be held responsible or liable in any court of the United States for the unlawful acts of any individual or officer, member or agent of the association except upon clear proof of actual participation in or actual authorization of such act or ratification of such act after actual knowledge thereof. This might prevent punishment for contempt or the recovery of damages but clearly was not intended to apply to the issuance of an injunction to prevent future acts of coercion in a case where such relief would be proper.

On the whole case we are convinced that a conspiracy, which resulted in an unwarranted and unreasonable interference with interstate commerce existed. The proof is sufficient to support the conclusion that members and at least one official representative of the International Longshoremen's Association and the local unions of that organization participated in the attempted coercion of plaintiff in furtherance of the conspiracy. It would be useless to issue an injunction against an organization unless it also restrained the constituted officers. The injunction properly issued against the named defendants and all others conspiring with them. *U. S. v. Workingmen's Amalgamated Council,* 54 F. 994, affirmed 57 F. 85; *Loewe v. Lawlor,* 208 U. S. 274; *Bedford Cut Stone Co. v. Stone Cutters' Association,* 274 U. S. 37.

The record presents no reversible error. Affirmed.

[¶ 55,120] Federal Trade Commission v. Southern Premium Manufacturing Company, a Corporation, in its own name and right, and trading as Ryan Candy Company.

United States Circuit Court of Appeals for the Fifth Circuit, June 1, 1936.

An order of the Federal Trade Commission enjoining a candy manufacturer from selling to jobbers, wholesalers and retailers, candy so packed and assembled that sales of such candy to the general public may be made by means of a lottery, gaming device, or gift enterprise, is affirmed in a consent decree.

Affirming Federal Trade Commission Complaint No. 2270.

The Federal Trade Commission, Petitioner herein, having filed with this Court on, to wit, April 22, 1936, its application for the enforcement of an order to cease and desist issued by it against the Respondent, under date of June 25, 1935, under the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act to Create a Federal Trade Commission, to define its powers and duties, and for other purposes" (38 Stat. 719, 15 U. S. C. A. Sec. 45); and said Petitioner, having also certified and filed herein, as required by law, a transcript of the entire record in the proceeding lately pending before it, in which said order to cease and desist was entered, including all the testimony taken and the report of said petitioner; and Respondent having subsequently filed his answer to said application for enforcement, in which answer Respondent stated it was not willing to contest said application for enforcement or the proceedings based thereon, and in which answer said Respondent consented that this Court might, upon said application and Respondent's answer thereto, and upon the pleadings, testimony, and proceedings set forth in the transcript aforesaid, make and enter its decree affirming said order to cease and desist and commanding Respondent, its officers, directors, agents, representatives, and employees, to comply therewith—

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed, that said order to cease and desist, issued by the Federal Trade Commission, Petitioner herein, under date of June 25, 1935, be and the same hereby is affirmed.

And It Is Hereby Further Ordered, Adjudged and Decreed that the respondent, Southern Premium Manufacturing Company, a corporation, in its own name and right and trading as Ryan Candy Company, its officers, directors, agents, representatives, and employees, in the manufacture, sale and distribution in interstate commerce, of candy and candy products, do cease and desist from:

(1) Selling and distributing to jobbers and wholesale dealers for resale to retail dealers, and to retail dealers direct, candy so packed and assembled that sales of such candy to the general public are to be made or may be made by means of a lottery, gaming device, or gift enterprise.

(2) Supplying to or placing in the hands of retail and wholesale dealers and jobbers, packages or assortments of candy which are used or may be used without alteration or rearrangement of the contents of such packages or assortments, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy or candy products contained in said assortments to the public.

(3) Packing or assembling in the same package or assortment of candy for sale to the public at retail, pieces of candy of uniform size, shape, and quality, having centers of a different color, together with larger pieces of candy, which said larger pieces of candy are to be given as prizes to the person procuring a piece of candy with a center of a particular color.

(4) Supplying to or placing in the hands of wholesale dealers and jobbers, assortments of candy together with a device commonly called a push card or punch board, for use or which may be used in distributing or selling said candy to the public at retail.

(5) Furnishing to wholesale dealers and jobbers a device commonly called a push card or a punch board, either with packages or assortments of candy or candy products or separately, bearing a legend or legends or statements informing the purchaser that the candy or candy products are being sold to the public by lot or chance or in accordance with a sales plan which constitutes a lottery, gaming device, or gift enterprise.

(6) Selling and distributing to concessionaires with, and to operators, managers, and proprietors of, burlesque theatres, traveling shows, tent shows, medicine shows, circuses and carnivals, and other similar places of amusement, candy so packed and assembled that sales of such candy to the general public are to be made, or may be made, by means of a lottery, gaming device or a gift enterprise.

(7) Supplying to, or placing in the hands of, concessionaires with, and operators, managers, and proprietors of, burlesque theatres, traveling shows, tent shows, medicine shows, circuses and carnivals and other similar places of amusement, packages or assortments of candy which are or may be used without alteration or rearrangement of the contents of such packages to conduct a lottery, gaming device or a gift enterprise in the sale or distribution of the candy or candy products contained in said package or assortment to the public.

(8) Packing or assembling in the same assortment, packages or small boxes of candy for ultimate sale to the public, which individual packages or small boxes of candy are of uniform appearance, but which contain other articles of merchandise of varying value.

(9) Furnishing to concessionaires with, or operators, managers or proprietors of, burlesque theatres, traveling shows, tent shows, medicine shows, circuses and carnivals and other similar places of amusement, assortments of candy consisting of individual packages or small boxes of candy for resale to the public, which individual or small boxes of candy are of uniform appearance, but which contain articles of merchandise of varying value.

And It Is Hereby Further Ordered, Adjudged and Decreed, that the Respondent, Southern Premium Manufacturing Company, trading as Ryan Candy Company, within thirty (30) days after the service upon it of this decree, shall file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which it has complied with this decree.

[¶ 55,121] Federal Trade Commission v. H. I. Sifers, Individually, and Trading as The Sifers Confection Company.

United States Circuit Court of Appeals, Eighth Circuit. June 4, 1936.

On application for enforcement of an order of the Federal Trade Commission.

The Court affirms an order of the Federal Trade Commission forbidding a candy manufacturer to sell candy so packed and assembled that it can readily be resold by lottery, or to furnish push cards or punch boards with the candy.

Affirming Federal Trade Commission Complaint No. 2276.

[*Commission seeks enforcement of order*]

In the above entitled cause, petitioner, Federal Trade Commission, filed in this Court on the 2nd day of March, 1936, its printed petition asking for a decree of this Court affirming, and providing for the enforcement of a certain order to cease and desist issued by said Commission on the 25th day of June, 1935, against respondent herein, commanding respondent to cease and desist from the use of certain methods of competition alleged to constitute the use of unfair methods of competition within the intent and meaning of Section 5 of the Act of Congress entitled "An Act to Create a Federal Trade Commission, to define its powers and duties and for other purposes," approved September 26, 1914.

On said day petitioner also filed in this Court a complete transcript of the entire record in the said proceeding before said Federal Trade Commission, including all the testimony taken and the report and order of the Commission.

On said day petitioner also filed in this Court the required number of printed copies of its brief in support of said petition.

Petitioner has also filed in this Court sworn proof that petitioner had served upon respondent printed copies of said transcript and of said brief.

[*Respondent consents to order*]

Respondent as of this date, to-wit: June 4, 1936, filed in this Court in this cause a certain written statement in which he declared his purpose to refrain from contesting the petition herein, and consented that this Court may sign the order asked for by petitioner, if it is in proper form.

[*Commission order affirmed*]

This cause now coming on for consideration and decision upon the petition herein, upon such proof of service, upon said written statement so filed by respondent, and upon the pleadings, testimony, and proceedings set forth in said transcript, and the Court being of the opinion that said order to cease and desist so issued by said Commission on the 25th day of June, 1935, ought to be in all things affirmed.

It is now Ordered, Adjudged and Decreed that said order to cease and desist be, and the same hereby is, in all things affirmed.

It is further Ordered, Adjudged and Decreed that the respondent, H. I. Sifers, individually and trading as Sifers Confection Company, his agents, representatives, and employees, in the manufacture, sale and distribution in interstate commerce, of candy and candy products, do cease and desist from:

(1) Selling and distributing to jobbers and wholesale dealers for resale to retail dealers, candy so packed and assembled that sales of such candy to the general public are to be made or may be made by means of a lottery, gaming device, or gift enterprise.

(2) Supplying to or placing in the hands of wholesale dealers and jobbers packages or assortments of candy which are used or may be used without alteration or rearrangement of the contents of such packages or assortments, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy or candy products contained in said assortment to the public.

(3) Supplying to or placing in the hands of wholesale dealers and jobbers assortments of candy together with a device commonly called a push card or punch board for use or which may be used in distributing or selling said candy to the public at retail.

(4) Furnishing to wholesale dealers and jobbers a device commonly called a push card or punch board, either with packages of candy or candy products or separately, bearing a legend or legends or statements informing the purchaser that the candy or candy products are being sold to the public by lot or chance or in accordance with a sales plan which constitutes a lottery, gaming device, or gift enterprise.

It is further ordered that respondent, H. I. Sifers, individually and Trading as Sifers Confection Company, within thirty (30) days after the service upon him of this order, shall file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist hereinabove set forth.

[¶ 55,122] Walter E. Meyer (suing in behalf of himself and other stockholders of the St. Louis Southwestern Railway Company, etc.), v. The Kansas City Southern Railway Company, et al.

United States Circuit Court of Appeals for the Second Circuit. June 22, 1936.

In a private suit allegedly under the Anti-Trust Laws, Federal jurisdiction is lacking when the acts alleged give rise to liability under the law of fiduciaries as well, for a determination of Federal law is then not necessarily involved.

The remedies provided by the Anti-Trust Laws are held to be exclusive.

A bill for injunctive relief against common carriers who allegedly were members of a conspiracy in violation of the Anti-Trust Laws fails as Section 16 of the Clayton Act provides that such relief can not be obtained against common carriers in respect to any matter subject to the jurisdiction of the Interstate Commerce Commission.

Before: MANTON, L. HAND and AUGUSTUS N. HAND, Circuit Judges.

[Summary of case]

Appeal from the United States District Court for the Southern District of New York. Plaintiff, as a minority stockholder of the St. Louis Southwestern Railway Company, for himself and for other stockholder who might join, brought a derivative suit in equity for the benefit of the company against certain other railroads, their directors, the directors of St. Louis Southwestern Railway Company, certain banking houses and others for participating in a conspiracy by which St. Louis Southwestern Railway Company was controlled to its great damage. The prayer sought: an accounting and adjudication of the defendants' liability in damages to plaintiff's company; an accounting by certain defendants for their profits in dealings in the stocks of the railroads concerned; the appointment of a receiver to sue the defendants for treble damages under the Federal Anti-Trust Laws; and injunctive relief against the continuation of the conspiracy. The decree below dismissed the cause for lack of subject matter jurisdiction; plaintiff appeals. Affirmed.

[*Counsel*]

Cravath, De Gersdorff, Swaine & Wood, Esqs., attorneys for Defendants constituting the firm of Kuhn, Loeb & Co., individually and as co-partners thereof; for executors of Estate of Mortimer L. Schiff; for executors of Estate of Otto H. Kahn; and for Jerome J. Hanauer, Wm. D. Whitney, Littleton Groom and Hugh A. Fulton, of Counsel.

Ben C. Dey, George L. Buland and Charles L. Minor, Solicitors for Appellee Southern Pacific Company, Hale Holden and Henry W. DeForest.

F. G. Nicodemus, Jr., Carleton S. Hadley, A. H. Kiskaddon, H. Brua Campbell, Counsel for defendants E. Roland Harriman, Alfred H. Swayne, William W. Cumberland, Winslow S. Pierce, Frank M. Gould and Central Hanover Bank and Trust Company, as Executors under the Last Will and Testament of Edwin Gould, deceased, solicitors for Defendant-Appellee St. Louis Southwestern Railway Company.

Hines, Rearick, Dorr & Hammond, Esqs., solicitors for appellees, Missouri-Kansas-Texas Railroad Company, Charles D. Hilles, Willis D. Wood, Richard H. Swartwout, John W. Platten and James I. Bush.

Samuel Untermyer, Samuel J. Moore, solicitor for Defendants The Kansas City Southern Railway Company, Leonor F. Loree, William C. Loree, Samuel McRoberts, Andrew J. Miller, Arthur Turnbull, Pierpont V. Davis, and William J. Hutchinson.

Marcus L. Bell, solicitor for Charles Hayden, Jere A. Downs, Frederick H. Baird, Claude W. Peters, Richard F. Hoyt, Lester Watson, Charles H. Connfelt, Clarkson Potter, Prescott Bigelow, Frank E. Gernon, John R. Dillon, Robert G. Stone, Herbert G. Bell and Richard L. Morris.

Van Vorst, Siegel & Smith, solicitors for Defendants-Appellees, Ladenburg, Thalmann & Co. and Executors of Mason B. Starring, deceased. Alexander B. Siegel, of Counsel.

Cullen & Dykman, solicitors for Appellees, Frank Bailey, William M. Grove, Charles B. Stuart, Halsey Stuart & Co., Inc., and Harold L. Stuart, Jackson A. Dykman, of Counsel.

Clarence G. Bernheimer, solicitor for Appellee Lec S. Bing.

Bruce R. Duncan, solicitor for Appellee Arthur H. Waterman.

Walter E. Meyer, Plaintiff-Appellant appearing in Person and Solicitor for Intervening Plaintiffs-Appellants, Samuel C. Coleman and Leon Ulman, of Counsel.

[*Violation of Interstate Commerce Act and Anti-Trust Laws alleged*]

MANTON, Circuit Judge.—The bill of complaint was dismissed below on motions for want of subject matter jurisdiction. Appellant, a stockholder of the St. Louis Southwestern Railway Co. (St. Louis Southwestern hereafter), brought a derivative suit in equity for the benefit of the company to recover from appellees, railroads, bankers, directors and investors in stock for alleged damages to the St. Louis Southwestern. The bill of complaint alleges that certain banking houses and others conspired to use the funds of a railway company already in their control, to control other railroads in deliberate disregard of § 5, paragraphs 2 and 3 of the Interstate Commerce Act, (40 U. S. C. A. § 5), and that in executing this plan without previous authorization from the Interstate Commerce Commission, the conspirators violated the Sherman Act, the Clayton Act,

and the Interstate Commerce Act. It is alleged that the St. Louis Southwestern, in which plaintiff held stock, came under the control of the conspirators and suffered severe losses.

[*Combination of railroads alleged*]

The theory of the appellant's suit is that the appellee railroads became parties to the conspiracy to acquire control and by abuse of their controlling position diverted traffic from and took unlawful advantage of their competitor, the St. Louis Southwestern, which, in turn, was damaged through the diversion of traffic, the impairment of valuable traffic relations with other roads, uneconomical and inefficient operation of its lines, and the waste and misuse of its funds. The banking firms and individuals sued are said to have profited through their holdings and dealings in the stock of the railroads in the illegal combination.

[*Damages and injunctive relief asked*]

The prayer for relief asks for an accounting to the St. Louis Southwestern and that the appellees be adjudged to be liable to it in damages, in a large sum. It asks that other appellees account to it for their profits in dealings in the stock of the St. Louis Southwestern and also in the stock of the other railroads which were participants in the conspiracy. It asks for the appointment of a receiver for the special purpose of instituting suit against the defendants for treble damages under the Anti-Trust Laws and prays for injunctive relief against the continuation of the conspiracy and in other respects.

[*Jurisdiction based on Anti-Trust Laws*]

The bill states that "The ground upon which the jurisdiction of this Court depends is that this suit includes matters in controversy arising under the laws of the United States. That this suit involves the construction and interpretation of Title 15, Sections 1-7 of the United States Code Annotated, commonly known as the Sherman Act, and Title 15, Sections 12-27 of the United States Code Annotated, commonly known as the Clayton Act." This is said to appear because the control of the St. Louis Southwestern by the conspirators was not only a breach of the fiduciary duties defendants owed St. Louis Southwestern and its minority stockholders by reason of their control, but was also a violation of the Federal Anti-Trust laws. Further, the means adopted and the end attained in carrying out the common plan are characterized as violations of the Anti-trust laws. In addition, the prayer for a receiver for St. Louis Southwestern to sue on any causes of action it may have under the Anti-trust laws and the allegations supporting this prayer, are advanced to show that the court, in determining whether a receiver should be appointed, must consider whether there are substantial grounds for believing the company has such causes of action under federal law.

The appellant disclaims any purpose to recover for damages under the provisions of § 7 of the Sherman Act [July 2, 1890, c. 647, § 7, 26 Stat. 210] or § 4 of the Clayton Act [Oct. 15, 1914, c. 323, § 4, 38 Stat. 731]. Such an action could not be maintained in equity. *Fleitmann v. Welsbach Street Lighting Co.*, 240 U. S. 27; *Decorative Stone Co. v. Building Trades Council*, 23 Fed 2, 426 (C. C. A. 2), certiorari denied, 277 U. S. 594. Nor would a stockholder's derivative action lie at law. *United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U. S. 261. If the plaintiff were seeking injunctive relief under § 16 of the Clayton Act, he would face dismissal on the merits. *General Inv. Co. v. N. Y. C. R. R. Co.*, 23 Fed. 2, 822 (C. C. A. 4), certiorari denied, 277 U. S. 588; *Continental Securities Co. v. Michigan Central R. Co.*, 16 Fed. 2, 378 (C. C. A. 6), certiorari denied, 274 U. S. 741. Cf. *General Investment Co. v. N. Y. C. R. Co.*, 271 U. S. 228.

The appellant relies on the doctrine announced in *Smith v. Kansas City Title & Trust Co.*, 233 U. S. 180, 199, that

"the general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under this provision." [Judicial Code, § 24.] See also *Cohens v. Virginia*, 6 Wheat. (19 U. S.) 264, 378.

[*Statutory remedies held exclusive*]

The contention seems to be that this suit may be maintained under the principles of *Southern Pacific Co. v. Bogert* (250 U. S. 483) and that the federal court has jurisdiction because the damaging acts of the appellees were not only violations of their fiduciary duties, but were also violations of the Anti-trust acts, and that in determining the appellees' liabilities, the court must construe or interpret the anti-trust statutes. But so far as the appellees are liable for a breach of the fiduciary duties to minority stockholders imposed upon them by reason of their control of the St. Louis Southwestern, it is immaterial that their breaches of faith to the appellant also involved violations of federal statutes. The appellees' liability would be complete though their acts were

not public offenses and a determination of federal law is thus not necessarily involved. As to the appellees sought to be held for their participation in the alleged conspiracy, the remedy provided by the statutes violated, is exclusive. *Decorative Stone Co. v. Building Trades Council,* 23 Fed. 2, 426 (C. C. A. 2), certiorari denied, 277 U. S. 594.

Three District Court cases are cited to support an opposite conclusion. *Hand v. Kansas City Southern Ry. Co.* (33 Fed. 2, 712 [S. D. N. Y.]); *Guiterman v. Penn. R. Co.* (48 Fed. 2, 851 [N. D. N. Y.]); *Venner v. Penn. Steel Co.* (250 Fed. 292 [D. N. J.]).

In the *Venner* case, the court discussed only the motion granted to quash a subpoena because of faulty venue. Nothing in the decision tends to show what the action of the court would have been had the jurisdiction of the subject matter been attacked. In both the *Hand* case and the *Guiterman* case, suit was originally brought in a state court against a railway and its directors by a stockholder for an accounting by the directors of the company for breaches of their trust based on acts damaging the corporation and violating the anti-trust laws. Removal to the federal court was had on the ground that the controversy involved substantial federal questions, namely the anti-trust laws. In the *Hand* case, an unreported decision, denying a motion to remand is cited. The memorandum opinion on this motion is not illuminating and in the reported opinions the point seems to have been assumed. Since there was no issue upon it, the cases can hardly be authoritative here. So far as they stand for the proposition that an allegation that a defendant violated a federal statute is sufficient to bring a case within federal jurisdiction, although the fact that a statute was violated is immaterial to the plaintiff's cause of action, we must decline to follow them. So far as the cases decided that a state court of equity had power to redress a waste of the assets of a corporation by its directors, we think the decisions were rightly reached. Neither case supports the appellant in his theory that one whose sole offense was a participation in a conspiracy in violation of the anti-trust laws could be held liable as a conspiratory by a remedy other than that specifically given by those statutes.

[*Injunctive relief incidental to damages*]

The bill asks for injunctive relief but the appellant advances no claim that it is sought as a remedy under the Clayton Act. If it were brought under that section, it would be dismissed on the merits as this matter is exclusively within the control of the Interstate Commerce Commission. *Central Transfer Co. v. Terminal R. R. Asso.,* 238 U. S. 469; *General Inv. Co. v. N. Y. C. R. Co., supra.* We think, however, the injunctive relief was sought here as an incident to the appellant's demand for damages and falls with that.

[*No necessity for receiver*]

Nor does the bill merit any more success in its demand for a receiver to maintain statutory suits for damages. A trustee has been appointed for the St. Louis Southwestern under § 77 of the Bankruptcy Act in the United States District Court for the Eastern District of Missouri, vesting title to all the property of the railroad company in such trustee under the direction of that court. By an order of that court, pursuant to § 77(e)(9), the trustee is authorized to investigate and directed to report to the court, any facts pertaining to irregularities, fraud, misconduct or mismanagement, by which the debtor may have a cause of action, and think, the necessity, if any, for appointing a receiver in this suit, for the same purpose, has been eliminated. It is not necessary to pass on the propriety of the appointment of a receiver to bring suit in other circumstances.

[*Dismissal without prejudice*]

The decree below was dismissed for want of subject matter jurisdiction. Appellant seeks to have the decree modified by a provision that the dismissal be without prejudice, with the proviso that leave be granted the District Court to entertain a motion by the appellant to cure defects in jurisdiction based on diversity of citizenship by discontinuing as to some of the defendants.

Dismissal for lack of jurisdiction is a dismissal without prejudice. *Walden v. Medley,* 39 U. S. 156; *Bunker Hill & Sullivan Mining & Concentrating Co. v. Shoshone Min. Co.,* 109 Fed. 504 (C. C. A. 9). A statement of the basis for the dismissal satisfies the requirements of *Scott v. First Nat'l Bank of Morris,* 285 Fed. 832 (C. C. A. 8). See, *Fowler v. Osgood,* 141 Fed. 20, 24 (C. C. A. 8). The form of the decree below was proper, in this regard.

[*Diversity of citizenship*]

The opinion of the District Court contained the statement that the appellant claimed that all of the appellees were necessary parties, and that his joinder of defendants whose presence destroyed Federal jurisdiction based on diversity of citizenship was a matter which could not be cured by the court by severance, or otherwise, unless the appellees, whose presence ousts the court of jurisdiction were mere formal parties. No motion to discontinue as to

any parties was made below, and the only assignment of error suggesting any support for appellant's present prayer is,

"9: The Court erred in holding that it was without power to cure by severance or otherwise any alleged defect of jurisdiction based on diversity of citizenship."

This gives no indication that the court below refused or precluded a request for dis continuance. It is so general in terms that it amounts to no more than an objection to a result, and as such, the appellate court need give it no consideration. See: *Seaboard Air Line Ry. v. Watson*, 287 U. S. 86, 91; *Trustees System of Pennsylvania v. Payne*, 83 Fed. 2, 103, 108 (C. C. A. 3); *Virginia Ry. Co. v. Chambers*, 46 Fed. 2, 20 (C. C. A. 4), aff'd. 284 U. S. 577.

Judgment affirmed.

[¶ 55,123] **Federal Trade Commission v. A. McLean & Son, M. J. Holloway & Company, Queen Anne Candy Company, The Bonita Company.**

United States Circuit Court of Appeals for the Seventh Circuit. July 1, 1936.

On application for enforcement of an order of the Federal Trade Commission.

Orders of the Federal Trade Commission, prohibiting candy manufacturers from distributing candy so packed and assembled that retail sales are designed to be made by means of a lottery or gaming device, are modified and affirmed.

Modifying and affirming Federal Trade Commission orders Nos. **2263, 2264, 2265, 2277.**

Before EVANS and SPARKS, Circuit Judges, and LINDLEY, District Judge.

[*Findings held conclusive*]

SPARKS, Circuit Judge. These are proceedings under section 5 of the Federal Trade Commission Act, 15 U. S. C. A. section 45, for the enforcement of orders issued by the Commission on June 21, 1935. The orders separately require the respective respondents to cease and desist from certain practices found to constitute unfair and forbidden methods of competition. The facts and the questions presented in all of these proceedings are identical, and a consolidated answer and brief of all the respondents was filed. Our discussion will, therefore, be directed to the *McLean* case as for all. The findings of the Commission[1] closely follow its complaint which

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FINDINGS AS TO THE FACTS

[1] "PARAGRAPH ONE. Respondent, A. McLean and Son, is a corporation organized under the laws of the State of Illinois, with its principal office and place of business in the City of Chicago, Illinois. Respondent is now and for several years last past, has been engaged in the manufacture of candy in Chicago, Illinois, and in the sale and distribution of said candy to wholesale dealers and jobbers in the State of Illinois and other states of the United States. It causes said candy when sold to be shipped or transported from its principal place of business in the State of Illinois to purchasers thereof in Illinois and in the states of the United States other than the State of Illinois. In so carrying on said business, respondent is and has been engaged in interstate commerce and is and has been in active competition with other corporations and with partnerships and individuals engaged in the manufacture of candy and in the sale and distribution of the same in interstate commerce.

"PARAGRAPH TWO. Among the candies manufactured and sold by respondent were several assortments of candy each composed of a number of pieces of candy of uniform size, shape, and quality together with a number of larger pieces of candy or small boxes of candy to be given as prizes to purchasers of said candies of uniform size, shape, and quality in the following manner:

"The majority of the said pieces of candy of uniform size, shape, and quality in said assortments have centers of the same color but a small number of said candies have centers of a different color. The color of the centers of these candies is effectively concealed from the prospective purchasers until a purchase or selection has been made and the candy broken open. The said candies of uniform size, shape, and quality in said assortments retail at one cent each but the purchasers who procure one of the said candies having a center of a different color than the majority of said candies, are entitled to receive and are to be given free of charge one of the said larger pieces or small boxes of candy heretofore referred to. The purchaser of the last piece of candy in said assortment is entitled to receive and is to be given free of charge a larger piece of candy or a small box of candy. The aforesaid purchasers of said candy who procure a candy having a center colored differently from the majority of said pieces of candy thus procure one of the said larger pieces or small boxes of candy wholly by lot or chance.

"Respondent manufactures, sells, and distributes several assortments involving the above lottery or chance feature. The pieces of candy of uniform size, shape, and quality are generally 160 in number but, occasionally, vary a few pieces more or a few pieces less, and the prizes are generally larger prizes of candy or small boxes of candy but occasionally other articles of merchandise are included as prizes, but the principle or sales plan is the same as to each of the said assortments.

"Respondent furnishes to said wholesale dealers and jobbers with said assortments of candy, display cards to be used by retail dealers in offering said candies for sale, which display cards bear a legend or statement informing the prospective purchaser that the said assortments of candies are being sold in accordance with the sales plan above described.

"PARAGRAPH THREE. Another assortment which respondent manufactures, sells, and distributes is contained within two boxes, one box having pieces of candy of uniform size, shape, and quality, the majority of which have centers of the same color but a small number of which have centers of a different color. The other box contains larger pieces or boxes of candy and the number of bars is approximately the same as there are pieces of candy with centers colored differently from the majority in the first box

was filed December 15, 1934. Aside from the presumption that the findings are supported by competent evidence (*National Harness Manufacturers' Assn. v. Federal Trade Commission,* 261 Fed. 170, and *Federal Trade Commission v. Inecto, Inc.*, 70 F. (2d) 370) we are assured of that fact from an examination of the record. It therefore follows that the findings are conclusive. Federal Trade Commission Act. Section 5; *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483.

[*Act held constitutional*]

It is contended by the respondents that the facts as found do not support an order to cease and desist. We hold otherwise on the authority of *Federal Trade Commission v. Keppel,* 291 U. S. 304; *Walter H. Johnson Candy Co. v. Federal Trade Commission,* 78 F. (2d) 717; and *Hofeller v. Federal Trade Commission,* 82 F. (2d) 647. Many questions of fact and law are raised by respondents, but most of them were decided adversely to respondents' contentions in the cases just cited. They

above mentioned and the two boxes are so packed that they may be displayed by the retail dealers as a single assortment and the larger pieces or bars of candy are distributed as prizes to purchasers of the small pieces of candy in the same manner as where they are packed in the same assortment and as described in Paragraph Two herein. Larger pieces or bars of candy are thus distributed to the purchasing public wholly by lot or chance and the respondent in so packing said assortment knows that the same may and will be used as a lottery or chance assortment when sold by the retail dealer.

"PARAGRAPH FOUR. The lottery, prize, or draw packages described in Paragraphs Two and Three above are generally referred to in the candy trade or industry as 'Break and Take,' or 'Draw' packages. The packages or assortments of candy without the lottery, prize, or draw features in connection with their resale to the public are generally referred to in the candy trade or industry as 'Straight Goods.' These terms will be used hereafter in these findings to describe these respective types of candy.

"PARAGRAPH FIVE. Numerous retail dealers purchase the assortments described in Paragraphs Two and Three above, from wholesale dealers or jobbers who in turn have purchased said packages from respondent and such retail dealers display said assortments for sale to the public as packed by the respondent and the candy contained in said assortment is sold and distributed to the consuming public by lot or chance.

"PARAGRAPH SIX. All sales made by respondent are absolute sales and respondent retains no control over the goods after they are delivered to the wholesale dealer or jobber. The assortments are assembled and packed in such manner that they can be displayed by the retail dealer for sale and distribution to the purchasing public, as above described, without alteration or rearrangement. * * * Said assortments can not be resold to the public by the retail dealers except as a lottery or gaming device, unless said retail dealers unwrap, unpack, disassemble, or rearrange the said assortments.

"In the sale and distribution to jobbers and wholesale dealers for resale to retail dealers, of assortments of candy, assembled and packed as described in Paragraphs Two and Three herein, respondent has knowledge that said candy will be resold to the purchasing public by retail dealers, by lot or chance and it packs and assembles such candy in the way and manner described so that it may and shall be resold to the public by lot or chance by said retail dealers.

"PARAGRAPH SEVEN. The sale and distribution of candy by the retail dealers by the methods described in these findings, is the sale and distribution of candy by lot or chance and constitutes a lottery or gaming device. * * *

"* * * Many competitors regard such method of sale and distribution as morally bad and encouraging gambling, especially among children; as injurious to the candy industry, because it results in the merchandising of a chance or lottery instead of candy; and as providing retail merchants with the means of violating the laws of the several states. Because of these reasons some competitors of respondent refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance. These competitors are thereby put to a disadvantage in competing. Certain retailers who find that they can dispose of more candy by the 'Break and Take' or 'Draw' methods, buy respondent's products and the products of others employing the same methods of sale, and thereby trade is diverted to respondent, and others using similar methods, from said competitors. Said competitors can compete on even terms only by giving the same or similar devices to retailers. This they are unwilling to do, and their sales of 'Straight Goods' candy show a continued decrease.

"There is a constant demand for candy which is sold by lot or chance, and in order to meet the competition of manufacturers who sell and distribute candy which is sold by such methods, some competitors of respondent have begun the sale and distribution of candy for resale to the public by lot or chance. The use of such methods by respondent in the sale and distribution of its candy is prejudicial and injurious to the public and its competitors, and has resulted in the diversion of trade to respondent from its said competitors, and is a restraint upon [and] detriment to the freedom of fair and legitimate competition in the candy industry.

"PARAGRAPH EIGHT. The principal demand in the trade for the 'Break and Take' or 'Draw' candy comes from the small retailers. The stores of these small retailers are in many instances located near schools and attract the trade of the school children. The consumers or purchasers of the lottery or prize package candy are principally children, and because of the lottery or gambling feature connected with the 'Break and Take' or 'Draw' package, and the possibility of becoming a winner, it has been observed that the children purchase them in preference to the 'Straight Goods' candy when the two types of packages are displayed side by side.

"* * * Children prefer to purchase the lottery or prize package candy because of the gambling feature connected with its sale. The sale and distribution of 'Break and Take' or 'Draw' packages or assortments of candy or of candy which has connected with its sale to the public the means or opportunity of obtaining a prize or becoming a winner by lot or chance, teaches and encourages gambling among children, who comprise by far the largest class of purchasers and consumers of this type of candy.

"PARAGRAPH NINE. The pieces of candy in the 'Break and Take' or 'Draw' packages of all manufacturers of that type of candy are either smaller in size than the corresponding pieces of 'Straight Goods' candy or the quality of the candy in the 'Break and Take' or 'Draw' packages is poorer than that in the 'Straight Goods' assortments. It is necessary to make this difference between either the size of the individual pieces of candy or the quality of the candy in order to compensate for the value of the prizes of premiums which are distributed with the 'Break and Take' or 'Draw' goods.

"PARAGRAPH TEN. There are in the United States many manufacturers of candy who do not manufacture and sell lottery or prize assortments of candy and who sell their 'Straight Goods' candy in interstate commece in competition with the 'Break and

contend that section 5 of the Act violates the federal constitutional mandate of separation of governmental functions, and the due process clause. We think there is no merit in this contention. *Sears, Roebuck & Co. v. Federal Trade Commission,* 258 Fed. 307; *National Harness Mfgs. Assn. v. Federal Trade Commission,* 268 Fed. 705; *Arkansas Wholesale Grocers' Assn. v. Federal Trade Commission,* 18 F. (2d) 866; *Federal Trade Commission v. Balme,* 23 F. (2d) 615. See also the concurring opinion of Mr. Justice Cardozo in *Schechter Poultry Corp. v. United States,* 295 U. S. 495 at 552.

[*Discontinuance of practice no defense*]

It is further contended by certain of the respondents that the court failed to find that they had discontinued the manufacture and sale of the chance assortments on August 1, 1934. Discontinuance or abandonment is no defense to the order, for, if true, it would be no guaranty that the challenged acts will not be renewed. *Federal Trade Commission v. Wallace,* 75 F. (2d) 733. The benefit to respondents of an abandonment may be fully protected by their report to the Commissioner as required by the Commission's order.

[*Interstate commerce not involved*]

Respondents further contend that the orders of the Commission seek to control the method of retail sale of candies in intrastate commerce, and for that reason they, together with the Act under which they were promulgated, are invalid under the ruling in the *Schechter* case. The orders, however, are expressly limited to interstate commerce and they do not apply to any intrastate business in which any of the respondents may be engaged.

[*Order modified*]

We are convinced, however, that paragraphs (1) and (2) of the cease and desist order are too broad in that they prevent the sale and distribution to jobbers and wholesalers for resale to retailers of any candy so packed and assembled that retail sales may be made by means of a lottery, or gaming device. This clearly would prevent the sale of any candy which might afterwards be sold by the retailer by means of a lottery, gaming device or gift enterprise. Obviously, this was not the intention of Congress, and we think it was not the intention of the Commission. We have therefore stricken the word "may" from paragraphs (1) and (2) of the orders and substituted the words "are designed to," and as thus modified, the orders of the Commission[2] are affirmed, and respondents,

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Take' or 'Draw' candy, and manufacturers of the Straight Goods' type of candy have noted a marked decrease in the sales of their products whenever and wherever the lottery or prize candy has appeared in their markets. This decrease in the sales of 'Straight Goods' candy is principally due to the gambling or lottery feature indicated with the 'Break and Take' or 'Draw' candy.

"PARAGRAPH ELEVEN. In addition to the assortments described in Paragraphs Two and Three herein, the respondent manufactures candy which it sells to wholesalers and jobbers without any lottery or chance features.

"PARAGRAPH TWELVE. The sale and distribution of candy by lot or chance is against the public policy of many of the states of the United States and some of said states have laws making the operation of lotteries and gambling devices penal offenses."

CONCLUSION

"The aforesaid acts and practices of respondent, A. McLean and Son, under the conditions and circumstances set forth in the foregoing findings of fact are all to the prejudice of the public and respondent's competitors and constitute unfair methods of competition in commerce and constitute violations of Section 5 of an Act of Congress, approved September 26, 1914, entitled 'An Act to Create a Federal Trade Commission, to define its powers and duties and for other purposes.'"

[2] (1) Selling and distributing to jobbers and wholesale dealers, for resale to retail dealers, candy so packed and assembled that sales of such candy to the general public are to be made or are designed to be made by means of a lottery, gaming device, or gift enterprise.

(2) Supplying to, or placing in the hands of, wholesale dealers and jobbers packages or assortments of candy which are used or are designed to be used without alteration or rearrangement of the contents of such packages or assortments, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy or candy products contained in said assortment to the public.

(3) Packing or assembling in the same package or assortment of candy, for sale to the public at retail, pieces of candy of uniform size, shape, and quality, having centers of a different color, together with larger pieces of candy, or small boxes of candy, or other articles of merchandise, which said larger pieces of candy, or small boxes of candy, or other articles of merchandise are to be given as prizes to the purchaser procuring a piece of candy with a center of a particular color.

(4) Furnishing, to wholesale dealers and jobbers, display cards, either with assortments of candy or candy products, or separately, bearing a legend or legends or statements informing the purchaser that the candy or candy products are being sold to the public by lot or chance or in accordance with a sales plan which constitutes a lottery, gaming device, or gift enterprise.

(5) Furnishing to wholesale dealers and jobbers display cards or other printed matter for use in connection with the sale of candy or candy products, which said advertising literature informs the purchasing public that upon the obtaining by the ultimate purchaser of a piece of candy of a particular colored center, a larger piece of candy or small box of candy or another article of merchandise will be given free to said purchaser.

It is further ordered that respondents within thirty (30) days after the service upon them of this order, shall file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist hereinabove set forth.

And it is hereby further ordered by reason of the decision of the Supreme Court of the United States in *A. L. A. Schechter Poultry Corporation v. United States of America,* decided May 27, 1935, Count Two of the complaint in this proceeding be, and the same hereby is, dismissed.

their officers, directors, agents, representatives and employees are hereby ordered to comply therewith. Petitioner will recover its costs in this court.

[¶ 55,124] Adolph Meyer, Inc., a corporation, v. The Florists' Telegraph Delivery Association, Inc., a corporation.

United States District Court, Southern District of New York. June 4, 1936.

A suit under the Anti-Trust Laws against a corporation may be brought in any district in which it "transacts business," which term has a wider significance than "doing business." A corporate association is held to be transacting business in a district when it maintains there an unpaid representative who solicits members, and when it has local members with whom it is in constant communication.

Memorandum

[*"Transaction of business" under Clayton Act*]

KNOX, D. J. The opinion of the Supreme Court in *Eastman Co. v. Southern Photo Company*, 273 U. S. 359, at page 373, very definitely points out that the "transaction of business" by a foreign corporation within the confines of a particular judicial district is of wider significance than the "doing of business" within such district so as to subject the corporation to the valid service of process therein. The quotation from Page 371 of the aforementioned opinion, and contained on page 13 of defendant's brief, has to do with the service of process within a district in which a defendant "does business" and is not an interpretation of what institutes the transaction of business under the venue provisions of the Clayton Act.

Defendant's affidavits admit that it has an unpaid district representative within this jurisdiction. His duties are

"to promote the interests of the retail floral business in his district; to promote the exchange of orders between members and give publicity to the service rendered by members; to solicit florists of good reputation to become members; and to furnish prospective members with all information necessary to send to the offices prevailing retail prices for the market report, and to offer suggestions for the proper handling of the business of the Association, and generally to assist in the promotion of all affairs of the association."

These services are comprehensive in character and contribute, undoubtedly to the value and efficiency of the business carried on by defendant, both at its home office, and throughout the rest of the country.

Plaintiff's papers set forth that each of defendant's members, resident within a specified unit, pay annual dues to such unit, and this is not denied. Unquestionably, also, the defendant is in constant communication with its local members and considerable sums of money are constantly passing between them and the home office. The house magazine, likewise, is regularly received in this district. That publication is a medium through which defendant caters to the welfare of its members, and tends to make membership in the organization desirable, as well as serve the purpose thereof. Mere solicitation upon behalf of a corporation is the transaction of business, as is indicated at page 533 of the decision of the Supreme Court in *Greene v. Chicago B. & O. Ry. Co.*, 205 U. S. 530. If this be true, I should think that what is here done on behalf of defendant is nothing less than the transaction of business of a continuous and substantial nature.

[*Service of subpoena upheld*]

Approaching the argument that the subpoena should be set aside for the reason that Lou N. Anderson, upon whom, as a director of the defendant, process was served, it needs only to be said that in his capacity as such, he was discharging the duties of his office within the boundaries of the territory over which he exercises authority, and for which he was elected to defendant's board. It follows that plaintiff found the corporation at Anderson's place of business.

[*Preliminary injunction denied*]

From the foregoing, it is apparent that plaintiff's motion for a preliminary injunction must be decided.

In my judgment, the danger of irreparable injury to plaintiff from the threatened acts of defendant is not so imminent and serious as to justify the restraining order that plaintiff asks. The matter of injunctive relief may well await final hearing. Both motions are denied.

[¶ 55,125] Armand Company, Inc., et al., v. Federal Trade Commission.

United States Circuit Court of Appeals for the Second Circuit. July 2, 1936.

It is not a fatal variance for the Federal Trade Commission to charge in its complaint a conspiracy between a manufacturer, wholesalers and retailers, concerning resale prices, and then to issue a cease and desist order against the manufacturer alone, against whom the Commission made no finding of the conspiracy charged, at the same time dismissing the charges as to the wholesalers and retailers.

Reaffirming the Court's opinion, reported at ¶ 55,078, sustaining Federal Trade Commission Complaint No. 1329.

Before HAND, SWAN and HAND, Circuit Judges.

On petition for reargument of a motion to vacate a decree of this court, (*Armand v. F. T. C.*, 78 Fed. (2) 707), affirming an order of the Federal Trade Commission directing the respondent to "cease and desist" from certain trade practices.

Henry Ward Beer for the motion.
Martin A. Morrison opposed.

[*Facts reviewed*]

Per Curiam: We have already once decided this motion without opinion,[1] and we now state our reasons in the hope that this at least may end the matter. The argument is based upon the motion that the "cease and desist" order of the Commission was a nullity because of the departure, or variance, between it and the complaint on which the Commission heard the cause. Apparently it is also supposed that our order affirming it was likewise a nullity, though before us at least there was a controversy to be decided, however void the order reviewed. Passing that question and before addressing ourselves to the first point, we must state the facts. The complaint was against the Armand Company and some of its officers and a number of wholesale and retail druggists, all named as respondents. The company was selling toilet articles manufactured by secret processes through wholesale and retail druggists, both those named as respondents, and others; and the sixth article alleged that the resepondents named were

"engaged in a conspiracy, common understanding, combination and agreement with and among themselves and * * * dealers not specifically named as respondents * * * to monopolize and unduly * * * to restrain the interstate business * * * of respondents and of the aforesaid dealers not specifically named * * * and in accordance with * * * said conspiracy * * * the respondents and those referred to above as dealers not specifically named * * * have monopolized and unduly * * * restrained the interstate trade * * * of themselves and their competitors".

This was alleged to have been done, (a) by selling the Armand Company's products at retail prices fixed by agreement, higher than would have prevailed except for the conspiracy; (b), by refusing to sell them at all to dealers who were not druggists; and (c) by refusing to sell them to those wholesalers or retailers who did not sell at prices fixed by the Admand Company. The complaint then alleged a number of overt acts in execution of this conspiracy, nine done by the company, and seven by the wholesalers and retailers. The respondents answered, much testimony was taken and elaborate findings of fact were made, the upshot of which was that the company exacted contracts of wholesalers and retailers by which they were to maintain retail prices. There was no finding that a conspiracy had existed. Upon these findings the Commission entered a "cease and desist" order, forbidding only the Armand Company and its officers (1) to procure "from wholesale or retail dealers contracts * * * that respondent's products * * * are to be resold * * * at prices specified", and (2) to procure from wholesalers "contracts * * * that Armand products are not to be resold by such wholesalers to price-cutting retail dealers". The proceeding was dismissed as to the wholesalers and retailers, named as respondents.

[*Parties to conspiracy*]

We assume arguendo, although this is not a criminal prosecution, that the rule does not apply which governs civil conspiracies at common law; that is, that the allegation of conspiracy is merely inducement; and that the gist of the wrong is the acts done in furtherance of the common plan. *Lewis Invisible Stitch Machine v. Columbia Blind Stitch Machine Co.*, 80 F (2) 862 (C. C. A. 2). Yet even upon a direct review of convictions for criminal conspiracies it is not a fatal variance to allege a single conspiracy of three and prove two conspiracies of two each, to which one of the conspirators is in each case not a party. *U. S. v. Berger*, 295 U. S. 77. A fortiori it is not such to allege a conspiracy of three or more and prove one of less members, or of more. Yet these are all cases of departure and show that it is immaterial to prove a different criminal agreement from that al-

[1] A motion to set aside the decree affirming the commission's order was denied March 25, 1936. The court said: "The departure between the complaint before the Commission and its order was not such as made its order a nullity. Motion denied."

leged, when the defendants are not prejudiced by the variance. Moreover, while it is true that a man may not be convicted on an indictment for conspiracy, if it appear that there was no other party to the transaction, it is not necessary that more than one shall be convicted. *Feder v. U. S.*, 257 Fed. Rep. 694 (C. C. A. 2); *U. S. v. Austin-Bagley Corp.*, 31 Fed. (2) 229, 233, (C. C. A. 2); *Didenti v. U. S.*, 44 Fed. (2) 537 (C. C. A. 9); *Rosenthal v. U. S.*, 45 Fed. (2) 1000, 1003 (C. C. A. 8); *Worthington v. U. S.*, 64 Fed. (2) 936, 939 (C. C. A. 7). Here, although the wholesalers and retailers, named as respondents, were indeed dismissed, there were others, not named, about whom nothing was determined; and besides, the Armand Company might have acted in concert with its officers and was indeed found to have done so. Thus, at worst, the case is no more than one in which the order does not in terms declare that the respondents in default had been guilty of a conspiracy, an omission of no consequence at all.

[*Variance between complaint and order held immaterial*]

If, however, that be thought to be too verbal a way to deal with the matter, the result is the same, though we assume that the company alone was found guilty, and that all wholesalers and retailers, named and not named, were acquitted. None the less the company made agreements with them which were exactly those alleged as the content of the conspiracy; the parties and the performance were precisely the same. The Commission might enjoin the company from so conducting itself, whether under the name of conspiracy, or of an individual "unfair method of competition." Even if we assume that the change was substantial enough to be ground for dismissal unless the complaint was amended, it was no more. To succeed here, the respondent must maintain that the order so far abandoned the very frame and outline of the original charge that it had no greater sanction than if the bailiff had signed it. It is true that there may be such departures. *Reynolds v. Stockton*, 140 U. S. 254; *Jorgenson v. Rapp*, 157 Fed. Rep. 732 (C. C. A. 9); *Osage O. & R. Co. v. Continental Oil Co.*, 34 Fed. (2) 585 (C. C. A. 10); *Clark v. Arizona M. S. & L. Assn.*, 217 Fed. Rep. 640; *Munday v. Vail*, 34 N. J. L. 418. But as was intimated in *Reynolds v. Stockton, supra*, 265, 266, much depends upon what takes place before judgment; if, for instance, the defendant merely files an answer and defaults thereafter, a closer registry between pleading and judgment is exacted than after a contested trial, where it may reasonably be assumed that the disposition corresponded to the actual controversy as the parties understood it, even though no formal amendment of the pleadings appears in the roll. Not only must this be true, but, even when the case has not been contested, the question is always one of degree, else any judgment may be upset for trifling variances. At least in a contested case there must be an entire abandonment of the very substance of the dispute to which the defendant was summoned, and the substitution of another which he could not have anticipated, and which he had no opportunity to meet. *Insley v. U. S.*, 150 U. S. 512; *Hatcher v. Hendrie Mfg. Co.*, 133 Fed. Rep. 267 (C. C. A. 8); (semble); *Jarrell v. Cole*, 215 Fed. Rep. 315 (C. C. A. 4); *Cushman v. Warren-Scharf Asphalt Co.*, 220 Fed. Rep. 857 (C. C. A. 7). It is apparent at a glance that so considered, this motion was without basis. The difference is of no practical moment between a conspiracy of a manufacturer and his dealers by which all agree to market the goods unlawfully, and the individual acts of the manufacturer in procuring exactly those agreements and distributing his goods under them. The manufacturer called upon to justify such a course of dealing is advised of what he has to meet, and the divergence between the charge framed as a joint wrong and as single, is utterly unimportant. If during the course of the prosecution, he could show any reason why it was important to make the formal adjustment, conceivably it might be error to refuse to do so; but to hold after all had gone through without question that it had been only a dance of marionettes, would be to go back at least two centuries.

[*Motion to vacate decree denied*]

Motion denied.

[¶ 55,126] Federal Trade Commission v. Benjamin D. Ritholz.

United States Circuit Court of Appeals for the Seventh Circuit. June 2, 1936.

The order of the Federal Trade Commission directing respondent to cease certain misrepresentations in the sale of dental plates is affirmed.

Affirming Federal Trade Commission Complaint No. 2140.

Before: Hon. Evan A. Evans, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Hon. Walter C. Lindley, District Judge.

[*Application for enforcement*]

The Federal Trade Commission, petitioner herein, having filed with this court on, to wit, December 16, 1935 its application for the enforcement of an order to cease and desist issued by it against the respondent under date of November 20, 1934, under the provisions of Section 5 of an act of Congress approved September 26, 1914, entitled "An Act to Create a Federal Trade Commission, to Define its Powers and Duties, and for Other Purposes" (38 Stat. 719, 15 U. S. C. A., Sec. 45); and said petitioner, having also certified and filed herein, as required by law, a transcript of the entire record in the proceedings lately, pending before it, in which said order to cease and desist was entered, including all the testimony taken and the report of said petitioner; and respondent having subsequently filed his answer, brief, and argument; and the Commission having filed its brief, and the matter having been heard before this court on oral argument * * *

[*Commission order affirmed*]

Now, Therefore, It Is Hereby Ordered, Adjudged, and Decreed that said order to cease and desist, issued by the Federal Trade Commission, petitioner herein, under date of November 20, 1934, be and the same hereby is affirmed.

[*Misrepresentation enjoined*]

And It Is Hereby Further Ordered, Adjudged, and Decreed that the respondents, Benjamin D. Ritholz, his agents, associates, employees and representatives in connection with the advertising, offering for sale or sale in interstate commerce, and in the District of Columbia, of dental plates, cease and desist from representing in any manner, including by or through the use of testimonials or endorsements or guarantees or in or through newspapers, magazines, radio, circulars, pamphlets, photographs or pictures, letters or otherwise:

(1) That said dental plates are of a value greater than their actual value;

(2) That respondent can make or does make a properly fitting and satisfactory dental plate from an impression of the mouth taken by a layman for whose use such plate is intended;

(3) That properly fitting and satisfactory dental plates can be made from an impression of the mouth taken by one who is not a dentist;

(4) That respondent has adopted and/or is using in the manufacture of dental plates the same scientific methods used by dentists or that he is using scientific methods in the making of said dental plates;

(5) That his methods of making dental plates from self-taken impressions are scientific;

(6) That the dental plates manufactured and sold by respondent meet the customers' needs;

(7) That through written guarantees or otherwise he will refund the money paid for dental plates which are returned as unsatisfactory, when he does not in all cases do so promptly;

(8) That great care or superior workmanship or fine quality of materials are used in the construction of respondent's dental plates;

(9) That dentists have endorsed or approved respondent's methods of making dental plates from self-taken impressions or that they have endorsed or approved any of his methods in making dental plates;

(10) That the laboratory wherein said dental plates are made is personally or otherwise supervised by licensed or other doctors of dental surgery;

(11) That the said dental plates will give full power of mastication, restore the natural facial expression, or enable the purchaser thereof to wear the same with ease and comfort;

(12) That the business of respondent in manufacturing and selling dental plates is conducted by a corporation.

[*Compliance report required*]

It Is Further Ordered that respondent shall, within sixty (60) days after service upon him of this decree, file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which he has complied with this decree.

[¶ 55,127] Hansen Packing Company, a Montana corporation, v. Armour and Company, an Illinois corporation; Armour and Company, of Delaware, a Delaware corporation, and Armour & Company, a New Jersey corporation.

United States District Court, Southern District of New York. July 30, 1936.

A corporation is held to be "transacting business" in a state within the meaning of section 12 of the Clayton Anti-Trust Act when 2.49 per cent of its business, amounting to $4,000,000 per year, is transacted in the state.

When defendant in a suit for treble damages under the Anti-Trust Laws files an affidavit stating that it does not transact business in the district, and the plaintiff alleges that defendant is doing business in the district but pleads no facts and submits no affidavits to substantiate the allegation, defendant's motion to dismiss will be granted.

Sections 15 of the Clayton Act and 5 of the Sherman Act, permitting the summoning before the courts of parties residing outside the district, are held to apply only to suits by the Government and are held not available to private litigants in civil suits for treble damages.

Plaintiff in a suit for treble damages under the Clayton and Sherman Anti-Trust Acts is required to state and number its causes of action under each Act separately.

In a suit for treble damages for injuries caused by wrongful price discrimination under Section 2 of the Clayton Act (prior to the 1936 amendment), it is held that possible justifications of defendant's act need not be negatived by plaintiff, but are matters of defense.

It is held that plaintiff must prove his actual damages, in a suit for treble damages under the Anti-Trust Laws, and that portion of the complaint which asks for punitive damages trebled is stricken.

George L. Schein, Esq., attorney for plaintiff, (Joseph M. Cohen, of counsel); Stahl & Updike, Esqs., attorneys for defendant, (J. Howard Carter, of counsel).

Opinion

[*Violation of Anti-Trust Acts charged*]

KNOX, D. J. This case involves two causes of action, both for treble damages under the Sherman and Clayton Acts. Suit was originally brought against Armour & Company, an Illinois corporation (hereafter the Illinois corporation). Subsequently, plaintiff was granted leave to join Armour & Company of Delaware, a Delaware corporation (hereafter the Delaware corporation) and Armour & Company of New Jersey, a New Jersey corporation, (hereafter the New Jersey corporation) as defendants. The amended supplemental complaint thereafter served upon defendants alleged two causes of action; one against the Illinois corporation alone which upon its face appears to charge the defendant with violations of the Sherman Act and of Section 2 of the Clayton Act; the other averring similar violations by the three defendant corporations.

[*Jurisdiction—"Transaction of business" in district*]

The defendants now make the following motions:

(1) The Delaware and New Jersey corporations move under Rule 107 of the Rules of Civil Practice for judgment dismissing the complaint as to them on the ground that this court does not have jurisdiction over the persons of the defendants.

Under Section 12 of the Clayton Act, 15 U. S. C. A., Section 22:

"Any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

Service on the New Jersey corporation was made on its resident agent in Jersey City, New Jersey. Service on the Delaware corporation was made on its resident agent in Wilmington, Delaware, and on its statutory agent for service of process in Jersey City, New Jersey.

In suits under Section 7 of the Sherman Act the word "found" came to mean "doing business" to a substantial extent.

Peoples Tobacco Company v. American Tobacco Company, 246 U. S. 79, 87. The amount of "doing business" necessary to constitute "transacting business," while not precisely determinable, is considerably less than that which has been required to satisfy the term "found." *Eastman Kodak Company v. Southern Photo Company,* 273 U. S. 359, 371; *Haskell v. Aluminum Company of America,* 14 Fed. (2d) 864 (D. Mass., 1926); *Northern Kentucky Telephone Company v. Southern Bell & Telephone Company,* 54 Fed. (2d) 107 (E. D. Kentucky, 1931).

The Delaware corporation contends that since it did only 2.49% of its business in New York for the fiscal year ending November 1, 1935, it has not "transacted business" here. This small percentage, however, amounted to $4,000,000, and is simply a commentary on the defendant's size. See unreported opinion in *Meyer v. Florists Telegraph Delivery Association, Inc.,* decided June 3, 1936. Also *Katz Drug Company v. Sheaffer Pen Company,* 6 F. Supp. 210 (D. Missouri, 1932). As to the Delaware corporation, the motion is denied.

[*Failure to allege facts showing transaction of business in district*]

The motion by the New Jersey corporation presents a more difficult problem. The plaintiff alleges that the New Jersey corporation is doing business in this district but has pleaded no facts, and submitted no affidavits to substantiate the allegation. Furthermore, the defendant denies the allegation and in an affidavit filed in support of the motion to dismiss specifically avers in some detail that the New Jersey corporation transacts no business here. In the light of this affidavit, this Court, therefore, should not exercise jurisdiction on a pleader's mere conclusion that the New Jersey corporation is "doing business" here and, in consequence, may be "found" here or is transacting business within this district. The jurisdictional allegation, if it is to be sustained, must be supported by proof.

If a factual question on the subject of jurisdiction were presented, this Court could refer the matter to a Special Master, *National Foundry Co. v. Alabama Pipe Co.,* 7 F. Supp. 823, 825, but it cannot subject the defendant to the equivalent of an examination before trial until the plaintiff alleges facts showing that this Court has jurisdiction. See *Ex parte Fisk,* 113 U. S. 713. Support for the plaintiff's contention that the allegation of conspiracy is sufficient to bring a co-conspirator under this Court's aegis cannot be found in the applicable statutes. Section 5 of the Sherman Act (15 U. S. C. A. Sec. 5) and Section 15 of the Clayton Act (15 U. S. C. A. Sec. 25) apply only to suits by the Government and the failure of Congress to make similar provision for civil suits by private litigants implies an intent to withhold the privilege.

The motion as to the New Jersey corporation is granted.

[*Separate statement of actions under Clayton and Sherman Acts*]

(2) The Illinois Corporation moves under Rule 90 of the Rules of Civil Practice for judgment requiring the plaintiff separately to state and number, in each of its alleged causes of action, the cause of action under the Sherman Act and the cause of action under the Clayton Act.

In each of the two causes of action the plaintiff charges the Illinois Corporation with violations of the Sherman Act and of Section 2 of the Clayton Act. In his memorandum in opposition to the defendant's motion, the plaintiff explains that he is seeking recovery only for the defendant's alleged price discrimination; nevertheless, the right to recover is predicated upon both the Sherman and Clayton Acts. Contention is made that each part sets up a single cause of action despite the alleging of both statutes. However, in *Baran v. Goodyear T. & R. Co.,* 256 Fed. 570 (S. D. N. Y., 1918), an almost identical problem was passed upon, and the present case is an *a fortiori* situation in that the plaintiff has no remedy at all under the Sherman Act for price discrimination, where as in the *Baran* case the plaintiff might have had a cause of action under the Sherman Act. See also *Ware-Kramer Tobacco Company v. American Tobacco Company,* 178 Fed. 117. The plaintiff's reliance on *Payne v. New York, S. & W. R. R. Co.,* 201 N. Y. 436, is misplaced since a decision under one of the anti-trust statutes would not be *res judicata* in a suit under the other. See *United Shoe Machinery Corporation v. United States,* 258 U. S. 451. Certainly a decision on price discrimination under the Clayton Act would not be *res adjudicata* in a suit under a statute giving no such remedy.

This motion is granted.

[*Striking of irrelevant, redundant, and prejudicial allegations*]

(3) The Illinois corporation moves under Rule 103 of the Rules of Civil Practice for judgment striking from the complaint, on the ground that they are irrelevant, redundant and prejudicial, the following paragraphs: XXIV XXVI, XXVII, XXX, XLIX, LI, LII, LIV.

Preliminarily, it should be noted that such motions are not regarded with favor, and will be denied unless the allegations have no possible relation to the controversy or may prejudice the defendant. See *Cerseta Corporation v. Silk Association of America,* 220 A. D. 302; *Woods v. Althauser,* 212 A. D. 618; *Ware Kramer Tobacco Company v. American Tobacco Company,* 178 Fed. 117. Paragraph XXIV charges the Illinois corporation with malice. Section 2 of the Clayton Act contains the following proviso:

"Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation or discrimination in price in the same or different communities made in good faith to meet competition: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

[*Burden of showing justification for price discrimination*]

It has been held that these possible justifications of the defendant's acts need not be negatived by the plaintiff. *Gibson Canning Company v. American Can Company,* 1 Fed. Supp. 242 (E. D. Illinois, 1932). The defendant's good faith under the proviso is a matter of defense. See *Porto Rican American Tobacco Company v. American Tobacco Company,* 30 Fed. (2d) 234, 237 (C. C.A. 2nd, 1929); *American Can Company v. Ladoga Canning Company,* 44 Fed. (2d) 763, 766, 767 (C. C. A. 7th, 1930). If this particular allegation were the only claimed defect in the complaint, liberality would dictate that it be passed over. Since the complaint will have to be redrawn, if the plaintiff desires to anticipate the defense (without now deciding whether such procedure is good pleading), it should be done explicitly.

[*Repetition*]

Paragraph XXVI repeats paragraph XXIII; one or the other should be eliminated.

[*Trebling of punitive damages*]

In Paragraph XXVII, the plaintiff asks for punitive damages which he then proceeds to treble. This paragraph should be stricken. The plaintiff must prove his actual damages. *Keogh v. Chicago, N. W. R. R.,* 260 U. S. 156 (1922); *American Sea Green Slate Company v. O'Halloran,* 229 Fed. 77 (C. C. A. 2nd, 1915). In trebling the amount of actual damages, it seems indisputable that the statutes carry their own symbols of punishment. The plaintiff can recover only what the statutes give him. *Buckeye Powder Company v. E. E. DuPont de Nemours Powder Company,* 196 Fed. 514, 519 (D. N. J. 1921), while apparently in support of the plaintiff, merely decided that an allegation of punitive damages does not make a complaint duplicitous. The question of relevance was not passed upon.

Paragraph XXIX must be revised and XXXVII is stricken.

The disposition having to do with XXIV, XXVI, XXVII, and XXIX is applicable to XLIX, LI, LII, LIV respectively.

[*Obscurity in dates remedied by bill of particulars*]

(4) The Illinois corporation moves under Rule 102 of the Rules of Civil Practice for judgment requiring that the following paragraphs be amended by setting forth the dates at which the alleged acts occurred: XV, XVII, XIX, XX, XXIX, XLI, XLIII, XLIV.

To give the defendant a chance to invoke the Statute of Limitations, if it be apposite, the plaintiff should give some indication, to the best of his ability, of the time when the acts alleged in paragraphs XVII, XIX, XX, XLI, XLII, XLIV occurred. *United Copper Securities Corporation v. Amalgamated Copper Company,* 232 Fed. 574, 576 (C. C. A. 2nd, 1916). Paragraphs XV and XXIX charge that at all times in the past and continuing in the present the defendants have done and are now doing certain acts not immediately related to the charge or price discrimination. Whatever obscurity there may be in these paragraphs can be remedied by a bill of particulars.

[¶ 55,128] Federal Trade Commission v. Maisel Trading Post, Inc.

United States Circuit Court of Appeals, Tenth Circuit, August 28, 1935.

A former court order, modifying and affirming an order of the Federal Trade Commission forbidding the advertising of jewelry as "Indian-made" without specifying that it has been partly made by machine, is vacated and the Commission's order is affirmed with a new modification.

Vacating the court order reported at ¶ 55,073, and modifying and affirming Federal Trade Commission Complaint No. 2037.

Per Curiam

Briefs and argument on rehearing have clarified the dispute and narrowed the issues. Petitioner now expressly asserts that machinery used in manufacturing the raw material—the slugs or blanks—with which the Indian starts his artistry, is outside the scope of the hearing or the order; that the order is not concerned with the dimensions of the raw material; that the order is designed to confine the term "Indian-made" to those who heat and hammer the slug or blank before ornamentation; and that the order does not define the amount of such heating or hammering. So construed, the order is applicable only to so much of respondent's jewelry, if any, as is not heated and hammered at all before ornamentation.

Both sides complain of the complexity and the difficulty of complying with our modification of petitioner's order; petitioner's order is complex and has already given rise to much misunderstanding. The second paragraph of petitioner's order will be modified to read as follows:

"It is now ordered that respondent, its agents, representatives, and employees, shall cease and desist from designating, describing, or offering any of its silver jewelry products for sale in interstate commerce as 'Indian' or 'Indian-made' jewelry, where in substantial part machinery (other than hand tools, or nonmechanical equipment, or buffing wheels for polishing) shall be substituted for hand hammering, shaping or ornamenting the same, unless the label, stamp, catalogue, or advertising shall clearly, expressly, and legibly state the method of such manufacture in immediate context with the descriptive terms."

A decree will be entered vacating our former modification of the commission's order, affirming the order of the commission as now modified; each party to pay its own costs.

[¶ 55,129] Federal Trade Commission v. Maisel Trading Post, Inc.

United States Circuit Courts of Appeals, Tenth Circuit. July 21, 1936.

Upon Motion of Petitioner and Amici Curiae for Interpretation of Final Order.

It is held that the manufacturer of Indian jewelry is giving purchasers fair notice that jewelry is in part machine made when it advertises "press cut and domed blanks." Interpretation of a former court order modifying and affirming a Federal Trade Commission order requiring the respondent to state the method of manufacture, is denied as unnecessary.

See previous court orders involving Federal Trade Commission Complaint No. 2037 at ¶ 55,073, 55,128.

Eugene W. Burr (William T. Kelley, Chief Counsel, Martin A. Morrison, Assistant Chief Counsel, Henry W. Blair, Ass't. Attorney General, Charles E. Collett, Attorney, and Wm. C. Lewis, U. S. Attorney, with him on the Motion) for Petitioner.
John F. Simms (Donald M. Bushnell with him on the Answer), for Respondent.

Before Lewis and McDermott, Circuit Judges, and Kennedy, District Judge.

Kennedy, District Judge, delivered the opinion of the court.

[*History of proceedings*]

This proceeding was originally instituted to enforce an order of the Federal Trade Commission, with a finding that the Respondent while engaged in interstate commerce misled the public in connection with the sale of Indian jewelry. The controversy revolved around the use of the terms "Indian" and "Indian-made." Upon the original hearing the court confirmed the order of the Commission with modifications, which detailed specifically the permissive use of the terms. (77 F. (2d) 246.) **Subsequently the Petitioner applied for a rehearing upon the ground that the modified order was too complex to be followed without great difficulty and that**

the order covered processes which were not involved in the controversy, in which contention the Respondent seemed to concur. Thereupon this court modified the substantive features of the orders so as to read as follows (79 F. (2d) 127):

"It is now ordered that respondent, its agents, representatives, and employees, shall cease and desist from designating, describing or offering any of its silver jewelry products for sale in interstate commerce as 'Indian' or 'Indian-made' jewelry, where in substantial part machinery (other than hand tools or non-mechanical equipment, or buffing wheels for polishing) shall be substituted for hand-hammering, shaping or ornamenting the same, unless the label, stamp, catalogue, or advertising shall clearly, expressly and legibly state the method of such manufacture in immediate context with the descriptive terms."

[*Interpretation of order in dispute*]

The modified order seemed to generally meet the approval of both parties, but the Petitioner and *amici curiae* now by motion complain of the interpretation of such order on the part of the Respondent, in that its advertising and literature is not sufficiently explicit to advise the public of its operations in the manufacture of jewelry as Indian made. As no appeal was taken from the last modified order it has become final. The motion of the Petitioner and the answer of the Respondent thereto contain copious examples of the Respondent's advertisement in connection with its attempt to comply with the order and these are generally in accord, so that the dispute narrows down to a proposition of determining whether or not this advertising is in substantial compliance with the order.

The gravamen of the charge of the Petitioner may be exemplified by the samples exhibited. A small pamphlet described in detail the manner in which the jewelry offered for sale by the Respondent is fashioned, in which it is stated that the manufacture of the jewelry from silver dollars has been dispensed with and ordinary coin silver reduced to 900 fine is prepared for the handwork of shaping, decorating and finishing by being rolled by an Indian to reduce it to a sheet of the desired thickness, the Indian then by using a press cuts out the blank silver in the general shape of the article to be made, in which condition it reaches the work bench where the Indian smith hand-hammers, files, shapes, decorates and polishes it by hand as the finished product. Other statements further explain in detail the method of manufacture of certain types of jewelry, expressly setting forth certain articles in which parts are purchased and not made by the Indians in connection with the manufacturing process. No particular complaint is made of this feature of the advertising, nor can there justly be, because it evidences the good faith of Respondent in meticulous form. The suggestion of the Petitioner in this respect is, however, that these pamphlets are not attached to the specific articles of jewelry exhibited for sale, and the real purpose and intent must be gathered from the specimens attached to the individual articles. In this respect all these specimens carry substantially the same purport except as they may be applied to different articles manufactured in a different way. One example will suffice:

"Guaranteed INDIAN-MADE from 900 Fine sheet and wire, COIN SILVER and TURQUOISE; press cut and domed blanks; filed, decorated, shaped and finished entirely by hand."

[*Motion for interpretation denied*]

The exact point contended for by the Petitioner is, that the term "press cut and domed blanks" does not suggest to the purchasing public the use of machinery. With this contention we cannot agree. The theory of the Petitioner's whole case is, that with those of the public interested in the purchase of Indian-made jewelry, the fashioning in the first instance of the silver is a process of hand-hammering and therefore the public is entitled to know when this hand-hammering is dispensed with and the use of machinery substituted therefor. This theory was approved and confirmed by this court. But the Petitioner now says that the public interested in the purchase of Indian jewelry will not be advised that the term press cut necessarily involves the use of a pressing machine. We cannot believe that those so discerning in the art of Indian jewelry making would be so ignorant in their understanding of ordinary English language. Furthermore, it will be noted that the ingredients and the processes of manufacture of the articles are distinctly separated by semi-colons and each phrase thereby expresses a separate and distinct element. As for example, the use of a press is distinctly cut off from what is indicated as being done in the manufacture by hand, and therefore it clearly appears that the press is substituted for hand-hammering. There ought to be no confusion in the minds of the public in such a description of the method of manufacture. We see no merit in the Petitioner's motion. It will therefore be overruled and denied, with costs assessed against the Petitioner.

[¶ 55,130] Butterick Publishing Company; Macfadden Publications, Inc., Frank A. Munsey Company, Street & Smith Publications, Inc., Pictorial Review Company, International Circulation Company, Inc., S-M News Company, Inc., Midwest Distributors, Inc., v. Federal Trade Commission.

United States Circuit Court of Appeals for the Second Circuit, August 13, 1936.

A Federal Trade Commission order is affirmed, enjoining magazine publishers from concertedly preventing anyone from selling second-hand or back number magazines to distributors or dealers, and from concertedly preventing wholesalers or retailers from buying or selling such magazines.

Affirming Federal Trade Commission Complaint No. 2171.

Before: L. HAND, AUGUSTUS N. HAND and CHASE, Circuit Judges.

Petition to review an order of the Federal Trade Commission. Affirmed.

Chester W. Johnson, Attorney for Petitioner, Midwest Distributors, Inc. Robert Maloney, Attorney for Petitioner, Frank A. Munsey Company. Joseph Schultz, Attorney for Petitioner, McFadden Publications, Inc.; Street & Smith Publications, Inc. Manheim Rosenzweig, Attorney for Petitioners, Pictorial Review Company; International Circulation Co. Inc. Whitman, Ransom, Coulson & Goetz, Attorney for Petitioner, S-M. News Company, Inc.

W. T. Kelley, Chief Counsel, Federal Trade Comn. Martin A. Morrison, Assistant Chief Counsel. Robert N. McMillen, James W. Nichol, Special Attorneys, Attorneys for Respondent.

[*Cease and desist order of Commission*]

CHASE, Circuit Judge: The petitioners were charged in a complaint filed by the Commission with using unfair methods of competition within the scope of section 5 of the Federal Trade Commission Act (15 U. S. C. A. Sec. 45). They all answered and appeared at hearings before a trial examiner at New York and at Boston where evidence was introduced in support of the complaint. At the close of these hearings, the petitioners (then respondents) filed a motion to dismiss the complaint for lack of evidence to support it but the motion was overruled with leave to renew upon final argument. At a hearing later called for the introduction of evidence by the respondents, they all waived their right to offer proof and insisted upon their motion to dismiss. The cause was argued before the Commission and upon the record made it found the facts and reached conclusions thereon upon which the order to cease and desist under review was made. This order provided that respondents

"their agents, employees and representatives, in connection with the sale and distribution of magazines and other periodical publications in interstate commerce, forthwith cease and desist from the following acts and practices;

(a) By agreement, combination or concert of action among themselves, or between or among any two or more of them, or with others, preventing or seeking to prevent any person, firm or corporation lawfully owning the same, from selling to distributors thereof or dealers therein, second-hand or back number magazines or other periodical publications; or

(b) By agreement, combination or concert of action among themselves, or between or among any two or more of them, or with others, preventing, or seeking to prevent, or causing or seeking to cause wholesalers of magazines to prevent, newsdealers or other retailers of magazines from buying and selling or dealing in second-hand or back number magazines or other periodical publications, or in any manner interfering with the business of distributors of or dealers in such second-hand or back number magazines or other periodical publication.

Provided, however, that nothing in this order contained shall prevent respondents from making such agreement or arrangements with, or taking such action against, wholesalers and retailers of their magazines or other periodical publications, as may be reasonably necessary to prevent unsold publications, for which respondents have reimbursed or credited such wholesalers or retailers, from being again placed on sale as reading matter."

[*Business of respondents*]

On sufficient supporting evidence the Commission found that all these petitioners were corporations duly organized under the laws of New York except the Pictorial Review Company which is a Delaware corporation and Midwest Distributors, Inc., a South Dakota corporation. During all material times, the principal place of business of each petitioner was in the City of New York. All but International Circulation Company, Inc., S-M News Company; and Midwest Distributors, Inc., were "engaged in the printing and publishing of periodical magazines and other periodical publications and in selling the same into and among the various states and territories of the United States and the District of Columbia." Those last above named were engaged in the sale and distribution of such magazines in the same territory. For convenience all the petitioners will hereafter be called publishers and all the periodicals will be called magazines. All of the publishers have caused magazines to be shipped in interstate commerce to the purchasers or consignees thereof and there has been during all the time material a constant current of trade and commerce in such magazines between and among the various states and territories of the United States and the District of Columbia. All the publishers "are now, and at all times hereinafter mentioned have been, in substantial competition in interstate commerce among themselves and

with other publishers and sellers of magazines * * *, and with distributors of second-hand or back-number magazines as hereinafter set forth. The aggregate business of these respondents (petitioners) amounts to substantially more than twelve million copies of each issue."

The magazines so transported in interstate commerce are sold to wholesalers for the most part by the publishers though some are sold direct to retailers consisting mainly of news stands and drug stores not situated in territory served by any wholesaler. Midwest Distributors, Inc., and Macfadden Publications, Inc., do not sell to wholesalers or retailers but consign their magazines to them for sale. The other publishers sell outright. The Commission further found and concluded as follows:—

[*Findings of Commission*]

"At all times hereinafter mentioned and for an undetermined period prior thereto it has been the custom of the industry and trade that all magazines remaining unsold in the hands of the wholesaler and retailer would be returned to the publishers from whom received and the wholesaler or retailer reimbursed or credited in the amount paid therefor, so that the publishers received payment only for those magazines actually sold by their wholesalers and retailers during the current period, that is from the time they were placed on sale until the succeeding issue of the same magazines were placed on sale. Also, it has been and is the custom that the wholesaler would reimburse or give credit to the retailer for all magazines remaining unsold in his hands at the end of the current period, so that the wholesaler receive payment only for those magazines which are sold by the retailer during the current period. Also, it is and has been the custom that instead of shipping back the entire unsold magazine, the cover only is returned, as a token that the same remains unsold, and wholesalers and retailers have been and are privileged to sell the remaining body of the magazine as waste paper, for their own account. The body of the magazine, from which the cover has been removed and for which the wholesaler or retailer has been reimbursed, is known in the industry and trade a 'coverless' magazine or 'coverless return' or 'return'."

"Paragraph Four: At all times hereinafter mentioned there were and now are throughout the United States, persons, firms and corporations hereinafter to be referred to as back-number distributors, engaged in the business of collecting non-current cast-a-way magazines, particularly story magazines, and selling them to retail dealers, consisting principally of news stands, drug stores and other retailers handling current magazines. These non-current magazines, hereinafter to be referred to as "back-numbers," regularly retail at from one-third to one-fourth the sale price of the same magazine while current. The sources of supply of these back-number distributors were and are princpally waste paper dealers located throughout the United States and, to a minor extent, such organizations as the Salvation Army, junk dealers, etc. The back-number magazines have been and are in active, substantial competition with the current numbers.

"Paragraph Five: Among the back-number distributors above referred to were Back Number Wilkins, Inc., a corporation, and Eastern Back Number Magazine Company located, respectively, at Danvers and at Lynn and East Saugus, Massachusetts. These two distributors at the times hereinafter mentioned dealt only in entire back-number magazines, as distinguished from coverless magazines or returns, and were the principal distributors of back-number magazines in eastern Massachusetts, and in the early part of the year 1932 had an aggregate of approximately 800 retail dealers in that area, 90% of whom were dealers in current magazines. The principal sources of supply of these two back-number distributors were waste paper concerns located in Massachusetts, New Hampshire, New York, Michigan, Pennsylvania, Ohio, Illinois and Missouri. When second-hand magazines were purchased by them from these sources of supply they were regularly shipped from said states to them at their respective places of business in Massachusetts.

"Paragraph Six: The retail dealers of the back-number distributors above named handled only entire, covered back-numbers and did not sell or offer for sale coverless magazines or returns.

"Paragraph Seven: In eastern Massachusetts the magazines of respondents were distributed by some thirteen wholesalers located in Boston and other towns and cities in that area. Respondents regularly sold and delivered current magazines from their respective places of business, located as aforesaid, to these wholesalers, who in turn supplied the retail dealers in that area, including 90% of the retailers handling the magazines of the back number distributors hereinabove named.

"Paragraph Eight: On or about November 5, 1931, representatives of the respondents, at a meeting in the City of New York, formed the Special Committee on Magazine Distribution, consisting of a representative from each of the respondent companies, to take action for and on account of respondents. The formation of said Special Committee, and the action thereafter taken by it, was with the full knowledge and consent of the responsible executive officers of the respondent corporations. Thereafter and beginning on the first of April, 1932, and continuing until about August 15, of that year, the Special Committee dispatched letters to all of the wholesalers in eastern Massachusetts handling the magazines of the respondents demanding that they inform their retail dealers that they, the retail dealers, would no longer be permitted to handle back-number magazines; that if they handled back-number magazines they would be denied further supplies of current issues. Upon receipt of these letters, the said wholesalers notified their retail dealers, both in writing and orally, that they would be required to choose between handling current issues and back-number magazines; that if they continued to handle back-number magazines they would no longer be supplied with current issues.

"Paragraph Nine: Because of the above-mentioned demands of respondents upon their wholesalers and of the notices of the wholesalers to their retailers approximately half the retail dealers handling both the current issues of respondents and the back-number magazines of the two distributors named, discontinued handling back-number magazines, and said distributors had difficulty in securing other dealers for the same reason.

"Paragraph Ten: During the same period of time the above-mentioned letters to wholesalers in eastern Massachusetts were being dispatched, the Special Committee on Magazine Distribution was also seeking to interfere with the sources of supply of the back-number distributors, by bringing pressure to bear upon the Salvation Army and other sources of supply to prevent the sale of back-number magazines to those concerns distributing the same to retail dealers.

"Paragraph Eleven: The result of the joint action of these respondents, as hereinabove found, has been and is to substantially interfere with and lessen competition between respondents and their wholesalers, on the other (*sic*) hand, and the said distributors of back-number magazines, on the other hand, thus depriving the public, to a substantial extent, of the benefits that would normally flow from such competition.

"Conclusion

"The acts and practices of these respondents under the circumstances hereinabove found and set forth, have been and are to the injury of their competitors

and prejudicial to the public interest and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Act of Congress hereinabove entitled."

[*Interstate commerce involved*]

While it is contended that the Commission was without jurisdiction in that the unfair methods of competition found were not shown to have been used in interstate commerce, it seems too clear for controversey that they were. The new magazines whose source of supply was controlled by the publishers were largely shipped across state lines and the threat to withhold them from dealers who did not sell new magazines exclusively would, if carried out, to that extent stop interstate transportation of the magazines. So, too, the second-hand magazines were largely transported from state to state and the threatened curtailment of that business would have like effect upon interstate commerce.

[*Concerted refusal to sell held unlawful*]

Though any one publisher acting alone may sell or not sell his magazines as he may choose, *Federal Trade Commission v. Raymond Bros.-Clark Co.,* 263 U. S. 565, two or more may not combine in such refusal if the result is to harm the public or any person against whom the concerted action is taken. *Binderup v. Pathe Exchange,* 263 U. S. 291.

While the Federal Trade Commission is not an agency for the enforcement of the Sherman Anti-Trust Act, that Act does require consideration in deciding what, in view of the public policy so declared, are unfair methods of competition which the Commission is authorized to suppress. *Federal Trade Commission v. Beech-Nut Packing Co.,* 257 U. S. 441. And an unfair method of competition which is against public policy may be stopped by the Commission for that alone. *Federal Trade Commission v. Klesner,* 280 U. S. 19.

The Sherman Act is to be construed in the light of the circumstances attending each case by applying what is called the rule of reason in determining what concerted action unlawfully restrains trade or commerce among the several states. *Standard Oil Co. v. United States,* 221 U. S. 1; *United States v. American Tobacco Co.,* 221 U. S. 106; *Board of Trade v. United States,* 246 U. S. 231; *Standard Oil Co. v. United States,* 283 U. S. 163; *Appalachian Coals v. United States,* 288 U. S. 344; *Sugar Institute v. United States,* 297 U. S. 553.

The Federal Trade Commission Act was in part at least aimed at the elimination of methods of competition called unfair which if left untouched would probably create the evils prohibited by the Sherman Anti-Trust Act. *Federal Trade Commission v. Raladam Co.,* 283 U. S. 643; *Federal Trade Commission v. Sinclair Co.,* 261 U. S. 463. The Commission may, and should, issue its complaint and if its essential allegations are proved make its order to cease and desist whenever the methods of competition are unfair in interstate commerce and their prevention is in the public interest though it may not properly act to prevent those trade practices which merely are offensive to a suitable standard of business morality. *Northam Warren Corp. v. Federal Trade Commission,* 59 Fed. (2) 196 (C. C. A. 2).

But in this instance the concerted attempt was to prevent the sale of second-hand magazines where the new magazines of the petitioners were sold in competition with each other and the second-hand ones. It was shown that the business of selling second-hand magazines had been seriously curtailed by the agreement of the publishers and the action taken thereunder; and except for some unsupported argument that the public health was endangered by the sale of used magazines the action was plainly for the purpose of stifling competition. Certainly it is self-evident that an owner of second-hand magazines may of right sell them if he chooses as may the owner of any other property suitable for sale. One need only remember the large use made of what are really second-hand books and magazines in the libraries throughout the country to put aside as inconsequential the notion that the business is injurious to public health. The requirement that dealers must not sell second-hand magazines where the new ones are sold as a condition precedent to being allowed to obtain new magazines for sale from the petitioners has been shown unreasonable and unnecessary to protect any legitimate rights of the publishers and the order of the Commission under review should be affirmed since the facts which support it have been found on sufficient evidence. *Federal Trade Commission v. Winsted Hosiery Co.,* 258 U. S. 483; *Federal Trade Commission v. Pacific States Paper Trade Association,* 273 U. S. 52.

[*Refusal to sell to those selling coverless magazines held lawful*]

Another phase of the matter should be noticed, however. Much has been made in argument of a claim that the practice of accepting the return of covers only for credit or reimbursement has enabled unscrupulous dealers to sell as reading matter the coverless magazines for which they have paid nothing. Though the record does not lend much support to that claim,

possibly because the petitioners saw fit to introdce no evidence themselves, it is plain enough that such a practice is possible and, if it is indulged in, that it is one which the publishers have the right to prevent by all fair means. Whether the means used are fair or not depends upon the necessities of each case. It is no answer to the publishers that they may prevent the wrong by refusing to accept covers for credit. That is a reasonable method for them to adopt if they want to in conducting their business and they have the right to prevent the sale of the body of the magazines as reading matter whose covers they have taken, or agreed to take, back for credit or reimbursement. It is our understanding of the cease and desist order that it does not cover instances where the claimed abuse of selling coverless returns actually exists and the publishers are permitted to take concerted action to prevent the sale of their new magazines where coverless returns are sold. It may not be an unfair method of competition to take such action to prevent the sale of their new magazines where any coverless copies of them are sold in view of the likelihood that most coverless magazines will be coverless returns. Under the order made the publishers may do whatever is reasonably necessary to that end and that fully preserves their rights. We assume that the Commission will make its order more specific in this respect if cause therefor is shown.

[*Commission's order affirmed*]

Order affirmed.

[¶ 55,131] United States of America v. Joseph Lanza.

United States Circuit Court of Appeals for the Second Circuit. August 13, 1936.

Conviction of defendant for participation in a conspiracy to restrain and monopolize interstate trade in fresh water fish is affirmed upon the Court's review of the evidence tending to prove defendant's connection with the conspiracy.

Before: MANTON, SWAN and CHASE, Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York on a verdict of guilty after trial on an indictment in four counts charging the appellant and others with the violation of Sections 1 and 2 of the Sherman Anti-Trust Act (15 U. S. C. A. Secs. 1 and 2.). Affirmed.

John Dickinson, Assistant Attorney General. John Harlan Amen, Special Assistant to the Attorney General. Albert J. Law, Special Assistant to the Attorney General. Joseph A. Barrett, Special Assistant. Andrew Bennett, Special Assistant. John C. Herberg, Special Attorney.

Ceasar B. F. Barra, Attorney for Appellant. Ralph J. Barra, Nicholas P. Iannuzzi and Julius I. Puente, of Counsel.

[*Conviction of conspiracy to monopolize fish trade*]

CHASE, Circuit Judge: The appellant was convicted and sentenced together with other defendants tried at the same time and alone has appealed. The indictment, which superseded the original one, charged in the first count a conspiracy to restrain trade and commerce in fresh water fish among the several states; in the second count, a conspiracy to monopolize such trade and commerce in such fish; in the third, an attempt to monopolize such trade and commerce in such fish; and in the fourth, that they did monopolize such trade and commerce in such fish. The appellant was convicted on all the counts and was sentenced upon all.

[*Connection of defendant with conspiracy questioned*]

He has not attempted to question the sufficiency of the evidence to prove, as the jury found, that the unlawful conspiracy and monopoly existed. The evidence as to that is, indeed, so strong that to question it would have been futile. But the appellant does argue that there was no evidence connecting him with the unlawful acts shown on the part of others and that there was reversible error in the admission of evidence and in the opening statement of the prosecutor to the jury. So it will be necessary to outline the nature of the evidence upon which reliance is placed to sustain the verdict and judgment against the appellant.

[*Fish wholesalers' association formed*]

From it the jury was justified in believing that by far the greater part of the fresh water fish handled in the New York market is shipped there from states other than New York; that by 1932 the retail dealers had combined, after some trouble, what may be called their Brooklyn association with their Bronx and Upper Manhattan association into what became known as the Bronx, Upper Manhattan and Brooklyn Fish Dealers Association with one of the

defendants, Kiselik, acting as the so-called Impartial Chairman of the combined associations; that Kiselik was endeavoring to have the wholesale fresh fish dealers organize and cooperate with the retail dealers to extend the control of the business; and that to bring this about he arranged a meeting of the wholesalers at the Half Moon Hotel in Coney Island; that at this meeting the appellant, who was a delegate of the United Sea Food Workers Union, was present and sat with Kiselik at a table on the dais but did not address the meeting; that most of the wholesalers attended and were told of the organization of the retailers and urged by Kiselik and one O'Keefe to organize to remedy the market conditions in concert with the retailers; that a committee was appointed to try to work out a satisfactory plan for the division of profits on a percentage basis; that the report of this committee was received and discussed but not then adopted and that the meeting broke up without taking any definite action; that O'Keefe continued his efforts with individual wholesalers and in about two weeks had worked out a scheme for cooperation on a changed basis which seemed likely to be generally approved; that within four or five weeks he had formed another committee consisting of five wholesalers who agreed and that he then submitted his plan to the committee formed at the Half Moon Hotel; that the result was the formation of a profit-pooling association; the assignment of percentages to wholesalers; the formation of a representative committee to collect information as to supply, prices, bad debts, credits, and the elimination of duplication; that in carrying out the scheme, which was really one to monopolize the business, they used threats and violence, extortion, boycotts, levies upon dealers who were coerced into paying; picketing; made charges for opening new stores; created labor disturbances; and that they fixed prices and attempted to maintain them by threats and violence.

[*Meeting arranged by defendant*]

Aside from the presence of the defendant at the meeting at the Half Moon Hotel, his connection with the scheme was shown only by evidence in substance as follows: One of the large dealers, Booth Fisheries, had trouble with the organization. It was indebted to the Guaranty Trust Company and O'Neill of that bank undertook to look into the matter. He talked with a friend, Reardon, who knew the appellant and who told him that O'Neill had inquired about the Booth situation. Lanza said that he had nothing to do with it but that he would take him to the man who handled the fish end of the business and took him to Kiselik. Reardon asked Lanza and Kiselik if they would go to the Guaranty Trust Company with him to meet O'Neill and they assented and went. O'Neill and Kiselik talked over the difficulties which had beset the Booth Fisheries while Lanza either talked with Reardon a few feet away or listened to what was said. O'Neill explained that the Booth Fisheries Company was having trouble in New York and was informed that Booth had not cooperated. During the conversation, Heinrichs who had charge of the principal office of the Booth Fisheries Company in Chicago and who was trying to adjust the trouble that had arisen in New York, came in. O'Neill testified in part that after Heinrichs came into the room, "I explained that these men had represented that Booth was not behaving in a cooperative fashion and that I wanted him to sit down and find out if to any extent or in any way Booth was to blame and that the matter might be straightened out. He made some comment about it being too expensive to cooperate, and I commented that a credit and collection service should not be unduly expensive, even on the basis explained to me." This conversation led up to an arrangement later made whereby Booth paid the agreed fee and was allotted 12½ per cent of the fresh water fish business in New York.

[*Conduct of members of union which defendant represented*]

All of the hand-truckmen in the fresh water fish markets in New York belonged to the United Sea Food Workers Union of which the appellant was the delegate. There was evidence that these hand-truckmen refused to load fish for a retailer named Rosenwasser until he had seen Kiselik and promised to join the association. A retailer named Seif testified that he bought some fresh water fish in Philadelphia and then bought some salt water fish in New York. The salt water fish was loaded on his truck by the hand-truckmen but an hour or so later while his truck was still at the market where he bought the fish Kiselik came and asked him how he dared buy sweet water fish in Philadelphia. He replied that it was cheaper there and Kiselik then told him he couldn't buy salt water fish in New York. A few minutes later the hand-truckmen who had loaded his fish took it off his truck. There was other evidence of similar conduct by the hand-truckmen belonging to the appellant's union.

[*Payment to defendant*]

One Waldman, a retailer and speculator in the fresh water fish business, testified

that he opened a new place of business and that Kiselik asked him "if I see his friend Joe Socks" (a name shown to be one by which appellant was known) and when asked about that Kiselik told him he must pay $1000.00 for his friend Joe Socks "for the reason that Joe Socks needs the money." After consulting one Aaronson, Waldman satisfied this demand by paying Kiselik $500.00. At one time while Kiselik was talking with Waldman about the money the appellant stood "a couple of steps away" but said nothing. Later Waldman asked the appellant if he could get the $500.00 back but the witness couldn't remember the appellant's reply and the money was never returned to him. The witness also testified that they bought fish outside of New York several times and brought it to New York to sell. That Kiselik, the appellant and three others were present when a conversation was had with him about purchases outside New York and Kiselik "helped me straighten this thing out, and that I should buy fish in New York." The appellant was not present when the talk began and the witness couldn't remember whether he remained to the end or that he said anything.

[*Defendant's speech at meeting*]

After the original indictment in this cause some of those who were acting in concert under the arrangements they had made in regard to the fish business apparently became apprehensive and a meeting was called which was attended by 175 or 200 retail dealers. At this meeting the appellant was one of those who made speeches. The testimony of Sam Moskowitz appears in the record in part as follows:

"I recall the time the association started to break up and the members stopping their dues. That was after the original indictment was returned in this case. I attended a meeting at which Joe Lanza made a speech at that time. I was outside and the people told me there would be a meeting. Joe Lanza passed by and said, 'Moskowitz, come on, we are going up to a meeting.' I said, 'I will get rid of my fish buying, I will go up'. When I got there Lanza was there. The room was packed and a couple of hundred of people were there. Lanza was in front. I do not know who was with him. Manny Lippman, Jerome Kiselik and many people were there. Lanza said, 'We should keep on with this organization, and with the same officers, and with the same charge,' and that it would be better for the retailers, and that if we keep this organization the union would be on top of us, because the retailers are very poor, and they could not afford to pay union wages. I said at the meeting that it would be better to have our organization of retailers".

On cross-examination the witness testified;

"Jerome Kiselik was there. I spoke to him at that time upstairs in the room. He did not make a speech. I heard Joe Lanza say something. He spoke about Communists and about a different union, and if we did not have this organization, we would have a union, and that it was better to have the organization than to have a union. I could not remind myself what he said,—a Communist union or a plain workers' union. He spoke about a union and we would not be bothered by the wholesalers any more. I heard him speak for the retail fish dealers, a code of the N. R. A. in Washington. He said, 'If you break up this organization, if you have not his association, you will have a union on top of the retailers'."

[*Defendant held to be connected with conspiracy*]

From the foregoing partial summary of the evidence, it will be seen that the jury was justified in finding that the appellant knew of the unlawful combination in violation of the Sherman Anti-Trust Act as charged in the superseding indictment and was familiar with much that was done in furtherance of it. And that with such knowledge, he advocated the continuance of the organization by means of which the unlawful acts were done to carry out the plan. Though there was some evidence that he was only working toward the setting up of a code under the National Recovery Act, that was an explanation of his conduct which might or might not be accepted by the jury and it was not. We think the evidence in the record is ample to support the verdict and judgment.

[*Other grounds for reversal held insufficient*]

On cross-examination, Waldman was asked whether he testified at the former trial that the money he paid was going to the association. He replied, "Yes, I did, I was afraid to talk any further." Upon redirect examination an attempt was made to learn from him why he had been afraid but he was evasive. In response to questions by the court, he said that something was said to him; he didn't know who said it; they came into his store and told him not to talk. The court ordered the statement that they told him not to talk stricken out. He was asked if he saw anyone in the court room who talked to him and he testified that he did not. The appellant duly excepted, moved for a mistrial and now urges that the denial of the motion was reversible error. All that need be said, however, is that the questions were asked in an attempt to explain what was brought out in cross-examination and even that failed in so far as anything definite became a part of the record. The appellant was not prejudiced. See, *Sullivan v. United States,* 75 F. (2) 622; *Shipley et al. v. United States,* 281 Fed. 134; *Vandell v. United States,* 6 Fed. (2) 188.

Exception was taken to permitting O'Neill to testify that when he talked with Kiselik the appellant was apparently an interested listener and "took no exceptions to representations made by Kiselik." This was clearly admissible. It related to the conduct of the appellant at a conversation when he was present while the business of

the conspiracy was being discussed. That he remained silent was a part of what transpired. He had been approached about the matter in hand and had volunteered to get the man who was in charge. Having done that he remained to hear what that man said. Plainly Kiselik was speaking as the man the appellant himself had produced to discuss the matter with Reardon and, at Reardon's request, with O'Neill. Under those circumstances it was proper to treat his silence as indicative of his assurance that what Kiselik said was correct. At least, that was a fair inference to draw and that made it a proper subject for the consideration of the jury. See *Morris v. Norton,* 75 Fed. (2) 912; *Graham v. United States,* 15 Fed. (2) 740; *Bilokumsky v. Tod,* 253 U. S. 149.

One Lillie Eber was allowed to testify under exception that after she had opened a new retail store after the association had told her not to an unidentified truckman at the market unloaded her fish and took it away and she later went to the rooms of the association where she became a member and settled for $25.00, after $100.00 had been demanded. We can perceive no error in that. The cases relied upon by the appellant deal with hearsay statements but in this instance the truckman who removed the fish said nothing except to state the self-evident fact that the fish was gone. Likewise it was not error to permit the witness Kremen to testify that when the appellant made the speech already alluded to in connection with the testimony of Moscowitz he was making it "on behalf of the old organization." Though that was, indeed, the conclusion of the witness it was also the fact as the record well shows.

The prosecutor told the jury in an opening statement what the government expected to prove. It is now claimed that he overstepped the bounds of propriety in his zeal for conviction. No exception was taken to the statement when made and there seems to have been adequate reason at the time for believing that it would be substantially borne out by the proof as in fact it was for the most part. We think it fairly appears that the opening statement was made in good faith to inform the jury and the defense in a general way of the nature of the government's case and that it did not go beyond this legitimate end.

[*Conviction affirmed*]

Affirmed.

Manton, C. J. dissents without opinion.

[¶ 55,132] Emanuel Rolsky, Edwin S. Young, Charles E. Esterly, Frank T. Mountjoy, H. F. Pautz and H. C. Rohde, a copartnership; Abe and Rosa Baier, a copartnership; Saline Theatre Corporation, a corporation, and Ritz Amusement Corporation, Inc., a corporation, v. Fox Midwest Theatres, Inc., a corporation; Paramount Pictures Distributing Company, Inc., a corporation; Universal Film Exchanges, Inc., a corporation; Twentieth Century-Fox Film Corporation, a corporation; Metro-Goldwyn-Mayer Distributing Corporation, a corporation; Columbia Pictures Corporation, a corporation; RKO Distributing Corporation, a corporation; United Artists Corporation, a corporation, and Vitagraph, Inc., a corporation.

In the District Court of the United States for the western division of the western district of Missouri, at Kansas City. August 5, 1936.

A conspiracy under the Sherman Anti-Trust Act need not be proved by direct evidence. "But if from the facts and circumstances it is as reasonable to draw a conclusion consistent with innocence as one that imputes illegality, then the former must be adopted." The fact that several moving picture distributors inserted new clauses in their contracts with exhibitors, giving priority of showing to one theater, was held not to indicate concerted action on the part of the exhibitors, as it was more reasonable to conclude that the one theater had insisted upon such priority in its dealings with each defendant.

Transcript of Testimony of the Court's Statement. Findings of Fact, and Conclusions of Law

Be It Remembered, That on Friday, the 24th day of July, 1936, the above entitled cause came on regularly for hearing before the Honorable Merrill E. Otis, one of the District Judges;

The plaintiffs appeared by their attorneys, Messrs. William G. Boatright, Harry L. Jacobs and Daniel S. Millman.

The defendant, Fox Midwest Theatres, Inc., was represented by its attorneys, Messrs. Samuel W. Sawyer, Henry W. Fox and Horace F. Blackwell, Jr.

The producer and distributor defendants were represented by their attorneys, Senator A. L. Cooper, Mr. William E. Kemp and Mr. Edward C. Raftery.

Mr. Leland Hazard appearing as amicus curiae.

Whereupon, following the taking of testimony in said matter, and arguments of respective counsel, the Court made the following statement, findings of fact and conclusions of law:

The Court: We have been engaged in the trial of this case for a considerable period. It has taken longer to try the case than to try the average case—much longer. The case is an important one. But it does not follow that the case is difficult because it has taken long to try nor because it is important. Nothing would be gained, I think, by putting off the decision of the case until tomorrow or next week or next month. The issues of fact and law involved are simple. They can be decided as well now as at some other time.

[*Nature of case*]

The general nature of the case may be stated briefly. The plaintiffs are exhibitors of motion pictures in Kansas City. The defendants, excepting one of the defendants, are producers or distributors of motion picture films. It may be that not all of the defendants are producers. All of them, I think, excepting one, are distributors. One of the defendants, the Fox Midwest Theatres, Inc., is an exhibitor of motion pictures in Kansas City.

In the season 1935-36, contracts were entered into between the distributor defendants and the defendant, Fox Midwest Theatres, Inc., and the plaintiffs, which, in one respect at least, were of a type different than contracts which had been entered into between the distributor defendants on the one hand, and the Fox Midwest Theatres, and the plaintiff on the other hand, in the year preceding, and for that matter, in several preceding years.

The respect in which the contracts entered into in the year 1935-36 differed from the contracts in the preceding year was that the contracts for the year 1935-36 gave theatres charging the same admission price priorities over other theatres charging that admission price. That is to say, to illustrate, if there were a half dozen theatres charging a given admission price in a given area, the contracts for the 1935-36 season gave to one of them the right to exhibit a given picture in advance of the others.

[*Conspiracy charged*]

It is the contention of the plaintiffs,—a contention embodied in the bill which was filed by them in this case—that the contracts for the year 1935-1936 having this feature, which differed from the contracts of earlier years, resulted from an agreement or conspiracy between the distributor defendants, and that the effect of that agreement or conspiracy was to restrain trade and free competition in interstate commerce, in violation of the Sherman Anti-Trust Statute, and to the damage and injury of the plaintiffs. Such was the contention embodied in the bill which they filed, in which bill they asked an injunction against the defendants, restraining them from continuing to carry into effect the alleged unlawful and illegal contracts, and for other relief.

The allegations of the bill were denied in answers which were filed, one answer by the distributor defendants, and one answer by the defendant, Fox Midwest Theatres, Inc.

[*Issues raised*]

By the pleadings, these principal issues were raised:

First, were the contracts referred to in the bill and referred to in the evidence in this case contracts in interstate commerce; or to state that same thought somewhat differently; are they of such a character as that their effect is to restrain interstate commerce or to limit competition in interstate commerce?

The second principal issue raised by the pleadings is: did the defendants enter into the alleged agreement in restrain of trade and free competition?

1. If the case were one which was close, I should desire to give much more careful consideration than I have given to the first of these two issues. Since, however, I do not believe that the case is a close case upon the evidence, I prefer to pass that issue without deciding it, assuming for the sake of this case that the contracts referred to in the bill and in the evidence are in interstate commerce.

2. The remaining issue is: was there a conspiracy among the defendants; was there a concerted action upon the part of the defendants; did they enter into an agreement one with another? That issue I shall decide. It is upon that issue that all of the evidence has been offered—at least, almost all of the evidence received in the case has been offered as bearing upon that issue. The issue is a simple issue of fact.

While there is no compelling reason why the trier of facts should make an argument in support of the conclusion as to an issue of fact which is reached, and while I shall not make any argument in support of the conclusion I have reached, nevertheless, no harm will be done if something is said touching the reasoning by which the conclusion is reached.

[*Conspiracy need not be proved by direct evidence*]

Full recognition must be given to the undoubted truth, often referred to in the books, that conspiracy need not be proved by direct evidence. It is seldom possible

to establish an unlawful conspiracy by any direct proof of its existence. Men who conspire to do that which they have no right to do, to do an unlawful thing, do not conspire openly, in the presence of witnesses, nor do they set out their conspiracy in a writing which they sign, if they know it is an unlawful conspiracy. It is for such reasons that it is almost impossible to prove a conspiracy by direct testimony. It may be proved by facts and circumstances in either a criminal or a civil case.

[*Conclusion consistent with innocence preferred*]

The conspiracy charged here is of that character, one that, if it existed, might have been proved by facts and circumstances. But if from the facts and circumstances it is as reasonable to draw a conclusion consistent with innocence as one that imputes illegality, then the former must be adopted.

Now, the great fact to which learned counsel for the plaintiffs points in support of the theory of the bill is that a half dozen defendant distributors in a given year entered into contracts with the Fox Midwest Theatres, Inc., one of the defendants, and with other exhibitors in Kansas City, having a different feature than contracts theretofore entered into. That fact, so it is argued, the fact that suddenly, in a given year, contracts were entered into with this new and common feature—that fact suggests concerted action on the part of the distributor defendants. There is a great deal of force in that argument, and if there were nothing else in the case, nothing else in the evidence excepting that fact, it might be sufficient to support the conclusion that there was concerted action upon the part of the distributor defendants.

I think, however, the fact that these contracts were entered into in 1935-1936—contracts embodying this new feature, has been fully and satisfactorily explained, and that the explanation is such as that upon the whole case it cannot be determined that there was any concerted action between the distributor defendants, any agreement between them. The explanation given is that these contracts with this new feature, this common feature, were entered into in the 1935-1936, because the Fox Midwest Theatres, Inc., one of the defendants, was by far the most important local customer of the distributor defendants. Its business was worth more to them than the business of all of the plaintiffs. It demanded this new form of contract. It was to the pecuniary interest of each of the defendants to comply with that demand. Moreover, this type of contract was the type of contract entered into between distributors and exhibitors generally in the United States. It was regarded by all distributors as a type of contract more advantageous to them than the type of contract that the plaintiffs preferred.

Now, if we have, for example, three distributors, "A," "B," and "C," and two exhibitors, "X" and "Y," and the business of "X" is ten times as valuable to the distributors, "A," "B" and "C," as the business of "Y," and if "X" demands of "A," "B" and "C" a certain type of contract different from that which "Y" demands, and if the type of contract which "X" demands is the type which generally is used, and which generally is looked upon by distributors as more advantageous than the type that "Y" demands, if, with all of those facts and circumstances, "A," "B" and "C" do enter into contracts with exhibitors "X" and "Y" of the type which "X" demands, rather than of the type which "Y" demands, the explanation of that fact, the sensible explanation of it, the reasonable explanation, the plausible explanation of it is that they have done so because the more important customer has demanded it of each of them, because it is more advantageous to them from a pecuniary standpoint, rather than that they have entered into an agreement with each other that they will enter into that type of contract with exhibitor customers. The explanation which is consistent with innocence and with that which is lawful is so much more reasonable than the explanation which imputes illegality to the producers, that apart from any presumption in favor of lawful conduct, the first explanation should be accepted.

[*Held that there was no conspiracy*]

So, I have no difficulty in reaching the conclusion that there was no conspiracy between the distributor defendants, no concert of action between them or among them resulting in these contracts that were entered into by exhibitors in 1935-1936, and that, as I have said, is the principal issue which the case presents.

[*Restraint of trade charged*]

3. During the argument of the case, what I think was a new theory was advanced by learned counsel for the plaintiffs. I do not know that it was a theory that was new in his mind just at the time it was advanced by him. I do not think it was present in his mind when the bill was drawn. Certainly it is not clearly presented by the allegations contained in the bill although they may be sufficient to embrace it. That new theory is this: Even if no concert of action has been proved

against the distributor defendants, no conspiracy, nevertheless, it has been proved that each of the distributor defendants entered into a contract with the defendant, Fox Midwest Theatres, Inc., by which that defendant was given a priority of run as to pictures sold it over some, at least, of the plaintiff exhibitors. The theory is that a contract of that character violates the Sherman Anti-Trust Statute, provided it has the effect of restraining interstate commerce. I do not think the theory is sound.

[*Distributor may sell exclusive right under copyright*]

The evidence in the case is that moving picture films are copyrighted. When a given distributor sells or licenses a given picture to a given exhibitor it does that by virtue of the ownership of the copyright and of the rights conferred by law on him who owns a copyright. I think there cannot be any doubt whatever but that a distributor of motion pictures, owning a copyright upon a given picture, may sell to an exhibitor in a given area the exclusive right to exhibit that picture, either for a short period or for a long period, provided it is not longer than the life of the copyright, without regard to whether that exhibitor is one who charges the same or a different admission price from that which is charged by another exhibitor or other exhibitors in the same area.

[*Findings and conclusions*]

4. The rules require that specific findings of fact shall be made in a case of this character. Requested findings have been presented to me by the defendants, one group by the distributor defendants, and one group by the defendant, Fox Midwest Theatres, Inc. Findings of fact requested by the distributor defendants, excepting Finding of Fact No. 1, are adopted by the Court as the Court's findings of fact.

The findings of fact requested by the defendant, Fox Midwest Theatres, Inc., excepting requested Finding of Fact No. 1 and requested Finding of Fact No. 16, are adopted by the Court, as the Court's findings of facts.

The conclusions of law requested by the distributor defendants, excepting requested Conclusion of Law No. 4, are adopted by the Court as the Court's conclusions of law.

The conclusions of law requested by the defendant, Fox Midwest Theatres, Inc., excepting requested Conclusion of Law No. 12, are adopted by the Court, as the Court's conclusions of law.

To each of the conclusions of law thus adopted by the Court, the plaintiffs are allowed an exception.

(Which said findings of fact and conclusions of law, so offered by the distributor defendants, over the objection and exception of the plaintiffs—excepting findings of fact I and conclusion of law IV—are in words and figures as follows:

(Which said findings of fact and conclusions of law, so offered by defendant, Fox Midwest Theatres, Inc., over the objection and exception of the plaintiffs—excepting finding of fact I and XVI, and conclusion of law XII—are in words and figures as follows:)

The plaintiffs have requested findings of fact Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14. While much that is embodied in those requested findings is fully supported by the evidence, the Court declines to make the findings as requested, and allows exceptions to the plaintiffs. The reason for the action of the Court, in this regard, in declining to make these findings, is that the findings made by the Court fully cover the issues involved in the case.

(Which said findings of fact numbered 1 to 14, both inclusive, and each of them, so offered by the plaintiffs, and refused by the Court, over the objection and exception of the plaintiffs, are in words and figures as follows:)

[*Bill dismissed*]

Plaintiffs' bills should be dismissed.

Counsel for defendants will prepare and submit to the Court for approval and entry an appropriate decree.

The Court will stand at recess until 9:30 o'clock tomorrow morning.

AND the foregoing are all of the proceedings had in the trial of said case.

[¶ 55,133] People of the State of California v. J. Kahn.

Appellate Department of the Superior Court, County of Los Angeles, State of California. August 28, 1936.

Section 3 of the California Unfair Practices Act, prohibiting sales below cost for the purpose of injuring competitors and destroying competition, is held constitutional, and a conviction thereunder is affirmed.

Appeal by defendant from the judgment of the Justice's Court of San Fernando Township, County of Los Angeles, H. A. Decker, Judge of conviction of violation of Section 3, Chapter 477, Statutes of 1935. Affirmed.

For Appellant—H. S. Shapiro, Esq. and A. L. Oster, Esq.

For Respondent—Buron Fitts, District Attorney, A. H. Van Cott, Deputy District Attorney.

Ami Curiae for Respondent—Ray L. Chesebro, City Attorney, Newton J. Kendall, Assistant City Attorney, John L. Bland, Deputy City Attorney, and Cupp & Cupp. Esqs.

EDWARD T. BISHOP, Judge. — Appellant was convicted, by his plea of guilty, of selling a six pound can of Crisco at less than cost for the purpose of injuring his competitors and destroying competition. From the judgment fining him \$500.00 and imposing a six months' term of imprisonment (suspended), he has appealed, contending that the provisions of the statute passed to make his act a public offense (Section 3, Unfair Practices Act, Stats. 1935, p. 1546) are unconstitutional.

With this contention we do not agree; we are of the opinion that the judgment should be affirmed.

[*Sales below cost not always unlawful*]

Section 3 of the Unfair Practices Act reads as follows: [Not reproduced herein.]

The giving away of articles or service is not made unlawful, it plainly appears, unless done for the purpose of injuring competition and destroying competition. It is not so clear that this purpose must be present in order that the act of selling below cost be a public offense. The absence of a comma after the second appearance of the words "service trade" clearly links the purpose to the act of giving away, but makes possible the argument that the purpose has no relation to selling below cost. It is our opinion, however, that selling below cost is not made a public offense except where it is done for the purpose that is, with the specific intent, of injuring competitors and destroying competition.

Several rules of construction unite in leading us to this conclusion. The first is enunciated in *Porto Rico Ry. &c Co. v. Mor* (1920) 253 U. S. 345, 64 L. Ed. 944, where the omission of a comma between the qualifying clause was applicable only to the nearest group of words and not to those first appearing and separated from those later used by a comma. In answer to the argument the Supreme Court stated:

"When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."

The phrase "for the purpose of injuring competitors and destroying competition" is as applicable to the words dealing with selling below cost as it is to those having to do with making gifts. An even stronger case, considering this same problem of statutory construction, and arriving at the same conclusion, is *Hillsboro Coal Co. v. Knotts* (1920) 273 F. 221.

Our statement that the phrase quoted is applicable to both sales and gifts becomes clear when we consider the next rule of construction which is expressed in 23 Cal. Jur. 764 and quoted in *In re Sekuguchi* (1932) 123 Cal. App. 537, 8, 11 P. (2d) 655;

"Every statute and code section should be construed with reference to its purpose and the objects intended to be accomplished by it. The language will be so interpreted, if possible, as to aid the design and intent of the legislature and to effectuate the evident objects and purposes of the law."

As appears throughout the statute spread before us, the legislature was not solicitous lest some one in business lessen his profits by selling below cost or by giving away his substance. It is implicit throughout the act that the concern of the legislature is that which it explicitly stated in section 13:

"The Legislature declares that the purpose of this act is to safeguard the public against the creation or perpetration of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be literally (sic) construed that its beneficial purposes may be subserved."

We reiterate, therefore, that the legislature intended to declare and has declared that selling below cost is a misdemeanor only when accomplished for the purpose of destroying competition and injuring one's competitors.

Furthermore, insofar as this interpretation, which as we have seen is a reasonable one, aids in presenting a statute not in conflict with either the state or federal constitution, it is to be adopted rather than a construction which would result in the existence of an unconstitutional enactment. See the plethora of cases cited in 5 Cal. Jur. 615. As we test the statute, therefore, to see if it runs afoul of any of the constitutional objections made, we shall read it as prohibiting selling below cost only when done to injure competitors and to destroy competition. We shall also keep in mind section 6 of the act, which makes these exceptions; [Not reproduced herein.]

[*Court not to determine wisdom of law*]

Our province in attacking the problems presented by this appeal is clearly marked. Answers to such questions as: Is unlimited competition best for the public welfare? Should competition be regulated by the state? Should monopolies be fostered? are for the legislature and not the courts to give. When, the legislature having made answer by the enactment of a statute, the rights of individuals are presented to the courts for adjudication, based on that statute, its validity is not to be tested by the court's idea of the wisdom or folly of its provisions, nor is it to be declared invalid because contrary to the law of supply and demand or any other economic law. The statute, embodying the legislature's judgment, is presumed valid and is to be given full effect unless it is plainly in conflict with a provision of the state or of the federal constitution. These, in our present system of government, are still supreme.

[*Prevention of unfair competition within police power*]

We have no hesitancy in holding that, generically, legislation prohibiting unfair competition and preventing acts which stifle competition, is well within the sur-

veyed limits of the police power. The recent case of *Max Factor & Co. v. Kunsman* (1936) 91 Cal. Dec. 345, 55 P. (2d) 177, sets the question at rest so far as the courts of this state are concerned. The stamp of approval of the United States Supreme Court may be found in *Central Lumber Co. v. State* (1912) 226 U. S. 157, 57 L. Ed. 165. See also *State v. Central Lumber Co.* (1909) 24 S. D. 136, 123 N. W. 504, 42 L. R. A. (N. S.) *State v. Fairmont Creamery Co.* (1911) 153 Iowa, 133 N. W. 895, 42 L. R. A. (N. S.) 821, *Sears, Roebuck & Co. v. Federal Trade Commission* (1919) 258 Fed. 307. In *Nebbia v. New York*, (1933) 291 U. S. 502, 526, 78 L. Ed. 940, 950, the statement appears:

> "Laws passed . . . to secure fair trade practices . . . have been found consistent with due process."

Later we find (p. 529 or 953),

> "Legislation concerning sales of goods, and incidentally affecting prices, has repeatedly been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those exacted in another, by giving trade inducements to purchasers, and by other forms of price discrimination."

Nor do we entertain any serious doubt that, in its endeavor to protect the public from the evil effects of unfair trade practices, the legislature's determination that sales below cost as here prohibited constitute an economic evil which should be curbed, is a conclusion which we may not question if we would. See cases *supra*, and *Economic Gas Co. v. Los Angeles* (1914) 168 Cal. 448. We certainly do not recognize the constitutional right of any man to sell his goods without profit to himself for the purpose of injuring his neighbor.

[*Difficulty of ascertaining "cost"*]

Appelant's remaining attack upon the statutory provisions, without which his conviction would have no foundation, is that the "cost" below which he is forbidden to sell, is left so uncertain that one cannot tell where the legislature has drawn the line between that which is lawful and that which is unlawful. It must be conceded that in many cases it is going to be extremely difficult to determine what the cost of an article is. We are of the opinion, however, that the difficulty will be a factual one, that of discovering the cost, as a truth, and not a legal one, that of discovering what the legislature meant by the term. A statute is, of course, not to be declared invalid because of any difficulty that may arise in applying its provisions. *Hygrade Provision Co. v. Sherman* (1925) 266 U. S. 497, 69 L. Ed. 402.

As stated in *Pacific Coast Dairy v. Police Court* (1932) 214 Cal. 668, 8 P. (2d) 140,

> "'A tatute cannot be held void for uncertainty if any reasonable and practical construction can be given to its language. Mere difficulty in ascertaining its meaning, or the fact that it is susceptible of different interprefations will not render it nugatory. Doubts as to its construction will not justify us in disregarding it' . . . But in determining whether a penal statute is sufficiently explicit to inform those who are subject to it what is required of them the courts must endeavor, if possible, to view the statute from the standpoint of the reasonable man who might be subject to its terms. Thus, when a statute employs words or phrases having a well-settled common law (sic) meaning of which a reasonable man in the ordinary conduct of his affairs is fully aware it is not for the court to determine that the statute is ambiguous or indefinite because through a strained construction of these words and phrases some ambiguity might arise."

In the absence of any further definition, the prohibition of the statute against selling below cost might well be interpreted as meaning below the cost of acquiring as distinguished from the combined cost of acquiring and selling. The legislative intent is rather fully expressed, however, that the "cost" of each article shall include not only the initial cost, but also its share of the load of carrying on the business through which it is sold. True, the legislature has not said "its share," but these words are necessarily understood from the language used, and would be so understood by anybody in business. Any other interpretation would be to convict the legislature of the folly of defining the cost of the can of Crisco, involved in this case, as including all the costs of running appellant's business, which costs likewise would be added into the cost of every other article he sold. Even in the face of the legislature's injunction to construe this statute "literally," we must not accept an interpretation so ludicrous and unnatural. 23 Cal. Jur. 766.

In support of the validity of the statute we must presume that the legislature was not without justification in concluding that it was using terms with a reasonably definite meaning to those affected, when it fixed the cost of an article, including its share of the business overhead, as the minimum price at which it could legally be sold. There is nothing in the record to indicate that the ordinary business man does not know, when he has the facts at hand, whether he is selling an article, or service, below cost, or at a profit. We certainly do not take judicial notice that business is carried on with the terms here involved conveying uncertain concepts. The legislature evinced its understanding that "costs" had an accepted meaning by its statement in section 5 of the statute before us that,

> "Where a particular trade or industry, of which the person, firm or corporation complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, the said cost survey shall be deemed competent

evidence to be used in proving the costs of the person, firm or corporation complained against within the provisions of this act."

We further note an article on "cost accounting" in Encyclopaedia Britannica (Vol. 6, 14th Ed.) from which it appears that while there may be several routes to the answer, the answer to the question "What is the retail cost of an article?" is one recognized by the business world when attained.

Further support for our conclusion that the provisions in question are not so uncertain that their enforcement will constitute taking property and liberty without due process, is found in the fact that there is . . . woven into the offense, as an essential element of it, an intent to injure competitors and destroy competition. As pointed out in *Hygrade Provision Co. v. Sherman, supra,* and *Hillsboro Coal Co. v. Knotts, supra,* the requirement of an intent tends to lessen the disadvantages that arise from creating an offense whose boundaries are not too plainly limned. We are of the opinion that the statute does not offend against the due process requirements of the constitution.

[*Conviction affirmed*]

Because of appellant's plea of guilty, we have no problem here, as we doubtless shall have in later cases, of the sufficiency of the evidence to support the conviction. Nor do we find any further problem justifying discussion. We are of the opinion that the judgment should be affirmed; it is so ordered.

We concur: HARTLEY SHAW, Presiding Judge; B. REY SCHAUER, Judge.

[¶ 55,134] Federal Trade Commission v. American Army and Navy Stores, Inc.

United States Court of Appeals for the District of Columbia. Filed August 24, 1936.

An order of the Federal Trade Commission is affirmed, prohibiting use of the words "Army" or "Navy" in the corporate name of respondent, or in connection with merchandise in advertising, unless the words be used specifically in connection and conjunction with particular merchandise actually procured from the Army or Navy Department of the United States Government.

Affirming Federal Trade Commission Complaint No. 2284.

Decree

[*Application for enforcement of FTC order*]

The Federal Trade Commission, Petitioner herein, having filed with this Court on, to wit, July 22, 1936, its application for the enforcement of an order to cease and desist issued by it against the Respondent, under date of November 26, 1935, under the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes" (38 Stat. 719, 15 U. S. C. A. Sec. 45); and said Petitioner, having also certified and filed herein, as required by law, a transcript of the entire record in the proceeding lately pending before it, in which said order to cease and desist was entered, including all the testimony taken and the report of said Petitioner; and Respondent having subsequently filed its answer to said application for enforcement, in which answer Respondent stated it was not willing to contest said application for enforcement or the proceedings based thereon, and in which answer said Respondent consented that this Court might, upon said application and Respondent's answer thereto, and upon the pleadings, testimony, and proceedings set forth in the transcript aforesaid, make and

enter its decree affirming said order to cease and desist and commanding Respondent to comply therewith—

[*FTC order affirmed*]

Now, therefore, it is hereby ordered, adjudged and decreed, that said order to cease and desist, issued by the Federal Trade Commission, Petitioner herein, under date of November 26, 1935, be and the same hereby is affirmed.

[*Use of words "Army" and "Navy" prohibited*]

And it is hereby further ordered, adjudged and decreed, that the respondent, American Army and Navy Stores, Inc., in connection with the conduct of its mercantile establishment within the District of Columbia, do cease and desist from:

(1) Using in connection with its corporate name the words "Army and Navy" or either of them.

(2) Advertising or causing to be advertised in any circulars, trade journals, daily newspapers, or other periodicals, the words "Army and Navy" or either of them, descriptive of or in connection with any merchandise to be sold or offered for sale to the public, unless in fact the words "Army and Navy" be used specifically in connection and conjunction with particular merchandise actually procured from the Army or Navy Department of the United States Government.

[*Compliance report required*]

And it is hereby further ordered, adjudged and decreed, that the Respondent, American Army and Navy Stores, Inc., shall, within thirty (30) days after the service upon it of a copy of this decree, file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which it has complied with this decree.

By the Court: GEO. E. MARTIN, Justice of the United States Court of Appeals for the District of Columbia.

I hereby consent to the entry of the above decree: American Army and Navy Stores, Inc., by Jacob Schwartz, President.

[¶ 55,135] Foster and Kleiser Company (a corporation) v. Special Site Sign Company (a corporation).

United States Circuit Court of Appeals for the Ninth Circuit. September 22, 1936.

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

In a suit for treble damages under the Sherman Anti-Trust Act for injuries caused by a conspiracy in restraint of trade, the Court holds that a business is not interstate in character when it makes use of materials manufactured in other states, when there is a pause between the manufacture and the transportation and again between the transportation and the use by the defendant business.

In a civil action for damages under the Sherman Anti-Trust Act, the right of recovery is held not to be based upon the conspiracy but upon the injuries resulting therefrom. The cause of action arises when the damage is sustained and the statute of limitations begins to run at that time. A plaintiff may recover only such damages as have been sustained within the applicable period of limitations immediately preceding the filing of the action.

In the absence of an allegation of the causal connection between the damage and the conspiracy to restrict interstate commerce, no cause of action is stated under the Sherman Act.

Before: WILBUR, MATHEWS and HANEY, Circuit Judges.

[*Counsel*]

Morrison, Hohfeld, Foerster, Shuman & Clark and Herbert W. Clark, both of San Francisco, Calif., and Gibson, Dunn & Crutcher, and Norman S. Sterry, both of Los Angeles, Calif., (J. Hart Clinton and Boice Gross, both of San Francisco, Calif., of Counsel), for appellant.

H. W. Glensor, of San Francisco, Calif., Charles W. Cradick and George K. French, both of Los Angeles, Calif., and Roy E. Jackson, of Seattle, Wash., for appellee.

[*Conspiracy to monopolize charged*]

WILBUR, Circuit Judge: This action was brought by the appellee-plaintiff to recover damages under the Sherman Anti-trust

Act of July 2, 1890 (c. 647, 26 Stat. 210, 15 USCA, Sec. 15), because of an alleged conspiracy on the part of the appellant-defendant corporation to secure and maintain a monopoly of the outdoor advertising business in the Pacific Coast states.

[*Business of defendants held local*]

The business of both parties is that of placing advertising matter upon billboards located in various places in the Pacific Coast states. They sell advertising space upon these billboards owned and maintained by them and paste lithographs, or advertising matter, thereon, or paint the advertisement thereon, as the case may be.

The business is essentially local in character. The posted bills remain as posted according to the terms of the contract under which the advertising display is made. In order to bring the conduct of the parties within the jurisdiction of Congress and within the terms of the Sherman Anti-trust Act, which forbids conspiracies having for their purpose the restraint of interstate commerce or the securing of monopolies therein which affect the conduct of such interstate business, it is alleged in the complaint that in the bill posting business of the appellant large quantities of material used in the construction of the billboards, as well as the posters used thereon, are moved from state to state. Thus, it is contended that if Foster and Kleiser ship nails, boards, posters, or other material from one state to another for the purpose of erecting billboards, this constitutes interstate commerce. But as the appellant merely ships this material from one of its agents to another it could scarcely be contended that it had conspired to restrict its own activities in such interstate commerce, and the effect of such shipments may clearly be disregarded in considering the right of the appellee for damages for the alleged misconduct of the appellant.

It is also alleged in the complaint that the posters and lithographs used upon the billboards are an essential part of the outdoor advertising business and that these posters and lithographs are manufactured in other states, particularly in Kentucky and Ohio, and transported from the place of manufacture to the billboards upon which they are to be displayed, and the appellee particularly relies upon the alleged restriction of this transportation of posters in interstate commerce as a violation of the Sherman Anti-trust Act by which it has been damaged. It seeks to recover damages because its interstate commerce in posters and stencils was unlawfully restricted. In support of this proposition the appellee alleges that the posting of bills or posters usually involves an advertiser, a lithographer and a billposter; that the advertiser secures the poster from the lithographer and makes his contract with the bill poster for the displaying of these posters upon its billboards; that the posters are shipped to the billposter, either by the advertiser, or at his direction, by the lithographer; that lithographers print large numbers of posters as sample posters, or stock posters, for sale to the smaller advertising concerns whose business does not justify the preparation of special lithographs; that these posters are purchased by billposters and advertisers throughout the United States and that these lithographs so purchased are moved in interstate commerce; that when an advertiser contracts for billposting in a particular city or town, such work is known to the trade as local work, while if he contracts with billposters in various localities in the same or different states such work is known as national work.

It will be observed that these allegations are entirely consistent with the idea that the appellant billposting concern, aside from its shipments to its various branches had nothing to do with the shipment of posters or their movement in interstate commerce, but received such posters either from the advertiser or the lithographer and displayed the same in accordance with contracts made with the advertiser so to do. An examination of the allegations concerning the methods alleged to have been adopted by the appellant to obtain the monopoly charged indicate that these methods almost entirely relate to the securing of advertising sites, that is, locations for billboards, and with the alleged interference by the appellants with the appellee in its effort to secure and retain such advertising sites. So far as the competition between the parties to this action relates to the securing or retaining of leases for the erection and maintenance of billboards, it is clear that the operations referred to are local and beyond the power of regulation by Congress. (*Carter v. Carter Coal Company,* 56 S. Ct. 855, decided May 18, 1936; *Schechter v. United States,* 295 U. S. 495. Such local operations, not constituting interstate commerce are expressly excluded by Congress from the operation of the Sherman Anti-trust Act, which by its terms relates only to conspiracies and monopolies in restraint of interstate commerce.

The appellant contends that the complaint does not state a cause of action because of the failure to make any substantial showing that the appellant has interfered with interstate commerce or to disclose any damages resulting to the ap-

pellee by reason of its interference with interstate commerce. In making this claim appellant asks us to ignore specific allegations by appellee that its interstate commerce and trade was interfered with by appellant, upon the ground that such allegations are mere conclusions of law, and claims that if such allegations of the complaint are ignored, as they should be, without them the allegations of fact in the complaint are insufficient to allege any cause of action under the Sherman Antitrust Act. The general allegation of interference with interstate commerce is a conclusion of law and is controlled by the specific allegation of facts, as to the nature of the appellant's business. We will further consider this question later in the opinion.

Although, as appellant contends, this question arises upon the allegations of the complaint, it arises more sharply with reference to the instructions given and refused by the trial judge upon the subject of what constitutes interstate commerce.

We will first consider the assignments of error relating to that subject, for if a new trial is ordered because of errors in instructing the jury in the progress of the case, then on the new trial, leave should be granted to amend the complaint to state a cause of action if it can be done, based upon interference with interstate commerce, for as has been specifically held by the Supreme Court, interstate trade in posters to be based upon billboards comes within the protective provisions of the Sherman Anti-trust Act and justifies an action for damages by anyone injured by reason of such a violation of that act. (*Ramsay v. Bill Posters Ass'n.*, 260 U. S. 501.)

The appellant contended throughout the trial that the billposting business was essentially local and that interference with the leases of the appellee and with the procurement of leases, and with the display upon billboards upon such leased premises, was purely an interference with intrastate business, and therefore not subject to control by Congress and that such damage as resulted from the acts of appellant in connection with the leases procured or sought to be procured by the appellee was not the result of an interference with interstate trade. This contention was clearly correct. It requested the court to give instructions upon that subject, Nos. 6, 9-a, 10 and 13, set out in the foot-note No. 1. The appellant reserved exceptions to the refusal of these instructions and also excepted to those given by the trial judge, among

Foot-note No. 1: "6. In this action, plaintiff charges that the defendants have monopolized, and attempted to monopolize, and are now monopolizing, interstate trade and commerce in outdoor advertising in the manner and by the means alleged in said complaint, and have engaged in a conspiracy and combination to place unlawful restraints upon trade and commerce in posters and lithographs between the several states. This charge is the basis upon which plaintiff seeks to recover. It is denied by the defendants. Before the plaintiff can recover, it must prove by a preponderance of all the evidence that the defendants were guilty of the said charge, or at least of some portion thereof. The court charges you that the business of outdoor advertising as conducted by either plaintiff or Foster and Kleiser Company, is not in and of itself interstate trade or commerce within the meaning or purview of the United States anti-trust laws. The posting or display of posters or lithographs by either plaintiff or defendant, Foster and Kleiser Company, is not a part, element or act of interstate trade or commerce nor does it become a part, element or act of interstate trade or commerce merely because the defendant, Foster and Kleiser Company, had advertising structures in several different states upon which it posted or displayed the same posters or lithographs, nor does such posting or display of posters or lithographs become interstate trade or commerce by reason of the fact that a large portion of the advertisements posted or displayed are of goods that are sold or shipped in interstate trade or commerce. Hence, a monopoly or an attempt to monopolize the business of outdoor advertising as such in one or more of the several states of the Pacific Coast area would not in and of itself be a breach of the anti-trust laws, or give a right of action to the plaintiff. Before the plaintiff can maintain this action it must show either an actual monopoly or a conspiracy by the defendant, Foster and Kleiser Company to monopolize or attempt to monopolize interstate trade or commerce between two or more of the several states.

"9-a. The court charges you that the term 'interstate trade or commerce in outdoor advertising' as used throughout these instructions means the shipment from one state into another state or states of posters or lithographs, for posting or display in the state or states into which such posters or lithographs are shipped. The act of an outdoor advertiser, after receiving such shipment of posters or lithographs, in posting or displaying them would not be an act of interstate commerce; the only part, act or element of interstate trade or commerce connected with outdoor advertising upon the Pacific Coast is, as stated, the shipment from one state into another state or states of posters or lithographs to be posted or displayed in the state or states into which such advertising matter is shipped.

"10. Before any act or acts of the defendants, or either of them, can form or give a basis for or a right of recovery, it must be shown by a preponderance of all of the evidence that such act or acts of defendants, or either of them, must have directly and unreasonably restrained interstate shipments of posters or lithographs; a mere incidental, indirect or remote effect upon or restraint of such shipments of posters or lithographs from one state into another state or states for posting and display in the state or states into which such posters or lithographs are shipped, would not give a basis for a right of recovery herein.

"13. The pleadings and the evidence show that a very large part of the business of outdoor advertising does not involve any element of interstate trade or commerce. The court charges you that the plaintiff cannot base any right of recovery against the defendants, or either of them, because of any monopoly of or conspiracy to acquire a monopoly in outdoor advertising which did not involve an element of interstate trade or commerce or which did not unreasonably restrain interstate trade or commerce in shipment of posters or lithographs."

others, Nos. 9 and 11, shown in foot-note No. 2.

[*Instructions to jury re interstate commerce*]

By the 11th instruction the jury was informed that if the business of Foster and Kleiser "required as an indispensable element the transportation of goods and materials, or the transmission of orders across state lines, then you will be justified in finding that the business in which the defendant Foster & Kleiser Company is engaged was interstate in character. The term 'commerce' comprehends more than the mere interchange of goods. It embraces intercourse in all its branches." It will be observed that in view of the fact that the business of Foster and Kleiser was conducted in several states, and that some materials for billboards were shipped from state to state and that orders from the headquarters of the appellant were transmitted to its agencies in other states, it follows that by this instruction the jury were in effect instructed that the Foster and Kleiser Company was engaged in interstate commerce.

During the exceptions to the instructions reserved by the appellant, the court interjected another instruction to the jury regarding the question of interstate commerce, as follows:

"The Court. You will pause right there. I think this, perhaps, may pertinently be said to the jury: That regardless of the type of business Foster & Kleiser was engaged in, the business that must have been restrained or monopolized, within the meaning of and as explained to you in the charge, must have been interstate commerce. That, I think, will set the matter clear."

After the jury retired it returned into court with a request for additional instructions. At this time the court instructed it as follows:

"The Court. I have a communication from the foreman of the jury to this effect: May we have that portion of your instructions to the jury which relate to the general subject of interstate commerce, restraint of trade, monopoly or attempt to monopolize and possible damages? Does the commission of one or more overt acts, as alleged in the complaint, justify finding against the defendants?

"This seems to call for an instruction on interstate commerce.

"Now, I will read again the law, start with that, the instruction containing the law, under which this action is brought. I think I will follow my original intention and refer to the section of the law itself. It is this:

" 'Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade and commerce among the several states or with foreign nations is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be guilty of a misdemeanor' and shall be dealt with in a certain way.

Foot-note No. 2: "9. In reaching a conclusion in this case you must first determine whether or not the business in which Foster & Kleiser Company is engaged and which it is charged that the defendants have monopolized or attempted to monopolize, or conspired to restrain, is in fact interstate commerce.

"If you decide that it is, you will next determine whether or not the defendants have committed any of the acts charged as violations of the anti-trust laws with relation to the same as those acts are described in plaintiff's complaint.

"If you find this to be the case you will next find whether or not the plaintiff was injured in its business or property by such violations.

"Then if you find such injury to have taken place, you will ascertain the amount of it and award to the plaintiff such sum as will reasonably compensate it for the damage so sustained.

"In all of the questions mentioned your finding must be in accordance with the preponderance of the evidence, and unless you resolve all of the first three inquiries mentioned in favor of the plaintiff your verdict must be for the defendant.

"11. You are instructed that the commerce or trade which may be interstate is not confined to the carriage of goods only but means intercourse of any kind carried on across state lines. *If you find from the evidence in this case that a necessary feature of the outdoor advertising business, contemplated, involved and required as an indispensable element the transportation of goods or materials, or the transmission of orders across state lines, then you will be justified in finding that the business in which the* defendant Foster & Kleiser Company is engaged was interstate in character. The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches.

"It has been testified to in this case on behalf of plaintiff that the business of the defendant Foster & Kleiser Company was the posting upon their structures of lithographs, posters, prints, practically all of which were manufactured outside of the state of California; that at the time of manufacture it was the design of the manufacturer that the same would be transported to the various states of the Union where they were used for the purpose of public and outdoor advertising; that it was the intention of those purchasing the same or the agencies that shipped such commodities across state lines that the same would be displayed by agencies in the same business as that of the defendant Foster & Kleiser Company. If you find from the evidence in the case that the display upon the billboards of the defendant was a necessary part of the business described and was contemplated at the time that the goods were manufactured and shipped into the state, then you are justified in concluding that the business of Foster & Kleiser Company was interstate in character.

"The mere placing of advertising matter upon sign boards without the presence of the other features mentioned, would not in and of itself constitute interstate commerce.

"Before any act or acts of the defendants, or either of them, can form or give a basis for a right to recovery it must be shown by a preponderance of all of the evidence that such act or acts, or either of them, must have unreasonably restrained interstate commerce in the business of outdoor advertising, or has had the effect of monopolizing or attempting to monopolize the same.

"Various acts are charged against defendants by the plaintiffs such as acquiring the business of its competitors in various places, unlawfully depriving the plaintiff in the action of its sites, securing sites not reasonably necessary for its growth, building obscuring structures on its own property for the purpose of obscuring the signs of the plaintiff, paying more for advertising sites than they were reasonably worth and many other acts. You are instructed that before any of such acts can form the basis of a verdict against defendants you must find that the effect of such must have been unlawfully to restrain interstate commerce in the business of outdoor advertising as the same as heretofore been defined to you, or of monopolizing or attempting to monopolize the same."

"You will observe, gentlemen, that the statute does not define 'restraint of trade.' It does not say what it is. That has been passed upon by the courts and I might say, generally, that it means not something merely slight or merely incidental, but something direct in the way of trade.

"Section 2 of the Act treats of monopolies. 'Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of a misdemeanor.' Meaning, of course, interstate commerce; it must be interstate commerce always. The statutes does not say precisely what interstate commerce is.

"Now, with reference to that I have attempted to speak in a way or to give you what I deem to be the important distinguishing mark of interstate commerce. It means that there is some element in the business—some necessary element, some essential element, some essential part of it without which it cannot be carried on—that involves and requires the transportation across state lines of some materials.

"If, now—and I use this illustration—you find that it is an essential part of this business of outdoor advertising that lithographs are made outside of the state wherein they are used and from there transported to the place where they are used, and that was the original design and plan and the parties connected with it intended that that should be done, then you are justified in finding that that is interstate commerce. That is as nearly the test as I think I can readily give to you.

"Cases have been before the courts involving the shipment of wheat, and wheat that comes from another state, of course that is interstate commerce if it crosses state lines. But there are so many variations to it that sometimes the cases will get into the courts. And even though wheat is within the state where it is raised, if the intention is to send it to a place outside of the state and it starts on that journey, then it is in interstate commerce within the state where it is raised because the element of the transportation across state lines is involved and is the necessary part of the transaction, deal, business, or whatever it may be.

"I will read again the instruction: You are instructed that the commerce or trade which may be interstate is not confined to the carriage of goods only but means intercourse of any kind carried on across state lines. If you find from the evidence in this case that a necessary feature of the business of the Foster & Kleiser Company, being the outdoor advertising business, contemplated, involved and required as an indispensable element the transportation of goods or materials, or the transmission of orders across state lines, then you will be justified in finding that the business in which the defendant Foster & Kleiser Company is engaged was interstate in character. The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches.

"I will not repeat the remainder of that because that was, I think, just repeated in another form to you.

"Now, with respect to monopoly, I read to you Section 2 of the United States Code which covers that subject: 'Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part *of the trade or commerce among the several states or with foreign nations shall be deemed guilty of a misdemeanor,' etc., and possibly to damages.*

"A Juror. Your Honor, may I ask you one question?

"The Court. Yes.

"The Juror. Will you define the word 'orders' as used there?

"The Court. The word 'orders'?

"The Juror. 'Orders.'

"The Court. Did I understand you to say 'orders,' o-r-d-e-r-s? Is that the word that is used? I think I did. 'The transmission of orders across state lines'; in other words, that means property purchased by 'orders' from outside of the state. I would not think, however, that merely because things were ordered it would be—although there are two decisions to support that—that you would be justified in finding from that fact alone that it was interstate commerce. The criterion, to my mind, being, as I have tried to explain to you, that if it was contemplated in order to carry on the business that these lithographs, posters, or whatnot, be transported across state lines and they were a necessary part of the business, then the business was interstate commerce.'

"I can say that evidently that was the way in which it was held, according to the Mack decree, because you will remember that the Mack decree started out and said 'The doing of any of these things shall be deemed'—and I do not pretend to quote the words precisely—a violation of the interstate commerce act. They did not use that term but they did use the Sherman Act and the Clayton Act. And evidently in that case this business was regarded as interstate commerce because they were prohibited from doing the thing that the plaintiff charges that the defendants did here, that is, excluding them from participation in the ownership of sign posting apparatus, in effect. I do not recall the term that was used. And in that case that business of outdoor advertising was held to be, or, rather, the violation or the monopoly, I will say, of that business of outdoor advertising was held to be a violation of the Sherman Act, therefore, that business was held to be interstate commerce.

"I have not that decree before me. I read it to you before, however, so of course you remember it. . . ."

Before the jury retired, the following occurred:

"A Juror. Your Honor, I think that this gentleman, Mr. Foy, would like to ask you a question. The question was on receiving posters here and not giving orders for them, would that be considered interstate commerce? Would they be considered—

"The Court. It goes back to the proposition of the creation; if those were ordered for the purpose and with a view that they would be shipped across state lines, then the statute would be satisfied.

"The Juror. Regardless of where the order came from?

"The Court. I think, regardless of where the order came from, yes."

[*Damages resulting from local acts*]

By these instructions the jury were in effect told that if lithographs manufactured outside of the state of California were manufactured with the intent on the part of the manufacturer that they were to be used in various states in the union and that if the purchaser shipped such posters so manufactured across state lines for display by the appellant and others similarly situated, appellant's business was interstate in character; also by instructions 9 and 11 (see Foot-note No. 2), that if the appellant was engaged in interstate commerce and was guilty of the conduct described in appellee's complaint which was mainly an alleged interference with the securing of sites for billboards, it was liable in this action for the damages suffered by the appellees from such activities to be trebled by the court.

In dealing with the question of damages in its instruction the court instructed the

jury that the acts of the appellant in acquiring the business of its competitors and in unlawfully depriving appellee of its advertising sites and in securing advertising sites not reasonably necessary for the appellant's operations, and in building structures on its own property for the purpose of obscuring signs of the appellee, and in paying more for advertising sites than they were reasonably worth, and in many other acts, local in character, should not form a basis of a verdict against the appellant unless the effect of such acts unlawfully restrained interstate commerce in the business of outdoor advertising. Thus the court instructed the jury that if these purely local acts resulted in injury to the appellee it could recover therefor under the Sherman Anti-trust Act if the effect of these acts was to in any way restrain interstate commerce, as previously defined in the instruction. (As we have shown, this definition included the entire bill posting business, if posters were manufactured for interstate transportation and so transported.) In effect, the jury was instructed that appellant was liable for damages resulting from these local acts if they in any way restrained the interstate commerce in posters, lithographs, or other materials manufactured for and shipped in interstate trade and used by appellants. Under this instruction if the appellee lost a number of its billboards and was thus unable to secure advertising matter to post thereon from the residents of other states, or the same state, although this inability to secure such advertising matter arose entirely from its inability to use the same by reason of not having a sufficient number of sites for display, the jury was required to find that such a restriction was a violation of the Sherman Anti-trust Act and the appellee was entitled to recover damages therefor.

[*Effect upon interstate commerce must be direct*]

The theory of these instructions, and of the appellee's whole case, was that if the business of appellee and appellant could be tied up to interstate commerce through the interstate transportation of bills and display advertising matter, then the whole business became interstate in character and any damages suffered by the appellee because of an illegal restraint in the business must be compensated by the appellant because of the liability imposed on the appellant by the Sherman Anti-trust Act. This theory is entirely erroneous and is not the law.

By these instructions the court ignored the hiatus which existed between the manufacture and the transportation of the lithographs, and also between the transportation and the display thereof, the display being essentially local in character after all transportation, local or interstate, had ceased. (*Packers Corp. v. State of Utah,* 285 U. S. 105.) Under such circumstances, in order to come within the provisions of the anti-trust laws, the effect upon interstate commerce must be direct and not remote and must be the result of an intent to restrain interstate commerce. (*Coronada Coal Co. v. United Mine Workers,* 268 U. S. 295, 45 S. Ct. 551; *Packers Corp. v. St. of Utah, supra.*) The mere inability of the appellant's competitors to use posters because they could not secure sites for billboards is so indirect an effect upon the commerce in billposting material as to be beyond the regulatory power of Congress. It is not covered by the Sherman Anti-trust Act. *Blumenstock Bros. Adv. Agcy. v. Curtis Pub. Co.*, 254 U. S. 436; *Industrial Ass'n of S. F. v. U. S.*, 268 U. S. 64, 45 S. Ct. 403. It is true that the court instructed the jury that the mere placing of advertising matter upon sign boards "without the presence of the other features mentioned would not in and of itself constitute interstate commerce." But the court was evidently of the opinion and so instructed the jury that if the billposting was contemplated at the time the posters were manufactured and shipped for posting, then the business of billposting became interstate commerce, and appellant would be liable for damages to appellee for injuries arising from all its local acts of monopoly. In this the court erred. What occurs before transportation and after transportation in interstate commerce is generally within the legislative power of the state and not that of the United States unless the effect upon interstate commerce is direct. *Schechter v. U. S., supra.* The Sherman Anti-trust Act regulating interstate commerce must be construed with reference to the respective powers of the state and the United States over the business transactions of the people.

[*Statute of limitations*]

Another instruction objected to by appellant was that with relation to the statute of limitations. The applicable statute of limitations is Sec. 338. Subd. 1, Cal. Code Civ. Proc., which provides for a three year limitation upon a claim based upon a statutory liability. This statute, it is agreed had run June 21, 1928. The trial court instructed the jury that if they should find that the conspiracy continued up to June 21, 1928, and if they found that Foster and Kleiser performed acts in furtherance of such conspiracy on or since that date, they might in their verdict include all damages

that were suffered by the appellee before June 21, 1928, that were the result of the operations of the appellant pursuant to the conspiracy. In support of this instruction, the appellee relies upon *United States v. Kissel,* 218 U. S. 601, 31 S. Ct. 124, where, in a criminal prosecution brought against defendants for a conspiracy punishable under the Sherman Anti-trust Act, the Supreme Court held that the applicable statute of limitations did not begin to run so long as the conspiracy continued, and that such a conspiracy is a single offense.

In a civil action for damages sustained because of a conspiracy in restraint of trade, the right of recovery is not based upon the conspiracy but upon the injuries resulting therefrom. The fact that there may be a criminal conspiracy does not give a plaintiff an action for damages under Sec. 7 of the Anti-trust law, 15 USCA, Sec. 15, *supra.* (*Glenn Coal Co. v. Dickinson Fuel Co.,* 72 F. (2d) 883; *Strout v. United Shoe Machry. Co.,* 208 F. 646, 651.) The gist of the action under this section is for injuries inflicted pursuant to the conspiracy for which the wrongdoer is liable. (*Morris & Co. v. Nat'l. Ass'n. of Stationers,* 40 F. (2d) 620.) The cause of action arises when the damage is sustained and the statute of limitations begins to run at that time. (*Bluefields Co. v. United Fruit Co.,* 243 F. 1, 20.) In *Bluefields Co. v. United Fruit Co., supra,* plaintiffs brought an action under the Sherman Anti-trust Act to recover damages for injuries alleged to have been sustained in consequence of defendant's creating in itself a monopoly in the banana business as forbidden and declared unlawful by the Act. It was there held that the statute of limitations began to run when the damage occurred.

Under this decision, in a civil action for damages under the Sherman Anti-trust Act, a plaintiff may recover only such damages as have been sustained within the applicable period of limitations immediately preceding the filing of the action. In *Baush Machine Tool Co. v. Aluminum Co. of America,* 79 F. (2d) 217, 227, the plaintiff sued for treble damages arising from defendant's violation of the Anti-trust laws, alleging that defendant had monopolized interstate trade in virgin aluminum by unlawfully combining and agreeing with foreign producers. It was held that "the plaintiff's damages, if any, suffered more than six years before this suit was brought, were not recoverable because of the bar of the statute of limitations."

In *Buckeye Powder Co. v. Du Pont Pdr. Co.,* 248 U. S. 55, 39 S. Ct. 38, the Supreme Court had under consideration a suit for damages resulting from a conspiracy forbidden by the Anti-trust laws. Mr. Justice Holmes, speaking for the court, in discussing the question of the statute of limitations, said:

> "The next matter requires but a few words. The plaintiff offered in evidence decrees in a proceeding by the government finding the Dupont Company guilty under the Sherman Act of an attempt to monopolize (citing cases). These, of course were held inadmissible. The court also ruled that the statute of limitations barred recovery for any damage suffered before September 18, 1905, six years before the beginning of the present suit. The plaintiff now contends that the Clayton Act of October 15, 1914 (citing act) making admissible such criminal judgments 'hereinafter rendered,' in some way should affect our decision upon a ruling made years before, and by virtue of the same section the running of the statute of limitations was suspended retrospectively as to claims already barred, pending the government suit. These matters do not need more than a statement of what was argued and what was done."

The decision of the trial court in that case was affirmed. Thus it was assumed that the statute of limitations began to run as to each item of damages from the time it occurred (unless the statute was tolled by the Clayton Act during the pendency of the criminal or civil prosecution).

Appellee contends, however, that if the instruction constituted error, it was harmless error, because appellant waived the defense of the statute of limitations by failing to plead the statute applicable, and, furthermore, because appellee was entitled to a peremptory instruction that the statute was tolled because of fraudulent concealment of the cause of action. Neither of these contentions were presented to the trial court. It was assumed in the trial court that the statute of limitations was properly pleaded, and that Sec. 338, sub. 1 of the California Code of Civil Procedure was the applicable statute. In any event, therefore, appellee cannot here claim waiver, having treated appellant's plea of the statute as sufficient upon the trial. *Churchill v. Woodworth,* 148 Cal. 669; *So. Pac. Co. v. Santa Cruz,* 26 Cal. App. 26. Moreover, the case should not be here disposed of upon an entirely different theory (see *Sav. Suburban Fruit Lands Co. v. Melin,* 36 F. (2d) 907, 909; *Peck v. Henrich,* 167 U. S. 624), nor is such theory tenable.

Appellee's present contention is that the applicable statute of limitations is Sec. 338, subd. 4, C. C. C. Proc., which provides that "an action for relief on the ground of fraud or mistake shall not be deemed to have occurred until the discovery by the aggrieved party of the facts constituting the fraud or mistake," and not by Sec. 338, Sub. 1, *supra,* which was pleaded by appellant. Appellee's contention is that although that statute by its terms applies only to actions for relief from fraud or mistake, the California decisions hold it also applicable to cases where there has been fraud in the concealment of the existence of a

cause of action, whether the cause of action itself be based on fraud or not. It cites in support of this proposition of law the following decisions of the California Supreme Court: *Kane v. Cook,* 8 Cal. 449; *Kimball v. P. G. & E.*, 220 Cal. 203; *Lightner v. Lane,* 161 Cal. 689.

The Supreme Court of California, in a decision more recent than any other of those cited above, has clarified the matter. In *Kimball v. Pacific Gas & Elec. Co.,* 220 Cal. 203, 30 P. (2d) 39, *supra,* it was held that "the three year limitation provided for in section 338, sub. 4, of the California Code of Civil Procedure, applies only where fraud is the gravamen of the original action."

It also held that, "independent of statute, a fraudulent concealment by the defendant of the facts upon which a legal common law action is based, under the certain circumstances, tolls the statute until discovery, and upon discovery, the statute applicable to that particular action . . . then commences to run." Under that decision when fraud is not the gravamen of the action, in order to toll the applicable statute of limitations, two factors must be present: (1) fraudulent concealment, (2) non-discovery, that is, absence of facts that would put a party upon notice of the cause of action. Mere ignorance of the injury complained of, or the facts constituting such injury, will not prevent the running of the statute. *Lighter v. Lane, supra.* See, also, *Kimball v. P. G. & E., supra,* 30 P. (2d) 39, 43. See, also, our decision as to California law in *Sacramento Suburban Fruit Lands Co. v. Johnson,* 36 F. (2d) 935, citing the general rule stated in 37 *C. J.* 939; *Sacramento Suburban Fruit Lands Co. v. Lindquist,* 39 F. (2d) 900; *Sacramento Fruit Lands Co. v. Tipper,* 36 Fed. (2d) 941. The evidence does not show that appellant fraudulently concealed its monopolistic activities, but clearly shows that appellee had knowledge of sufficient facts to put it upon notice of these activities, and of its resultant damage.

Appellee, in its brief, points out the following testimony, which it contends shows concealment:

(1) Charles King, president and stockholder of the appellee, testified that upon complaint by him as to appellant's activities, Mr. Kleiser told him that "the trouble was that the two companies were not in close enough personal touch."

(2) King further testified (in the same conversation referred to above) that in answer to his complaint that appellant had obstructed a certain location of his, Kleiser had promised that it would be removed right away.

(3) King testified that in 1929 Foster and Kleiser "built out" a Special Site Sign near Merced, and that when this was called to appellant's attention appellee was told that "it had been done unintentionally."

But the following evidence shows that appellee had knowledge of facts sufficient to put it upon notice of the character of appellant's enterprise.

Charles King, president and manager of appellee, testified that in a conversation with Mr. Lausen, general manager of Foster and Kleiser, relating to signs appellee had on the Peninsula, Lausen said: "We are going to get that location King if it costs us $10,000. I want to warn you King, we are out to get you," and that he enumerated five companies they had put out of business. This was in 1920. King also testified that in the same year he was invited to participate in the conspiracy in that Kleiser proposed to make him head of a country department which department he was informed was "for the purpose of crushing independent firms," that Mr. Thompson, assistant general manager of Foster and Kleiser, informed him that his job would be to go into small towns where independents were getting a foothold and put them out of business before they got under way, or, as Thompson put it, "in other words, crush them in the shell."

In the face of this and other evidence of a similar nature introduced by appellee, it is clear that there was no evidence sufficient to show concealment of the cause of action. Consequently, the trial court's instruction to the jury to assess damages for all injuries sustained at any time during the conspiracy, although beyond the period fixed by the parties under the applicable statute of limitations was erroneous and prejudicial, although the jury in the case at bar rendered a verdict for an amount far less than the amount claimed. *Jayne v. Loder,* 144 F. 21; *Stars v. Los Angeles Ry. Corp.,* 187 Cal. 270, 201 P. 599.

We have not disposed of the claims of the parties with reference to the duty to plead facts with reference to the discovery of fraud, as bearing upon the applicable period of limitation for bringing the action, for the reason that this question is presented to us by the appellant, only to meet the new position of the appellee first taken on appeal, and not presented to the trial court, which position we hold is untenable under the evidence, and consequently not available to cure the error in the instructions given the jury on the subject of the statute of limitations.

It may be noted that appellee also contends that Sec. 338, subd. 4, is the applicable statute of limitations because at the time the case came to trial that subdivision applied to cases of relief from fraud, mistake, *or conspiracy.* It is a sufficient answer to this contention to say that at the time the complaint and answer in the case at bar were filed this statute had not been amended to cover conspiracy. The words "or conspiracy" were inserted in the statute

by amendment of August, 1933. This amendment was repealed September 1935. The complaint herein was filed June 11, 1932, and the answer of Foster and Kleiser was filed February 15, 1933.

[*Outdoor advertising business held not interstate*]

It is contended by the appellant that the complaint fails to state a cause of action under the Sherman Anti-trust Act, and consequently that the federal courts have no jurisdiction over the action.

The conspiracy alleged is one to monopolize outdoor advertising, or as stated in the complaint, "to monopolize . . . said interstate trade and commerce in outdoor advertising," and "to place unlawful restraints upon trade and commerce in posters and lithographs between the several states."

In the main, the theory of the complaint is that the business of outdoor advertising, as conducted by the parties, is per se interstate commerce, because of the fact that various materials, used in the business are transported across state lines; and because the business is conducted in several states, and the products advertised are transported in interstate commerce. This theory is erroneous. Business may be and usually is composed of both intrastate and interstate operations. The fact that these operations are conducted by a single corporation or individual does not make the entire business so conducted either interstate commerce, or intrastate commerce. The character of the business is determined by the particular transactions involved and the respective jurisdiction of the Federal and state governments is determined thereby. An interesting illustration of this proposition is found in the decision of the Supreme Court in *Smith v. Illinois Bell Telephone Co.*, 282 U. S. 133. It follows that the allegations of the complaint that the outdoor advertising business is interstate commerce, must be disregarded as a mere conclusion of the pleader, unsupported by the specific allegations as to the nature of the business, which is intrastate in character. Therefore, as the outdoor advertising business is not interstate commerce, but is local in character, the theory of the pleader must fail to that extent.

[*Lack of causal connection between conspiracy and damage*]

We have remaining the charge that the appellant conspired to restrain interstate commerce in posters and lithographs. The means alleged to have been used to carry out the conspiracy are fifteen in number, eight of these acts relate to the procurement or cancelling of leases for sites for billboards, or the maintenance thereof; one relates to the giving of "unfair and discriminatory prices" for display of outdoor advertising; and another to the cutting of prices for outdoor advertising, to induce the plaintiff's customers to break their contracts with it. Other means alleged to have been used to interfere with plaintiff's outdoor advertising business are misrepresentations to plaintiff's customers calculated to cause them to transfer their outdoor advertising business to the defendant. It is also alleged that defendant granted "preferences, priorities, rebates and discriminations relative to prices and terms of contracts for the display of outdoor advertising matter, . . . for the purpose of preventing plaintiff from carrying on its lawful business and the interstate trade and commerce in outdoor advertising."

It is also alleged that the defendant paid a commission of 16⅔ per cent on contracts for outdoor advertising secured by the National Outdoor Advertising Bureau and only ten per cent to other solicitors, for the purpose of securing the award of outdoor advertising contracts to the exclusion of its competitors.

All the means alleged to have been used for the carrying out of the conspiracy were adopted to the injury or destruction of the plaintiff's business in its intrastate aspects. None are alleged to have directly affected the interstate trade in posters or lithographs. The claim of appellee for damages in the sum of $383,112.50, to be trebled is based upon the injury to plaintiff's outdoor advertising business; by the various acts of the defendant directed to that end. Neither the allegations of damages nor the allegations of the acts of the conspirators in inflicting the damage are in any way related to the allegation as to a conspiracy to restrain interstate trade and commerce in posters and lithographs. In the absence of an allegation of the causal connection between the damage, and the conspiracy to restrict interstate commerce in posters, no cause of action is stated under the Sherman Anti-trust Act. For these reasons, the complaint does not state a cause of action within the jurisdiction of the federal court. The general demurrer should have been sustained.

[*Judgment reversed and cause dismissed*]

The judgment is reversed, with directions to the trial court to sustain the general demurrer and dismiss the cause unless plaintiff applies for leave to amend its complaint to conform to the decision herein. The application to be accompanied by the proposed amendment, and to be made within thirty days after remittitur is filed in the lower court.

Reversed with directions.

[¶ 55,136] J. Clyde Dean v. International Longshoremen's Assn. et al.

United States District Court, Western District of Louisiana, Lake Charles Division, September 18, 1936.

In a suit for civil damages under the Clayton Anti-trust Act, it was held that international labor unions are entities, separate and distinct from the members who compose them and from the local organizations, and can not be brought into court by service on the president of a local, but must be cited through some one having authority either expressed or necessarily implied from his relation to the association or the duties which he discharges.

Messrs.: Stanley W. Ray, Leon Sarpy, New Orleans, Louisiana; Plauche & Stockwell, Lake Charles, Louisiana, for Plaintiff. Messrs.: Bentley G. Byrnes, New Orleans, Louisiana; W. R. Mayo, T. A. Edwards, Lake Charles, Louisiana; D. C. Boland, Beaumont, Texas, for Defendants.

DAWKINS, J.:

This is a suit at law against the International Longshoremen's Association (hereinafter referred to as International), Locals Nos. 1214 and 1180, of said Association, and certain individual officers and members of said locals, for damages alleged to have been caused by defendants' violation of the Clayton Anti-Trust Act, in that they all combined and conspired to interfere with and did interfere and prevent the operation of plaintiff's barge line in interstate commerce.

Defendant, International, excepted to the jurisdiction of this court *rationae personae,* and to the citation. All of the other defendants pleaded the exception of no cause or right of action, and on the day of the trial of said exceptions and pleas, also filed a plea in abatement, based upon the contention that the injunction proceeding by plaintiff against all of these defendants, which had been decided by this court adverse to them, was at that time still pending and undecided in the Court of Appeals for this circuit. However, since the submission of these pleas and exceptions that case has been finally affirmed and disposed of by the Court of Appeals.

PLEA TO THE JURISDICTION AND CITATION BY INTERNATIONAL

The citation to this defendant was addressed as follows:

"To International Longshoremen's Association, a labor organization acting and operating through locals or affiliated organizations in all ports of the United States and Canada, and acting and operating in the Port of Lake Charles, Louisiana, and within the Western District of Louisiana, through its proper officer for service of legal process."

It was served, according to the marshal's return, "through Walter R. Mayo in person, proper officer for service."

The petition in this case alleges:

"1. That International Longshoremen's Association is a labor organization composed of persons engaged in longshore work and that said Association acts and operates through locals or affiliated organizations in all of the ports of the United States and Canada, and that said Association acts and operates in the port of Lake Charles, State of Louisiana, within the Lake Charles division of the United States District Court for the Western District of Louisiana."

It prayed for service upon "International Longshoremen's Association," without naming anyone as agent for such service or any place as its domicile. On the trial of the plea to the jurisdiction and exception to the citation, the only witness sworn was Walter R. Mayo, President of the White Local No. 1214, who testified that he was not an official or representative of the International for any purpose. The Constitution and Rules of Order of the International were introduced in evidence, and it was shown that Joseph P. Ryan of New York City is its President. The Constitution declares that all executive powers, when the Association is not in convention, shall be vested in an executive council, consisting of the President and fourteen Vice-Presidents, and a Secretary-Treasurer, elected as quadrennial conventions. The Vice-Presidents are selected, six from the Atlantic Coast and Canadian Provinces, four from the South Atlantic and Gulf Coast district and two from the Great Lakes district. The South Atlantic and Gulf Coast district, in which the controversy out of which this suit arose, is described as embracing "every port south of Cape Hatteras, along the Atlantic, Gulf and Carribean Sea."

Locals are created by charters granted from the International and initiation fees, dues, penalties and assessments are collected, portions of which are allocated to the locals and the balance paid into the International treasury. Locals are permitted to enter into agreements, provided they do not conflict "with the Constitution of the I. L. A." If "conditions necessitate," an executive officer or representative "meets with the conference committee" of the local to see that nothing is inserted in agreements "that will work a hardship on sister locals." Sec. 6 of Art. XIV provides:

"Section 6. This International Association maintains that all locals shall have full power to regulate their own wages, whether by the hour, by the thou-

sand, by the ton, or otherwise. If there is more than one local of the same craft in the same port and vicinity, then such local or locals, shall co-operate and establish a uniform wage scale and working conditions. Said locals shall at all times and in all disputes secure the endorsement of the International Officers and International Executive Council. It is further understood that all settlements of disputes must be endorsed by the members of locals directly interested, before going into effect."

Section 3 of Article XVII provides:

"Section 3. No local shall go out on strike without first getting the consent of the Executive Council, through International headquarters."

Plaintiff contends that because of the provisions of Articles XIV and XVII, quoted immediately preceding, no strike can take place or dispute arise without the approval of the International officers, this, in effect, makes the same acts of the International; and the court should take cognizance of the conditions existing along the Gulf Coast from Galveston, Texas, to Pensacola, Florida, as well as the Pacific Coast, during the time this controversy arose.

With this assumption, he seeks to draw the conclusion that in some way, this made Mayo, President of the White Local, an agent for the service of process against the International. It is also contended that because in the injunction suit by plaintiff, above referred to, the International appeared through Mayo, this is evidence of his authority to represent it as the person for service of process in this case.

[*Unions are entities*]

As was pointed out by the Supreme Court in *United Mine Workers v. Coronada Coal Co.*, 259 U. S., 345, these international labor unions are entities, separate and distinct from the members who compose them and from the local organizations. It is true that case did not involve a question of citation or jurisdiction, but if it be true, as must be conceded, that they have rights as juridical personages distinct from the members or locals who compose them, then it necessarily follows that they cannot be brought into court by service merely upon a member, but must be cited through some one having authority either expressed or necessarily implied from his relation to the association or the duties which he discharges. Mayo has not been shown to possess any such authority, but on the contrary, his testimony and the provisions of the Constitution with respect to officers and governing authority of the International, appear to me to establish that he has none. See *Christian v. International Association of Machinists,* 7 Fed. (2nd) 481; *Singleton et al. v. Order of Railway Conductors of America, et al.,* 9 Fed. (2nd) 417. I am of the opinion, therefore, that the exception to the citation should be sustained. I cannot see that the voluntary appearance of the International, even if authorized in the other case, could have the effect of making Mayo the proper person for service in this instance.

EXCEPTION OF NO CAUSE OR RIGHT OF ACTION

The petition charges that the other defendants, by force and violence, prevented the plaintiff from operating his barge line in interstate commerce for more than six months, causing large losses and the incurring of great expense; that these acts likewise operated as an immediate and direct restraint and interference with the carrying by him in interstate commerce of the merchandise and cargoes which he had on board and was preparing to load and transport, not only at the time of the alleged acts of violence, but during the entire period and all in open violation of the Anti-Trust laws of the United States. I do not deem it necessary to refer to these allegations in detail, but sufficient to say that I think the petition amply discloses a cause and right of action against the other defendants. The exception should, therefore, be overruled.

Proper decree should be presented.

[¶ 55,137] Agnes R. Rossman v. Pullman Co.

U. S. District Court, S. D. New York. Decided May 19, 1936.

Where it is not clear how a jury can estimate the amount of damage to a mere common-law right, as in the case of an unused patent right, an action for three-fold damages under the anti-trust laws may be dismissed.

Oral Opinion

GALSTON, J. On this motion to dismiss there are two fundamental problems involved, since under the Anti-Trust Acts, Sec. 15, Title 15, United States Code provides that any person who shall be injured in his business or property by anything forbidden in the Anti-Trust Laws may sue and recover three-fold the damages sustained by him.

Therefore, the two questions are: First—has the defendant violated, as alleged in the complaint, any provisions of the sections therein recited embraced within the Anti-

Trust Acts? Second—if so, has the plaintiff any such property right as was damaged thereby?

I shall discuss the second subject first. The plaintiff is the owner of six patents, ostensibly covering alleged inventions in sleeping cars and their equipment, such as ladders, service doors, and cabinets.

At the outset it becomes necessary to appraise the nature of the patent right because it is that which she alleges in the third paragraph of her complaint as having been interfered with by the unlawful acts of the defendant. The nature of the right is succinctly stated in *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*, 243 U. S. 502. Mr. Justice Clark said:

"It has long been settled that the patentee receives nothing from the law which he did not have before, and that the only effect of his patent is to restrain others from manufacturing, using or selling that which he has invented. The patent law simply protects him in the monopoly of that which he has invented and has described in the claims of his patent. *United States v. American Bell Teleph. Co.*, 167 U. S. 224, 239, 42 L. ed. 144, 154, 17 Sup. Ct. Rep. 809; *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 424, 52 L. ed. 1122, 1130, 28 Sup. Ct. Rep. 748; *Bauer v. O'Donnell*, 229 U. S. 1, 10, 57 L. ed. 1041, 1043, 50 L. R. A. (N. S.) 1185, 33 Sup. Ct. Rep. 616, Ann. Cas. 1915A, 150."

There is no evidence that the plaintiff was ever in the business of making, using or selling sleeping cars or any of their equipment. There is no evidence that any other person was ready, able and willing to make, use or sell, under license from her, any of the alleged patented improvements. There is no evidence that she submitted these patents indeed to the Pullman Company or the Pullman Manufacturing Company, or to any company engaged in the manufacture, use or sale of sleeping cars or their equipment. Thus, assuming the performance of illegal acts by the defendant, there has been no damage to a property interest. She still enjoys the right, as she did when the patents were issued to her, of excluding any and all persons from making, using or selling the patented improvements without her consent.

She has, as was said in *Patterson v. U. S.*, 222 F. 599, by Judge Day, the common law right to make, use or sell the patented improvements. "This right is to no extent dependent upon the Statute." How the jury can estimate the amount of damage to that common law right, if any, is not made at all clear. The monies that she expended, as she testified, were for the procurement of a statutory right.

With this view of the case it is not necessary to consider whether the defendant's acts constituted a monopoly, as set forth in Sec. 2 of the Sherman Act, or whether its failure to advertise for bids for the cars that it purchased from the Pullman Manufacturing Company was a violation of the Clayton Act.

Accordingly the motion to dismiss is granted.

Gentlemen, you are released from further attendance at this time.

MR. SHAMUS: I respectfully except to your Honor's ruling.

[¶ 55,138] Pick Manufacturing Co. v. General Motors Corp'n et al.

Supreme Court of the United States. No. 12. October Term, 1936. Decided October 26, 1936.

On petition for a writ of certiorari to the Seventh Circuit Court of Appeals.

A clause in contracts between automobile manufacturers and their dealers, providing that dealers shall not use, or sell for use, in repair of automobiles manufactured by the contracting manufacturers, any parts not manufactured or authorized by such manufacturers, is held not to violate Section 3 of the Clayton Anti-Trust Act. Both courts below having found from the evidence that the effect of the clause had not been in any way substantially to lessen competition or to create a monopoly in any line of commerce, the Supreme Court applied the rule under which it "accepts the findings in which two courts concur unless clear error is shown," and affirmed the decree of the lower court.

The court below further held that such covenants are necessary to protect the manufacturers in their warranties of automobiles, and to protect their goodwill inasmuch as the efficiency of the car is dependent on parts, but these additional reasons were not discussed by the Supreme Court.

Per Curiam: By this suit petitioner challenged the validity under Section 3 of the Clayton Act (38 Stat. 730, 731, 15 U. S. C. 14) of a provision of the contracts made with dealers by selling organizations of the General Motors Corporation. The provision in the contract between the Chevrolet Motor Company and dealers is as follows:

"Dealer agrees that he will not sell, offer for sale, or use in the repair of Chevrolet motor vehicles and chassis second-hand or used parts or any part or parts not manufactured by or authorized by the Chevrolet Motor Company. It is agreed that Dealer is not granted any exclusive selling rights in genuine new Chevrolet parts or accessories."

There is a similar provision in contracts made by the Buick company.

The District Court dismissed the bill of complaint for want of equity and its decree was affirmed by the Circuit Court of Appeals. 80 F. (2d) 641. Upon the evidence adduced at the trial the District Court found that the effect of the clause had not been in any way substantially to lessen competition or to create a monopoly in any line of commerce. This finding was sustained by the Circuit Court of Appeals. *Id.*, p. 644.

Under the established rule, this Court accepts the findings in which two courts concur unless clear error is shown. *Stuart v. Hayden*, 169 U. S. 1, 14; *Texas & Pacific Railway Company v. Railroad Commission*, 232 U. S. 338; *Texas & N. O. R. Co. v. Railway Clerks*, 281 U. S. 548, 558; *United States v. Commercial Credit Co.*, 286 U. S. 63, 67; *Continental Bank v. Chicago, Rock Island & Pacific Rwy. Co.*, 294 U. S. 648, 678. Applying this rule, the decree is affirmed.

Affirmed.

Mr. Justice Van Devanter, Mr. Justice Stone and Mr. Justice Roberts took no part in the consideration and decision of this cause.

[¶ 55,139] Becton, Dickinson & Co. v. Eisele & Co.

United States Circuit Court of Appeals, Sixth Circuit, No. 7062. Decided November 11, 1936.

A contract giving exclusive right to sell in the United States patented products made abroad and not obtainable in the United States is held to be within the scope of patent monopoly, and so does not offend against the anti-trust laws.

Appeal from the District Court of the United States for the Middle District of Tennessee.

Before Simons and Allen, Circuit Judges, and Ford, District Judge.

Simons, Circuit Judge. The appeal is from a judgment in an action for damages under the Anti-Trust Laws (Sherman Act, July 2, 1890, Wilson Tariff Act, August 26, 1894, as amended by act of February 12, 1913, and Clayton Act, October 15, 1914). The damages were assessed by a jury as flowing from execution and performance of a certain contract between the appellant and a foreign company by which the appellant obtained the exclusive right to sell in the United States products made abroad and not obtainable in the United States. The main defense was that the contract dealt with products imported into and sold in the United States under license from the owners of patents, and so, being in furtherance of a legal monopoly under the patent laws, did not offend against the anti-trust laws.

[*Facts of the case*]

On February 25, 1927, Cottrell & Company of London, England, agreed to supply the appellant and it alone (subject to certain exceptions) with its entire requirements for stainless steel hypodermic tubing, manufactured of an alloy protected by United States patents and sold under the vendor's trade mark as "Firth Brearley Stainless Steel." The circumstances leading up to the execution of the contract need to be narrated.

The American Stainless Steel Company of Pittsburgh is the owner of patents for an alloy producing so-called stainless steel, adjudicated as valid in *American Stainless Steel Co. v. Ludlum*, 290 Fed. 103 (C. C. A. 2). It did not itself manufacture steel, but granted many non-exclusive licenses to concerns in the United States giving them the right to manufacture and to sell therein the steel covered by its patents.

It also granted to others so-called import licenses for the importation into and sale of stainless steel in the United States. In addition it also granted to still others licenses, some exclusive and some non-exclusive, for the importation into and sale in the United States of specific articles of manufacture made of stainless steel as distinguished from the steel itself. On November 30, 1926, it granted to A. P. deSanno & Son of Philadelphia an exclusive license to import into and sell in the United States hypodermic needle tubing. DeSanno contracted with Cottrell for exclusive importation into the United States of Firth Brearley tubing and canulae.

The appellee, who had been in the business of manufacturing hypodermic needles out of carbon steel, became a customer of deSanno, purchased from it substantial quantitites of stainless steel tubing, and claims to have built up a large and growing business in the sale of stainless steel hypodermic needles. The McGregor Instrument Company of Needham, Massachusetts, and the Cook Laboratories of Chicago, were also customers of deSanno. Subsequently Cottrell & Company repurchased its exclusive import agreement from deSanno for a consideration of Five Thousand Pounds, to be paid in tubing, deSanno surrendered its exclusive license agreement with the American Stainless Steel Company, and the latter granted a similar license to Cottrell. When deSanno surrendered its agreement to Cottrell it reserved the right to supply the patented product in the form of tubing and canulae to the McGregor Instrument Company without limit, to the Cook Laboratories for a certain type of needle, and to Eisele & Company, the appellee, in a limited amount to cover its commitments from November, 1926, to June 30, 1927, but not thereafter.

Subsequently the contract here assailed was entered into. It recited the license from the American Stainless Steel Company to Cottrell, bound appellant to supply the full market demand in the United States for hypodermic needles made of the patented alloy, and granted the appellant the right to sell such needles throughout the Western Hemisphere. It bound Cottrell to supply the appellant's entire requirements for hypodermic tubing, and during its continuance not to supply hypodermic needles, nor tubing nor canulae for the manufacture of such needles, to any other person or concern in the Western Hemisphere except the McGregor Instrument Co., without limit, to Cook Laboratories for a specified type of needle, and to Eisele in the limited amount specified in the deSanno reservation. The contract was to continue during the life of the patents. There was no contract between the appellant and deSanno.

In the early part of 1927 Eisele was informed it could no longer depend upon continued supply of Firth Brearley tubing, as it was controlled by the appellant and McGregor interests, and it immediately sought other sources of supply. Eisele went wherever he thought there was a mill able to produce stainless steel tubing, including the American licensees of the Stainless Steel Company. While he did obtain a shipment from Bishop & Company of Malvern, Pennsylvania, its tubing never had a temper hard enough to make a satisfactory needle. Finally he went abroad, but was unable to obtain the tubing from Cottrell. He went to France and Germany, and interviewed manufacturers there with the same result. In December, 1929, shipments from deSanno ceased entirely. Whether he ever tried to get tubing from the appellant is not disclosed, although the latter had expressed a willingness to supply his company.

[*Restraint of trade contended*]

It is the plaintiff's contention that the contract between the appellant and Cottrell is in unreasonable restraint of trade, and that through it the appellant has an unlawful monopoly of the entire supply of stainless steel tubing and canulae suitable for the fabrication of hypodermic needles in the United States; that the appellant's exclusive right to import and sell such tubing and canulae offends against the anti-trust laws, and is not within the scope of any lawful monopoly possessed by Cottrell under its license from the American Stainless Steel Company, and so is not within legitimate patent rights legitimately exercised. It is urged that all that Cottrell obtained under its license was the right to exclude others from using and vending in the United States imported tubing or canulae for the manufacture of hypodermic needles without its permission, and that beyond that any undertaking by which appellant bound Cottrell to refuse to sell its product to others in the United States was subject to the penalties of the anti-trust laws.

It has, of course, been said that the franchise which a patent grants consists altogether in the right to exclude. *Bloomer v. McQuewan*, 14 How. 539; *United Shoe Machinery Corporation v. United States*, 258 U. S. 451, and cases therein cited. It has also been held that the monopoly granted by a patent does not extend to unpatented supplies with which it is used, or unpatented ingredients of which the patented articles are made. *Carbice Corporation v. American Patent Corp.*, 283 U. S. 27; *Motion*

Pictures Patent Co. v. Universal Film Manufacturing Co., 243 U. S. 502, 515. "If a monopoly could be so expanded the owner of a patent for a product might conceivably monopolize the commerce in a large part of unpatented materials used in its manufacture." We are not, however, here concerned with the attempted extension of patent monopoly over unpatented supplies or unpatented raw materials used in the fabrication of machines or articles covered by the patent, as in *Oxford Varnish Corporation, et al. v. Ault & Wiborg Corp.,* 83 Fed. (2d) 764 (C. C. A. 6). The contract here assailed deals with the patented alloy itself when fabricated into specific articles of commerce imported into and sold in the United States.

[*Patentee's right to grant licenses*]

In order to determine whether or not the present contract is within the scope of monopoly under the patent laws it is necessary to consider the external bounds of every patent grant. By it the patentee acquires the exclusive right to make, use and vend the invention throughout the United States. This right he may assign to another and convey either in whole or in part, though any transfer short of an undivided share of his exclusive right, or his exclusive right within and through a specific part of the United States, is a license, giving the licensee no title in the patent itself. *United States v. General Electric Company,* 272 U. S. 476, 489, 490. In granting a license the patentee may limit the licensee's right to sell. He may grant a license to make and use the patented articles, but withhold the right to sell them. He may license one to make, another to vend, and still another to use, and he may confine each to a specified part of the United States. Manifestly his monopoly has no extra-territorial validity, but within the jurisdiction of the United States he has the exclusive authority to exclude or control the making of the patented articles, or the using and vending of them within the United States wheresoever they are made.

The patentee, or his assignees here, granted numerous non-exclusive licenses for the manufacture, sale and use within the United States of the patented alloy. While these licenses are not in the record, it is the inescapable inference from the evidence, particularly from the testimony of Holding of the American Steel Company, and indeed is not disputed, that the right granted to licensees to vend in the United States was confined to such patented product, in whatever form fabricated, as was made in the United States, and as an incident to the right to make therein. This being so, there was still left to the owner of the patent a valuable part of the monopolistic field not preempted by virtue of any license to American manufacturers of steel. This was the right to use or vend in the United States patented products elsewhere made, and this field the owner of the patent could further subdivide, granting to one a license to vend steel when made into one specific article of commerce and to another the right to use or vend other articles. This it did. It granted to some the license to sell imported products of specified character made of the patented alloy. It granted to others the right to sell in the United States other products made of the patented alloy, and finally it granted to Cottrell the exclusive right to sell within the United States hypodermic tubing and canulae imported into the United States from without, and in this respect it is immaterial what phraseology we use, whether we say affirmatively that the licensee had the right to sell certain imported articles made of the patented alloy, or say negatively that he had the right of immunity from claims of infringement and action for damages for selling such imported articles. In either case the licensee's rights arise from his occupation of a sector of the field of monopoly. Indeed his right to import and sell is but a concomitant part of his right to exclude others from doing so, while his obligation to import and sell arises from his royalty agreement, without which he would not have been chartered to exclude or command the exclusion of others.

[*Import licenses*]

Confusion is perhaps imparted to the argument by the term "import licenses" used in the contract and employed by counsel. Strictly speaking, of course, there can be no such thing as an "import license." The monopoly granted by a patent includes the exclusive right "to make, use and vend the invention throughout the United States." The law does not undertake control of importations into the United States, and what the patent does not grant, of course, the patentee may not convey. Once imported, however, articles which respond to the patent claims become subject to the patentee's right to control or exclude their use or sale, and so what necessarily must be meant by an import license is nothing more nor less than the license to use or vend within the United States patented articles not made in the United States. This right being within the monopoly granted to the patentee, it could license Cottrell to occupy the whole or a portion of that part of its field of monopoly, and occupying it Cottrell could sell, if it chose, to one or to many. It could sell exclusively to the appellant, or it could sell to the

appellant and to deSanno, and it could agree to limit its sales to both or to either of them.

Once having sold patented articles, neither the patentee nor its licensee may exercise future control over them. They pass beyond the scope of the patentee's monopoly. *United States v. General Electric Co., supra; Bloomer v. McQuewan, supra; Keeler v. Standard Folding Bed. Co.,* 157 U. S. 659. But there is here no control reserved by the contract or otherwise to Cottrell over its sales to the appellant. The appellant may do with its purchases whatever it sees fit, and may legally do. It may use all in its own factory, or it may sell to others; it may sell to Eisele and is bound by no undertaking to refrain from selling to Eisele. It is true that Cottrell made certain exceptions to its grant of exclusive rights to the appellant. It would continue to sell through deSanno to McGregor, to Cook Laboratories for a certain purpose, and to Eisele in pursuance of previous commitments. But the appellant had no contract with deSanno. Such reservations as were made by Cottrell were not in furtherance but in limitation of the exclusive rights it contracted to give the appellant. They were reservations made at the instance of deSanno for the protection of Eisele and others, and so not in furtherance but rather in limitation of any monopoly conferred upon the appellant.

[*Contract within scope of patent monopoly*]

That the anti-trust laws do not embrace nor include contracts entered into in the legitimate exercise of rights conferred under the patent laws has been established in many cases. *Bement v. National Harrow Company,* 186 U. S. 70; *United States v. United Shoe Machinery Company,* 247 U. S. 32; *United States v. General Electric Company, supra; Virtue v. Creamery Package Company,* 227 U. S. 8; *Victor v. The Fair,* 123 Fed. 424 (C. C. A. 7); *International Visible System v. Remington-Rand, Inc.,* 65 Fed. (2d) 540 (C. C. A. 6). It was said in the *Bement* case, "The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article will be upheld by the courts. The fact that the conditions in the contract keep up the monopoly or fix prices does not render them illegal." There is nothing in this case to bring it within any recognized exception. We conclude that the contract between the appellant and Cottrell was within the scope of patent monopoly and rights legally conferred upon Cottrell by the owner of the patents, and so does not offend against the anti-trust laws. In view of this it becomes unnecessary to consider other questions raised by the briefs. The District Court should have granted the motion for a directed verdict. Its denial of it was error.

Judgment reversed, and cause remanded for further proceedings in conformity herewith.

[¶ 55,140] The Prairie Farmer Publishing Company, Wallace Publishing Company, and the Wisconsin Farmer Company, et al., v. The Indiana Farmer's Guide Publishing Company.

Supreme Court of the United States. October Term, 1936. Decided December 7, 1936.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Since it appears that the Circuit Court of Appeals, in holding the evidence sufficient to sustain a verdict for respondent upon the issue of unlawful restraint or practices under the Sherman Anti-Trust Act and consequent injury, felt itself controlled by a former opinion of the Supreme Court, whereas the Supreme Court had expressed no opinion on that particular question, the judgment is reversed and the case remanded to the Circuit Court of Appeals for further consideration.

[*History of the case*]

Per Curiam. Respondent brought this action against petitioners for damages caused by alleged violation of the Sherman Anti-Trust Act. On the first trial, the court directed a verdict in petitioners' favor and entered judgment accordingly which the Circuit Court of Appeals affirmed. 70 F. (2d) 3. We reversed the judgment and directed a new trial. 293 U. S. 268. That trial resulted in a verdict against petitioners and the judgment thereon was affirmed by the Circuit Court of Appeals. 82 F. (2d) 704. In view of petitioners' contention that

the Circuit Court of Appeals had misapplied our former opinion, we granted certiorari. October 12, 1936.

[*Evidence failed to establish a violation*]

In its opinion the Circuit Court of Appeals stated that the evidence on the former trial "differed little in essential respects" from that in the present record. The court then gave the grounds of its decision as follows:

"On the former appeal we sustained the District Court's dismissal of the action on the ground that the evidence failed to establish a violation of the sections relied upon. The Supreme Court reversed the judgment, and a new trial followed. On retrial, the duty of the District Court to follow the instructions of the Supreme Court was, of course, clear. It attempted so to do and submitted the case to the jury with the results above stated.

"The parties disagree as to the construction of the Supreme Court decision. Both agree that it controls this appeal.

"Appellants earnestly contend that the evidence in the case fails to show either a conspiracy to restrain interstate commerce or the adoption of unfair or unlawful trade practices by the appellants. This court adopted this view on the previous trial, and the Supreme Court differed with us and reversed the judgment. Appellants also argue that the evidence in this case fails to show any recoverable damages suffered by appellee.

"We deem it unnecessary to elaborate the questions so fully discussed in the previous opinions. As we view the question before us it is merely a matter of applying the Supreme Court's decision.

"We accept appellee's version which is that the complaint stated a good cause of action, and, if the facts which the evidence on the trial tended to establish be accepted by the jury as true, then it was justified in finding for appellee. In other words, the arguments which appellants advance do not establish a bar to recovery, but merely challenge the facts and the inferences which support appellee's fact contentions. The result is that a jury question on the issue of damages, restraint of trade, and unfair methods, existed, and the jury settled the fact issues by its verdict. As we construe the decision of the Supreme Court, this conclusion is unavoidable.

"It follows, therefore, that the judgment should be and is hereby affirmed."

[*Misinterpretation by lower court*]

We are unable to escape the conclusion that in holding the evidence sufficient to sustain a verdict for respondent upon the issue of unlawful restraint or practices and consequent injury to respondent, the Circuit Court of Appeals felt itself controlled by our decision. That was a misinterpretation. We expressed no opinion upon that question. On the contrary, after dealing with the question of interstate commerce and holding that it was not necessary that the restraint or monopoly should affect all the business of the kind throughout the country, but might relate to the part of it carried on in a particular section, we said:

"We intimate no opinion whether, upon the question of restraint or monopoly, or upon the question of injury to petitioner [respondent here] or its business, the evidence is sufficient to warrant a verdict in its favor." 293 U. S., p. 281.

That question as raised by the present record should have been determined by the Circuit Court of Appeals upon a consideration of the evidence adduced, untrammeled by any supposed expression upon that point by this Court.

[*Judgment reversed*]

The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings in conformity with this opinion.

It is so ordered.

[¶ 55,141] Old Dearborn Distributing Company v. Seagram-Distillers' Corporation. Carl W. McNeil, Doing Business as McNeil's Liquor Store, v. Joseph Triner Corporation.

Supreme Court of the United States. Nos. 226, 372. October Term, 1936. Decided December 7, 1936.

Appeals from the Supreme Court of the State of Illinois.

The constitutionality of Sections 1 and 2 of the Illinois Fair Trade Act, which permit resale price maintenance contracts and prohibit sales below such prices even by non-contracting distributors, is upheld.

Section 1 of the Illinois Fair Trade Act "does not attempt to fix prices, nor does it delegate such power to private persons. It permits the designated private persons to contract with respect thereto. It contains no element of compulsion but simply legalizes their acts, leaving them free to enter into the authorized contract or not as they may see fit. Thus far, the Act plainly is not open to objection."

Section 2 of the Illinois Fair Trade Act "does not deal with the restriction upon the sale of the commodity *qua* commodity, but with that restriction because the commodity is identified by the trade-mark, brand or name of the producer or owner. The essence of the statutory violation then consists not in the bare disposition of the commodity, but in a forbidden use of the trade-mark, brand or name in accomplishing such disposition. The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself."

"We find nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others. . . . The restriction, already imposed with the knowledge of appellants, ran with the acquisition, and conditioned it."

"Nor is Section 2 so arbitrary, unfair or wanting in reason as to result in a denial of due process."

"The phrase 'fair and open competition' is as definite as the phrase contained in Section 5 of the Federal Trade Commission Act 'unfair methods of competition,' which this court has never regarded as being fatally uncertain."

Section 2 of the Illinois Fair Trade Act does not deny equal protection of the laws, as the separate classifications of trade-marked goods and others not so identified are based upon reasonable, essential differences in such classes of goods.

[*Question of constitutionality*]

Mr. Justice SUTHERLAND delivered the opinion of the Court.

These appeals bring here for decision the question of the constitutional validity of sections 1 and 2 of the Fair Trade Act of Illinois (Smith-Hurd Rev. Stat., 1935, c. 121-½; § 188 *et seq.;* Illinois State Bar Stat., 1935, c. 140, § 8 *et seq.*), providing as follows:

"Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

"(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

"(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

"Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

"(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity; provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice price, at least ten (10) days before such stock shall be offered for sale to the public.

"(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

"(3) By any officer acting under the orders of any court.

"Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered

into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

Section 3 of the act provides that it shall not apply to contracts or agreements between producers or between wholesalers or between retailers as to sale or resale prices.

[*Facts of cases*]

No. 226 is a suit brought by appellee against appellant to enjoin the latter from wilfully and knowingly advertising, offering for sale or selling, certain brands of whisky at less than prices stipulated by appellee in accordance with contracts, made in pursuance of the Fair Trade Act, between appellee and distributors or retailers of such whisky. The facts set forth by the court below follow.

Appellee is a dealer in alcoholic beverages at wholesale. It buys the products here in question from the producers. The whiskies bear labels and trade-marks, and are in fair and open competition with commodities of the same general class produced by others. Appellant is a corporation operating four retail liquor stores in Chicago, and selling at both wholesale and retail. Appellee's sales in Chicago are made to wholesale distributors. It has not sold any of the whiskies in controversy to appellant, but has sold other liquors. Contracts in pursuance of the Fair Trade Act have been executed between appellee and certain distributors, and numerous Illinois retailers. Appellee does not sell directly to any retailer. Appellant sold the products in question at cut prices—that is to say, at prices below those stipulated—and continued to do so after appellee's demand that it cease such practice. The result of such price cutting was a diminution of sales during the price-cutting period suffered by appellee and retailers other than appellant. Some dealers ceased to display the products, and notified appellee that they could not compete with appellant and would discontinue handling the products unless the price cutting was stopped. Appellant was also a party to breaches of other fair-trade contracts between appellee and certain distributors, and continued the price cutting throughout the trial of the case in the Illinois state court of first instance.

The record shows that one of the retailer's contracts drawn in pursuance of the act was signed by appellant's secretary and treasurer prior to the commission of the acts complained of. This contract, among other things provided that the product in question should not be sold, advertised or offered for sale in Illinois below the prices to be stipulated by appellee. The contract was assailed by appellant below as ineffective, and for present purposes we accept that view. It is plain enough, however, that appellant had knowledge of the original contractual restrictions and that they constituted conditions upon which sales thereafter were to be made.

No. 372 is a suit of the same character as No. 226, seeking the same relief by injunction. The facts set forth in the complaint were admitted by a motion to dismiss. These facts, fully stated in the opinion of the court below, *infra,* we find it unnecessary to repeat. It is enough to say that while they differ in detail from those appearing in No. 226, they are sufficiently the same in substance as to be controlled by the same principles of law.

Both appellants attack the validity of the act upon the grounds that it denies due process of law and the equal protection of the laws in violation of the Fourteenth Amendment in the particulars which hereafter appear. The state courts of first instance in which the suits were brought sustained the validity of the act and entered decrees as prayed for in the bills of complaint. These decrees were affirmed upon appeal by the court below. 363 Ill. 559, 611.

[*"Identified" commodities*]

The Illinois statute constitutes a legislative recognition of a rule which had been accepted by many of the state courts as valid at common law. This rule was based upon the distinction found to exist between articles of trade put out by the manufacturer or producer under and identified by patent, copyright, trade-mark, brand, or similar device and articles of like character put out by others and not so identified. The same rule was followed for a time by some of the lower federal courts; but their decisions were upset by this court in a series of cases, of which *Dr. Miles Medical Co. v. Park & Sons Co.,* 220 U. S. 373 is an example. In that case this court held that a system of contracts between manufacturers and wholesale and retail merchants which sought to control the prices for sales by all such dealers by fixing the amount which the consumer should pay, amounted to an unlawful restraint of trade, invalid at common law and, so far as interstate commerce was affected, invalid under the Sherman Anti-trust Act of July 2, 1890; and it was held that the rule applied to such agreements notwithstanding the fact that they related to proprietary medicines made under a secret process and identified by distinctive packages, labels and trade-marks. The argument that since the manufacturer might make and sell or not as

he chose, he could lawfully condition the price at which subsequent sales could be made by the purchaser, was rejected.

"If there be an advantage to a manufacturer in the maintenance of fixed retail prices," this court said at pages 407-409, "the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system. . . . The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes. No distinction can properly be made by reason of the particular character of the commodity in question. It is not entitled to special privilege or immunity. It is an article of commerce and the rules concerning the freedom of trade must be held to apply to it. . . . The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

It is unnecessary to review the contrary state decisions. It is enough, for present purposes, to say that, generally speaking, they sustained contracts standardizing the price at which "identified" commodities subsequently might be sold, where the price standardization is primarily effected to protect the good will created or enlarged by the identifying mark or brand. Where a manufacturer puts out an article of general production identified by a special trademark or brand, the result of an agreement fixing the subsequent sales price affects competition between the identified articles alone, leaving competition between articles so identified by a given manufacturer and all other articles of like kind to have full play. In other words, such restraint upon competition as there may be is strictly limited to that portion of the entire product put out and plainly identified by a particular manufacturer or producer.

The ground upon which the opposing view of this court proceeds is that such an agreement, nevertheless, constitutes an unlawful restraint of trade at common law and, in respect of interstate commerce, a violation of the Sherman Anti-trust Act. A careful reading of the decisions discloses no other ground.

Following these decisions, bills were introduced in Congress from time to time authorizing standardization-of-price agreements in respect of identified goods, upon which extensive hearings were held by the appropriate Congressional committees. These bills are in all essential respects like the Illinois act. The hearings disclose exhaustive legal briefs, and testimony and arguments for and against the economic value of the proposed laws. See, for example, Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, on H. R. 13305 (63d Cong., 2d and 3d Sess.); H. R. 13568 (64th Cong., 1st and 2d Sess.); compare Report of the Federal Trade Commission on Resale Price Maintenance, 70th Cong., 2d Sess., H. Doc. No. 546.

It is not without significance that while the proposed legislation was vigorously assailed in other respects, we do not find that any constitutional objection was urged. And the decisions of this court, far from suggesting any constitutional infirmity in such proposed legislation, contain implications to the contrary. In the *Dr. Miles Medical Co.* case (p. 405), the court said, "Nor can the manufacturer by rule and notice, *in the absence of contract or statutory* right, even though the restriction be known to purchasers, fix prices for future sales." (Italics supplied.) In *Boston Store v. American Graphophone Co.*, 246 U. S. 8, where this court struck down a stipulation that patented articles should not be resold at prices other than those fixed presently and from time to time by the patent owner, it was suggested (p. 26) that if this view resulted in damage to the holders of patent rights or the law afforded insufficient protection to the inventor, the remedy lay within the scope of legislative (that is to say, Congressional) action. And in a concurring opinion (p. 28), it was said, "If the rule so declared is believed to be harmful in its operation, the remedy may be found, as it has been sought, through application to the Congress . . ." The words "as it has been sought" quite evidently referred to the bills of which we have just spoken, since they had theretofore been introduced and made the subject of the hearings. See, also, *Bauer v. O'Donnell*, 229 U. S. 1, 12. While these observations of the court cannot, of course, be regarded as decisive of the question, they plainly imply that the court at the time foresaw no valid constitutional objection to such legislation, for it cannot be supposed that the court would suggest a legislative remedy the validity of which might seem open to doubt.

In the light of the foregoing brief résumé of the question with respect to the standardization of selling prices of identified goods in the absence of statutory authority, we proceed to a consideration of the specific objections to the constitutionality of the act here under review.

[*Held not price fixing law*]

First. In respect of the due process of law clause, it is contended that the statute is a price-fixing law, which has the effect

of denying to the owner of property the right to determine for himself the price at which he will sell. Appellants invoke the well-settled general principle that the right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself, and as such is within the protection of the Fifth and Fourteenth Amendments. *Tyson & Brother v. Banton,* 273 U. S. 418, 429; *Wolff Co. v. Industrial Court,* 262 U. S. 522, 537; *Ribnik v. McBride,* 277 U. S. 350; *Williams v. Standard Oil Co.,* 278 U. S. 235; *New State Ice Co. v. Liebmann,* 285 U. S. 262. These cases hold that, with certain exceptions, which need not now be set forth, this right of the owner cannot be denied by legislative enactment fixing prices and compelling such owner to adhere to them. But the decisions referred to deal only with legislative price fixing. They constitute no authority for holding that prices in respect of "identified" goods may not be fixed under legislative leave by contract between the parties. The Illinois Fair Trade Act does not infringe the doctrine of these cases.

Section 1 affirms the validity of contracts of sale or resale of commodities identified by the trade-mark, brand or name of the producer or owner, which are in fair and open competition with commodities of the same general class produced by others, notwithstanding that such contracts stipulate (1) that the buyer will not resell except at the price stipulated by the vendor; and (2) that the producer or vendee of such a commodity shall require, upon the sale to another, that he agree in turn not to resell except at the price stipulated by such producer or vendee. It is clear that this section does not attempt to fix prices, nor does it delegate such power to private persons. It *permits* the designated private persons to contract with respect thereto. It contains no element of compulsion but simply legalizes their acts, leaving them free to enter into the authorized contract or not as they may see fit. Thus far, the act plainly is not open to objection; and none seems to be made.

The challenge is directed against section 2, which provides that wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract made under section 1, whether the person doing so is or is not a party to the contract, shall constitute unfair competition, giving rise to a right of action in favor of anyone damaged thereby.

It is first to be observed that § 2 reaches not the *mere* advertising, offering for sale or selling at less than the stipulated price, but the doing of any of these things *wilfully* and *knowingly.* We are not called upon to determine the case of one who has made his purchase in ignorance of the contractual restriction upon the selling price, but of a purchaser who has had definite information respecting such contractual restriction and who, with such knowledge, nevertheless proceeds wilfully to resell in disregard of it.

In the second place, § 2 does not deal with the restriction upon the sale of the commodity *qua* commodity, but with that restriction because the commodity is identified by the trade-mark, brand or name of the producer or owner. The essence of the statutory violation then consists not in the bare disposition of the commodity, but in a forbidden use of the trade-mark, brand or name in accomplishing such disposition. The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself.

Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under § 2 of the law by which such acquisition was conditioned. Cf. *Provident Institution v. Jersey City,* 113 U. S. 506, 514-515; *Vreeland v. O'Neil,* 36 N. J. Eq. 399, 402; same case on appeal, 37 N. J. Eq. 574, 577.

[*No unlawful delegation*]

We find nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others, such as was condemned in *Eubank v. Richmond,* 226 U. S. 137, 143; *Seattle Trust Co. v. Roberge,* 278 U. S. 116, 121-122; and *Carter v. Carter Coal Co.,* 298 U. S. 238, 311. In those cases the property affected had been acquired without any preexisting restriction in respect of its use or disposition. The imposition of the restriction *in invitum* was authorized after complete and unrestricted ownership had vested in the persons affected. Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it.

[*No denial of due process*]

Nor is § 2 so arbitrary, unfair or wanting in reason as to result in a denial of due process. We are here dealing not with a commodity alone, but with a commodity plus the brand or trade-mark which it bears as evidence of its origin and of the quality of the commodity for which the brand or trade-mark stands. Appellants own the commodity; they do not own the mark or the good will that the mark symbolizes. And good will is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation. Good will is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of commodities. And distinctive trade-marks, labels and brands, are legitimate aids to the creation or enlargement of such good will. It is well settled that the proprietor of the good will "is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trade-mark without his consent and authority." *McLean v. Fleming*, 96 U. S. 245, 252. "Courts afford redress or relief upon the ground that a party has a valuable interest in the good-will of his trade or business, and in the trade-marks adopted to maintain and extend it." *Hanover Milling Co. v. Metcalf*, 240 U. S. 403, 412. The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with. Sec. 2 of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates "unfair competition." See *Liberty Warehouse Co. v. Burley Tobacco Growers' Assn.*, 276 U. S. 71, 91-92, 96-97. There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end.

There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful purpose to review the evidence or to enlarge further upon the subject. True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as this court is concerned. Where the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the legislature. *Radice v. New York*, 264 U. S. 292, 294; *Zahn v. Board of Public Works*, 274 U. S. 325, 328, and cases cited.

[*Terms held definite*]

Certain terms contained in the act are said to be fatally vague and indefinite, and therefore to deny due process of law under our decisions in *Connally v. General Const. Co.*, 269 U. S. 385, 390 *et seq.*, and other cases. The contention is directed in the main against the phrase in § 1 of the act, "fair and open competition," and "any commodity" and "any contract entered into pursuant to the provisions of section 1" contained in § 2. The point is shown to be lacking in substance by the reasoning in the *Connally* case at pp. 391-392 and the cases there cited. See particularly *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 501-503; *United States v. Cohen Grocery Co.*, 255 U. S. 81, 92, where it is said "that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded." Certainly, the phrase "fair and open competition" is as definite as the phrase contained in § 5 of the Federal Trade Commission Act, "unfair *methods* of competition," which this court has never regarded as being fatally uncertain. *Federal Trade Commission v. Gratz*, 253 U. S. 421, 427; *Federal Trade Commission v. Beech-Nut Co.*, 257 U. S. 441, 453; *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 648. We think the phrases complained of are sufficiently definite, considering the whole statute; and that no one need be misled as to their meaning, or need suffer by reason of any supposed uncertainty. Cf. *Miller v. Schoene*, 276 U. S. 272, 281; *Standard Oil Co. v. United States*, 221 U. S. 1, 69.

[*Equal protection of laws*]

Second. The contention that § 2 of the act denies the equal protection of the laws in violation of the Fourteenth Amendment proceeds upon the view that it confers a

privilege upon the producers and owners of goods identified by trade-mark, brand or name, which it denies in the case of unidentified goods. As this court many times has said, the equal-protection clause does not preclude the states from resorting to classification for the purposes of legislation. It only requires that the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Colgate v. Harvey,* 296 U. S. 404, 422, 423, and cases cited.

Clearly, the challenged section of the Illinois act satisfies this test. Enough appears already in this opinion to show the essential difference between trade-marked goods and others not so identified. The entire struggle to bring about legislation such as the Illinois act embodies has been based upon this essential difference. In *Radice v. New York,* 264 U. S. 292, 296-297, we sustained a statute prohibiting night employment of women in restaurants in large cities, against the claim that it denied equal protection of the laws in that it did not apply to small cities, or to women employed as singers and performers, or to attendants in ladies' cloak rooms and parlors, or employees in hotel dining rooms and kitchens or in lunch rooms and restaurants conducted by employers for the benefit of their employees. Former decisions of the court were cited sustaining classifications based upon differences between fire insurance and other kinds of insurance; between railroads and other corporations; between barbar-shop employment and other kinds of labor; between "immigrant agents" engaged in hiring laborers to be employed beyond the limits of a state and persons engaged in the business of hiring for labor within the state; between sugar refiners who produce the sugar and those who purchase it. Other illustrations of a similar character might be cited.

But it is unnecessary to pursue the subject further; for, since the sole purpose of the present law is to afford a legitimate remedy for an injury to the good will which results from the use of trade-marks, brands or names, it is obvious that its provisions would be wholly inapplicable to goods which are unmarked.

Decrees affirmed.

[¶ 55,142] The Pep Boys, Manny, Moe & Jack of California, v. Pyroil Sales Company, Inc.

Clarence G. Kunsman, v. Max Factor & Co., and Sales Builders, Inc.

Supreme Court of the United States. Nos. 55, 79.—October Term, 1936. Decided December 7, 1936.

Sections 1 and 1½ of the California Fair Trade Act, as amended, sustained on the authority of *Old Dearborn Distributing Company v. Seagram-Distillers Corporation* [¶ 55,141.]

Appeals from the Supreme Court of the State of California.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

These appeals involve the question of the constitutionality of § 1 and 1½ of the California Fair Trade Act, as amended, Cal. Stat. 1931, p. 583, Cal. Stat. 1933, p. 793; Deering's Gen. Laws of California, 1931, vol. 3, Act 8782, printed in the margin.* It will be seen upon comparison that they are substantially identical with § 1 and

* Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of California by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.
2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.
2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.
3. By any officer acting under the orders of any court.

Sec. 1½. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

2 of the Illinois act, which we have just sustained in *Old Dearborn Distributing Company v. Seagram-Distillers Corporation, ante.*

In the present cases suits were brought by appellees against appellants to enjoin the latter from alleged violations of § 1½. The sufficiency of the complaints was challenged by demurrer, the facts alleged being, therefore, admitted. The trial courts, upon these facts, held the section invalid, and appeals were taken to the state supreme court. In that court, No. 79 was first heard; the view of the trial courts was rejected; and the section held to be constitutionally valid. 5 Cal. (2d) 446. Upon the authority of that decision, No. 55 was also reversed. 5 Cal. (2d) 784. The decrees of the trial courts entered on the orders sustaining demurrers without leave to amend were reversed; and respondents (appellants here), having elected to stand on their demurrers, the trial courts were ordered to enter judgment in favor of appellants (appellees here), as prayed for in their complaints.

The questions presented and the facts involved are substantially the same as those which were present in the two suits involved in the *Old Dearborn Distributing Company* case; and upon that authority, the decrees entered in the court below are

Affirmed.

[¶ 55,143] The Joseph Triner Corporation v. E. R. Oransky.

Supreme Court of Illinois. December 10, 1936.

A decree enjoining a retailer from advertising certain brands of whiskey at a price below that stipulated by the distributor in contracts with other retailers under the Illinois Fair Trade Act is affirmed.

Affirming decision of Circuit Court of Cook County, Illinois.

Mr. Justice STONE delivered the opinion of the court:

The circuit court of Cook county entered a decree permanently enjoining appellant from directly or indirectly advertising certain brands of whisky at a price below the standard and uniform price of those brands. The cause was tried on a stipulation of facts.

Errors assigned are, that the Fair Trade act of Illinois is in contravention of section 2 of article 2 of the constitution of this State and the fourteenth amendment of the constitution of the United States; that it violates section 22 of article 4 of the constitution of this State and is in violation of the trust laws, also that re-sale price maintenance contracts are unlawful. All of these assignments were urged and passed upon contrary to the contention of appellant here in *Triner Corp. v. McNeil,* 363 Ill. 559. The holdings in that case settle the issues here.

The decree of the circuit court is affirmed.

Decree affirmed.

[¶ 55,144] Federal Trade Commission v. Army and Navy Trading Company.

United States Court of Appeals for the District of Columbia. Decided January 4, 1937.

On Application for Enforcement of an Order of the Federal Trade Commission.

A Federal Trade Commission order forbidding a merchandise company from using "Army" or "Navy" in connection with its corporate name is affirmed. Such part of the order as forbids the use of the word "Army" or "Navy" except in connection with merchandise actually procured from the U. S. Army or Navy Department is modified to permit such use when goods are not purchased directly from such departments, provided that the words are used in a manner exactly specifying the origin or character of that particular lot.

Modifying and affirming Federal Trade Commission Complaint No. 2284.

Martin A. Morrison and *James W. Nichol,* of Washington, D. C., for petitioner.
Joseph B. Stein, of Washington, D. C., for respondent.

Before MARTIN, Chief Justice, ROBB, VAN ORSDEL, GRONER and STEPHENS, Associate Justices.

[*Facts*]

STEPHENS, Associate Justice: This is a proceeding brought under Section 5 of the Federal Trade Commission Act, 38 Stat. 719, by the petitioner, the Federal Trade Commission, hereafter called the Commission, to enforce an order issued by it on November 26, 1935, requiring the respondent, the Army and Navy Trading Company, hereafter called the Trading Company, to cease and desist from using the words "Army and Navy," or either of them, in connection with its corporate name.

[*Commission's findings*]

Following the usual procedure under the Act, the Commission issued a complaint against the Trading Company charging that the words "Army and Navy" in its name were misleading, and that their use was to the injury of competitors and the public. The Trading Company answered denying this. A hearing was had before an examiner of the Commission, and then before the Commission itself. Thereupon the Commission made findings of fact which, so far as here pertinent, were in substance and effect that:

The Trading Company, a Maryland corporation, has, since its organization in 1922, maintained its principal place of business in Washington, D. C., and carried on business there. It was organized chiefly for the purpose of buying from the Army and Navy Departments of the United States Government certain surplus, reject and refuse goods and reselling the same. From 1922 until about 1927, between 85% and 90% of the merchandise offered for sale by the Trading Company was procured from the Army and Navy Departments, either directly or indirectly, there being during those years opportunity to secure large lots of various kinds of merchandise from the Departments. About 1927 the Departments began sharply to curtail the quantity of goods offered for sale, and since 1932 have offered virtually none. They were offering none at the time of the Commission's order. In 1932 the stock of merchandise of the Trading Company contained only about 15% to 18% of goods purchased from the Army and Navy Departments. The Trading Company causes its corporate name "Army and Navy Trading Company" to be displayed in large signs about its mercantile establishment, and in trade journals and circulars, and in advertisements, and in daily newspapers and other periodicals, with the words "Army and Navy" as prominently featured therein as other portions of the name. Various members of the purchasing public, upon observing such use of the words "Army and Navy," have been led into the belief that the goods to be purchased in the Trading Company's store were substantially all, if indeed not all, procured from the Army and Navy Departments, and into the belief that they were of the quality and nature used by those Departments and that a substantial bargain with reference to price and quality would be obtained at the Trading Company's store; and a substantial number of such members of the purchasing public have been induced by such beliefs to make purchases from the Trading Company. The use by the Trading Company of the words "Army and Navy" as above described causes a diversion of trade from competitors of the Trading Company who offer for sale merchandise which, like the bulk of the stock of the Trading Company, is procured from ordinary markets, but who do not use the words "Army and Navy" in connection with their trade names; and the use of the words "Army and Navy" by the Trading Company causes substantial injury to substantial competition within the District of Columbia.

From the facts thus found by the Commission it concluded that the use of the words "Army and Navy" in the Trading Company's name is to the prejudice and injury of competitors and the public and an unfair method of competition in commerce and a violation of Section 5 of the Act.

[*Commission's order*]

The Commission ordered the Trading Company to cease and desist from:

(1) Using in connection with its corporate name the words "Army and Navy" or either of them.

(2) Advertising or causing to be advertised in any circulars, trade journals, daily newspapers, or other periodicals the words "Army and Navy" or either of them, descriptive of or in connection with any merchandise to be sold or offered for sale to the public, unless in fact the words "Army and Navy" be used specifically in connection and conjunction with particular merchandise actually procured from the Army or Navy Department of the United States Government.

Provided, however, that for a period of two years from the date of the service of this order upon respondent, the respondent shall be permitted to use in connection with such corporate or trade name as it might assume the words:

"Formerly Army and Navy Trading Company."

[*Issue raised*]

The only issue raised by the Trading Company's answer to the Commission's complaint was that respecting the misleading character and effect of the use of the words "Army and Navy" in the Company's name, and the finding of fact adverse to the Trading Company on this issue is the only finding attacked by it.

[*Evidence supports findings*]

The findings of the Commission if supported by evidence are conclusive. *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483; *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67. We have examined the record. There is evidence therein to support the finding attacked. We shall not assume to review the evidence in detail, but it is worthy of comment that it was made to appear through the testimony of the secretary and treasurer of the Trading Company itself that the name "Army and Navy Trading Company" was selected for the corporation in order to impress the public with the fact that the stock consisted principally of articles purchased from the Army and Navy Departments—that being so at the time of incorporation—and that there was a response, advantageous to the Trading Company, to this impression; and further that while the percentage of Army and Navy goods in the Trading Company's stock was

as high as 90% up to about 1926, there was a rapid decline in the percentage thereafter, and at the time of the hearing before the Examiner, in 1935, only about 10% of the total inventory was of such goods; and further, that purchases of stock at that time were principally made in the open market from commercial manufacturers catering to department stores and various concerns. It is also worthy of comment that several members of the purchasing public testified that in purchasing from a so-called Army and Navy store they expected to find lower prices and better quality merchandise, and to get Army and Navy refuse or salvage goods or goods made up to Army and Navy specifications.

[*Misrepresentation of origin or nature*]

The first of the two issues of law in the case is whether the conclusion of the Commission that the use of the words "Army and Navy" in the Trading Company's name is an unfair method of competition is justified. It is. The Supreme Court has ruled that false and misleading representations as to the origin of a commodity constitute an unfair method of competition. *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212. It has ruled similarly in respect of false and misleading representations as to the nature or quality of an article. *Federal Trade Commission v. Winsted Hosiery Co., supra; Federal Trade Commission v. Algoma Lumber Co., supra.* Accord: *Federal Trade Commission v. Civil Service Training Bureau*, 79 F. (2d) 113.

[*Qualifying words to eliminate deception*]

The second issue of law is whether the cease and desist order of the Commission is too broad. The Trading Company contends that the Commission cannot lawfully order suppression of a trade name where the use of qualifying words will eliminate the deception and preserve the rights of competitors and the public, and it asserts that the Commission's order should be modified so as to permit the use of, and it offers to use, in connection with its full trade name "Army and Navy Trading Company," one or more of the following qualifying phrases: "Not Connected with the Army and Navy," "Not Connected with the Government," "Not a Government Store." "Not affiliated with the United States Government," "We Do Not Handle Exclusively Army and Navy Goods." The Trading Company urges *Federal Trade Commission v. Royal Milling Co., supra; N. Fluegelman & Co. v. Federal Trade Commission*, 37 F. (2d) 59; *Federal Trade Commission v. Good-Grape Co.*, 45 F. (2d) 70; and *Federal Trade Commission v. Cassoff*, 38 F. (2d) 790. These cases justify the proposition that the Commission's "orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public." These were the words of the Supreme Court in the *Royal Milling Co.* case. There the word "Milling" imported the grinding of wheat into flour, when in truth the Royal Milling Company only mixed and blended flours purchased from others engaged in grinding. The continued use of the trade name if used together with such qualifying words as "Not Grinders of Wheat" was permitted. In *N. Fluegelman & Co. v. Federal Trade Commission*, the use of the words "Satinmaid" and "Satinized," which signified a fabric with a satin weave and a silk content, whereas the product in question was of a satin weave but of a cotton content, was permitted provided there was also used the phrase "a cotton fabric," "a cotton satin," "no silk," or equivalent modifying terms. In *Federal Trade Commission v. Good-Grape Co.*, it was held that the name "Good-Grape" and the slogan "Fruit of the Vine," might be used if qualified by words making it appear that the product was an imitation, artificially colored and flavored. In *Federal Trade Commission v. Cassoff*, the word "shellac," in the trade name "White Shellac" and "Orange Shellac," deceptively imported a product composed solely of genuine shellac gum dissolved in alcohol. The court permitted use of the word "shellac" if there was also used in connection therewith the phrase "shellac substitute" or "imitation shellac," accompanied by the statement that the product was not 100% shellac.

But it will be noted that in these cases the selection of qualifying words effective to eliminate deception was feasible because the names involved made separate and distinct representations in respect of the origin and characteristics of single products, some of which representations were true and some of which were untrue.[1] There-

[1] Thus in *Federal Trade Commission v. Royal Milling Co.*, the representation of the word "Milling" as to mixing and blending of the flour was true, but the representation as to the origin of the flour, *i. e.*, as to by whom it was ground, was untrue. In *N. Fluegelman & Co. v. Federal Trade Commission*, the representation of the words "Satinmaid" and "Satinized" that the fabric had a satin weave was true, but the representation that it had a silk content was not. In *Federal Trade Commission v. Good-Grape Co.*, the representation of the phrases "Good-Grape" and "Fruit of the Vine" that the product was like grape juice in color and flavor was true, but the representation that it was made of natural grape juice was untrue. In *Federal Trade Commission v. Cassoff*, the representation of the phrases "White Shellac" and "Orange Shellac" that the product was composed solely of genuine shellac gum dissolved in alcohol was untrue, but the representation that it was like shellac, or that it could be used for the purpose of shellac, was true.

fore, qualifying words could be chosen which would eliminate any deceptive representations and leave standing the truthful ones alone. Thus in *Federal Trade Commission v. Royal Milling Co.,* the qualifying words "Not Grinders of Wheat" indicated definitely that the grain from which the flour is made did not originate with, *i. e.,* was not ground by, the Royal Milling Company, but left standing the representation that the flour was mixed and blended by that Company; and in the other three cases, the qualifying words clearly eliminated the deceptive representations of what the characteristics of the products were not, but left standing the true representations as to what the characteristics were. The qualifying words suggested for use in the instant case would not have the effect of wholly eliminating the deception. Use with the trade name "Army and Navy Trading Company" of the phrase "Not Connected with the Army and Navy" would still leave an implication that the Trading Company's goods are purchased from the Army and Navy Departments or are of the character or quality of Army and Navy goods. The same is true of the phrase "Not Connected with the Government," and of the phrase "Not a Government Store," and of the phrase "Not Affiliated with the United States Government." The phrase "We Do Not Handle Exclusively Army and Navy Goods" would imply that a substantial portion of the goods are Army and Navy goods. We think it not feasible to select qualifying words for use with the name "Army and Navy Trading Company" which will be effective to eliminate deception. The stock of goods of the Trading Company is in only an insubstantial portion, if at all, in any sense Army and Navy goods. But the phrase "Army and Navy" in the name "Army and Navy Trading Company" makes the single representation that at least the major portion of the merchandise offered for sale is in some sense Army and Navy goods. This single representation being untrue, it cannot be qualified; it can only be contradicted. The cases urged by the Trading Company and above discussed justify qualification of a trade name where qualification is possible; they do not justify contradiction.

In a supplemental memorandum filed before the Commission the Trading Company offered to use with the name "Army and Navy Trading Company" the "qualifying" words "We do not deal in Army and Navy Goods." This phrase is not discussed in the Trading Company's brief filed in this court, and we take it, therefore, that the offer to use it has been abandoned. If not, however, it is clear that it cannot be used because it is contradictory.

[*Order modified and affirmed*]

In one particular we think the order of the Commission is too broad. It cannot be concluded that because at the time of the hearing there was little or no opportunity for the Trading Company to purchase goods in some sense Army and Navy goods, there will not be such opportunity in the future; and the Trading Company ought not be forbidden to tell the exact truth, whatever it may be, concerning the origin or character of any particular lot of goods. Paragraph (2) of the Commission's order forbids the use of the words "Army and Navy" "unless in fact the words 'Army and Navy' be used specifically in connection and conjunction with particular merchandise actually procured from the Army or Navy Department of the United States Government." The Trading Company may at some time procure a particular lot of goods not purchased by it actually from the Army or Navy Department, but from a jobber or broker who purchased therefrom; or it may procure from a manufacturer or jobber or broker a particular lot of goods made for the Army or Navy Department but rejected for lack of compliance with specifications in some respect although satisfying them in others. Paragraph (2) of the order should, therefore, be modified so as to permit the use of the words "Army and Navy," or either of them, in connection with a particular lot of merchandise, provided such words are used in a manner exactly specifying the origin or character of that particular lot.

Subject to such modification, the order of the Commission is affirmed and the respondent is ordered to comply therewith.

[¶ 55,145] Opinion of United States Attorney General.

Addressed to the Secretary of War, December 28, 1936.

The Robinson-Patman Price Discrimination Act is held not to prohibit persons from selling to the Government at lower prices than to other purchasers.

[*Robinson-Patman Act*]

I have your letter of October 30, requesting my opinion concerning the application of the Robinson-Patman Act (approved June 19, 1936, c. 592, 49 Stat. 1526) to government contracts for supplies.

The statute reads, in part, as follows:

Section 2 of the Act, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,". approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), is amended to read as follows:

Sec. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities *of like grade and quality*, where either or *any of the purchases involved in such discrimination are in commerce*, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, *or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them:* Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *. (Italics supplied.)

[*Similarity to former Clayton Act*]

Aside from the proviso, the above quoted portion of the statute differs from Section 2 of the Act of October 15, 1914, in no respect save as indicated by the underscored words, which did not appear in the earlier statute. The language of the proviso is different from that of the corresponding proviso in the earlier statute, but the change does not bear upon the question which you have submitted.

[*Government contracts excepted from other statutes*]

In my opinion of April 20, 1936, to the Secretary of War concerning contracts with motor vehicle carriers, it was pointed out that statutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government. As Mr. Justice Brandeis observed, in *Emergency Fleet Corporation v. Western Union Telegraph Company,* 275 U. S. 415, 425, "it may be doubted whether the prescribed rule requiring equality of treatment would ever be violated by giving to the Government preferential rates."

The Act of June 19, 1936, merely amended the Act of October 15, 1914, as above pointed out, and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts. The practice in this respect indicates that it has been customary in the past for those dealing with the various agencies of the Federal Government to grant to them special prices on contracts for supplies. Such prices are often below the regular market for similar material supplied to the regular trade—due, perhaps, to an estimated lower cost of doing business with the Government because of quantity purchases and absence of credit risk, solicitation expense, etc., although it may often be impossible to evaluate such factors with exactness.

[*Government prices seldom violate statute*]

It has been suggested that the force which would ordinarily be attributed to this practice may be weakened because of the probability that the prices named have seldom, if ever, violated the statute, even assuming its application. Perhaps this is true. It is also conceivable that if the past practice is maintained the prices hereafter named to the Government will seldom, if ever, violate the amended statute, likewise assuming its application; and this would seem to supply another reason for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters, in the absence of any clear indication that it intended to depart from that policy in this instance.

[*Act held inapplicable to Government contracts*]

It is therefore my opinion that the Act of October 15, 1914, as amended by the Act of June 19, 1936, is not applicable to Government contracts for supplies.

[¶ 55,146] Nathan I. Lipson v. Socony Vacuum Corporation.

Same v. Standard Oil Company of New York.

United States Circuit Court of Appeals for the First Circuit. January 5, 1937.

Appeals from the District Court of the United States for the District of Massachusetts.

In a suit for treble damages under the Clayton Anti-Trust Act, it is held that, although defendants fix lower prices for the importation of gasoline in tank car lots direct to their customers, provided the customer agrees to deal only in their products, yet it does not appear, owing to there being no competition in price between the plaintiff and other retailers of gasoline, that the result of defendants' policy is to substantially lessen competition between plaintiff and stations dealing exclusively in defendants' products in the same competitive territory.

Before BINGHAM, WILSON and MORTON, JJ.

Opinion of the Court

[*Facts*]

WILSON, J. These are actions at law to recover treble damages under Sections 2, 3 and 4 of the Clayton Act, 38 Stat. 730 (15 U. S. C. A., Secs. 13, 14 and 15). Since the allegations in each case are the same, they may be disposed of in one opinion.

Both cases were previously before this court on appeal from the ruling of the District Court sustaining a demurrer to the plaintiff's declarations. The rulings of the District Court were sustained (76 Fed. (2d) 213) on the ground that the alleged unlawful acts of the defendant did not appear to have been done in the course of interstate commerce; that there was no averment of any facts with substantial certainty that the plaintiff was discriminated against; and that the allegations upon which plaintiff relies to show that acts of the defendants may substantially lessen competition, or which may tend to create a monopoly, were too vague, indefinite and insufficient to warrant such a finding.

The judgment of the District Court was vacated, however, provided that plaintiff filed within a definite time an amendment to his declaration rectifying the defects therein pointed out by this court; otherwise the judgment of the District Court was affirmed.

The plaintiff within the time limit fixed by this court filed a substituted or amended declaration to which the defendants filed a demurrer setting forth three grounds therefor as follows:

1. That the plaintiff's declaration does not allege that the transactions complained of involved commerce between the several states.
2. That the declaration does not state a cause of action under the statutes of the United States entitling the plaintiff to the relief prayed for.
3. That the declaration vague, indefinite and insufficient in that it does not allege facts which show a tendency to substantially lessen competition in interstate commerce, or facts which show a tendency to create a monopoly, or any illegal discrimination on the part of the defendant.

The District Court sustained the demurrer on the ground that the amended declaration did not remedy the defects which this court pointed out in the original declaration, and that the allegations of sale and delivery in tank car lots in interstate commerce were in the alternative and insufficient, and should be resolved against the plaintiff.

From this ruling the plaintiff appealed and assigned as errors that the District Court erred in sustaining the demurrer and in entering judgment for the defendants.

[*Question of sufficiency of declaration*]

The question is, does the amended declaration set forth a cause of action "concisely and with substantial certainty" as required by Section 7 of Chap. 231 (Mass. G. L. 1921 Ter. Cent. Ed. 1932)? It may well be questioned whether the declaration sets forth the substantive facts "concisely," but it is urged by the defendants' counsel that it does not set forth facts constituting a cause of action with "substantial certainty."

The first seven paragraphs of the amended declaration describe the parties and the method of producing and the distribution of gasoline, and have no special bearing on the issue raised by demurrer.

[*Interstate commerce*]

In paragraphs 8, 11, 13 and 17 the plaintiff seeks to remedy one of the defects in its original declaration, viz.: that it did not therein allege that the transactions as therein set forth between the plaintiff and defendants were in the course of interstate commerce.

We are unable to agree that, as set forth in paragraph 11 of the amended declaration, the plaintiff has alleged with substantial certainty that, owing to what it terms a continuous flow of gasoline, all gasoline brought into the northeastern territory by the defendants remains in interstate commerce until it is delivered into the storage tanks of the retailer. While it is clear that the defendants must keep a supply on hand in their storage tanks to meet the fluctuations of demands of the retailers, an anticipated demand by retail customers is not sufficient to render shipments a transaction in the course of interstate commerce until delivered to the customer whenever a demand arises. The cases which hold an order or contract for goods which necessitates a shipment in interstate commerce, and that interstate commerce continues until delivered to the customer, do not apply to anticipated demands. We do not think

the Supreme Court has gone so far as to hold that, to meet the anticipated demands of customers without a specific contract therefor, interstate commerce continues until the demand eventuates in the form of an order or contract and the merchandise is delivered to the retailer.

The cases of *United Shoe Machinery Corp. v. United States*, 258 U. S. 451; *Binderup v. Pathe Exchange, Inc., et al.*, 264 U. S. 291, and *Standard Fashion Co. v. Magrane Houston Co.*, 259 Fed. 793, do not sustain such a contention. In each of these cases, and in the other cases cited by the plaintiff on this branch of the case, there was a definite contract which required transportation of the goods in interstate commerce. The plaintiff here is relying on anticipated demands as rendering all gasoline brought into Massachusetts as continuing or remaining in interstate commerce until delivered into the tanks of the retailer. The facts, to warrant such a conclusion as a matter of law are not alleged with substantial certainty, or otherwise.

While the defendants in paragraph 17 are alleged to have entered into long term contracts with what are termed their "authorized distributors" who sell on a commission basis, and with retailers dealing exclusively in defendants' products to supply them on a "tank car market," it does not necessarily follow that the gasoline to supply such contracts is not distributed from the defendants' local storage tanks in Massachusetts direct to the consumer in tank trucks at tank car prices, in which case the distribution or transportation from the storage tanks to the distributor or retailer is intrastate commerce. *Quincy Oil Co. v. Sylvester et al.*, 238 Mass. 95. If such allegations were intended as allegations that gasoline to supply these contracts remained in interstate commerce until delivered to the distributor or retailer, it is doubtful whether it is alleged with the certainty required by the statute.

The mere fact that a local transaction may cause a movement in interstate commerce is not sufficient. *Moore v. New York Cotton Exchange et al.*, 270 U. S. 593, in which case the Supreme Court said:

> "If interstate shipments are actually made, it is not because of any contractual obligation to that effect; but it is a chance happening which cannnot have the effect of converting these purely local agreements or the transactions to which they relate into subjects of interstate commerce. *Ware & Leland v. Mobile County*, 209 U. S. 405, 412-413. The most that can be said is that the agreements are likely to give rise to interstate shipments. This is not enough."

In paragraph 8 the plaintiff alleges in his amended declaration that:

> "Gasoline is sold in bulk both at wholesale and at retail and, except in rare instances, not in containers. By reason thereof its distribution requires transportation and storage facilities specifically constructed for that purpose. From refineries gasoline is shipped directly to customers in tank cars or tank trucks, or to the principal marketing centers in tank steamers, or by pipe lines from which it is directly transshipped by tank car, tank truck or tank wagon, to customers, or is pumped into *storage tanks* to act as *reservoirs* to meet the fluctuations of demand and supply and from *such tanks is transshipped* to *customers*.
>
> "The defendant owned tank steamers, pipe lines, tank cars and tank trucks, and leases other tank cars. It transported the gasoline which it sold from the refineries to the places of delivery continuously in vessels or vehicles owned by it, and retained full dominion and title to the same during such transportation. Gasoline sold by it in Massachusetts was imported by it into that state either by tank steamers from refineries on the seaboard, or by pipe line from a refinery at Providence, Rhode Island, or by tank car from other refineries, and was shipped directly to customers *or transshipped as above described*." (Italics supplied.)

And in paragraph 13 it is alleged that none of the gasoline sold by the defendants was produced in Massachusetts, there being no refineries in that commonwealth, but was "imported by the defendant into Massachusetts, either in tank cars, or in tank steamers, or by pipe line. Deliveries in tank cars were either in the original tank cars in which the gasoline had been imported or in tank cars into which the gasoline had been transshipped directly from tank steamers. Deliveries in tank trucks were in trucks in which gasoline had been transshipped either directly from tank cars or tank steamers, or from storage tanks."

While alternative allegations are permissible in Massachusetts under Chap. 231, Sec. 37 (Mass. G. L. 1921; Ter. Cent. Ed. 1932), it is only when each alternative allegation sets forth a cause of action. Where one of the alternative allegations presents no ground of action, as in the case of an allegation of delivery in tank cars from refineries direct to a retailer in Massachusetts, *or* of deliveries into the storage tanks of the defendants to be transshipped to customers, it cannot be said that any facts are alleged with substantial certainty showing transportation in interstate commerce, since interstate commerce ends when gasoline is deposited in storage tanks of the defendants to supply local demands. *Quincy Oil Co. v. Sylvester et al., supra*.

Therefore, by reason of the alternative allegations therein, paragraph 8 of the amended declaration standing alone cannot be said to allege with substantial certainty facts showing transportation in interstate commerce to the retailers' storage tanks; but we think the allegations of paragraph 13, wherein it is alleged that from refineries gasoline is imported into Massachusetts and is delivered in the original tank cars in which it is imported, or is delivered in tank cars in which it has been transhipped directly from tank steamers, sufficiently allege that transportation in interstate commerce is continuous until delivered to the retailer.

The allegations in paragraph 13, therefore, comply with Secs. 7 and 37 of Chap. 231 (Mass. G. L. 1921; Ter. Cent. Ed. 1932) and sufficiently set forth that, to some ex-

tent, at least, gasoline when imported from the refineries and delivered in tank cars is being transported in interstate commerce until received by the retailer, though to what extent this is done does not appear.

It is alleged that in their transportation of gasoline into Massachusetts the defendants retain control and title, indicating that the sale is finally consummated in Massachusetts; but this may not necessarily militate against the pleader if, as a direct result, the sale required transportation in interstate commerce. *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282; *Lemke v. Farmers Grain Co.,* 258 U. S. 50; *Federal Trade Commission v. Pacific States Paper Trade Association,* 273 U. S. 52, 64.

[*Lessening of competition*]

Assuming that the declaration to the above extent sets forth transportation of gasoline from refinery to retailer in interstate commerce, has the plaintiff also alleged with substantial certainty the other necessary facts to render the defendants liable under Secs. 2 and 3 of the Clayton Act?

The following are the provisions of Secs. 2, 3 and 4 of the Clayton Act:

"Sec. 2. It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities * * * where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold. or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition. * * *

"Sec. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale * * * or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Under Sec. 4 in case of recovery the plaintiff shall recover three-fold the damages sustained by him.

The plaintiff obviously must go farther than merely alleging that the defendants are transporting gasoline from refineries to the retailers in Massachusetts in the course of interstate commerce. He must also allege that in the course of such commerce they have discriminated in price between "different purchasers of their commodity," and that the effect of their discrimination may be to substantially lessen competition or tend to create a monopoly in such commerce. Sec. 2 of the Clayton Act also contains the proviso that it does not prohibit discrimination in price between purchasers of commodities by reason of difference in grade, quality or quantity.

Since the burden of the plaintiff's declaration is that the defendants discriminated in price in case of sales in tank cars over sales in tank trucks or tank wagons, it is obvious that such discrimination is permitted under the proviso in Sec. 2 and is not in itself unlawful. Many of the other practices of the defendants set forth in the declaration have been held not to be unlawful. *Federal Trade Commission v. Sinclair Refining Co.,* 261 U. S. 463; *Standard Oil Company of New York v. Federal Trade Commission,* 273 Fed. 478, 482.

It is urged, however, that the added condition in case of sales at tank car prices, that the buyer must agree not to sell the products of a competitor of the defendants, is a violation of Sec. 3 of the Clayton Act, since by so stipulating competition is lessened between the plaintiff and other retailers in the competitive territory and thereby a tendency to create a monopoly results.

We think it cannot be said that the declaration contains sufficient allegations to warrant the conclusion as a matter of law that a monopoly in the northeastern territory may result from such a stipulation. It is alleged that the defendants have sold gasoline in the northeastern section of the county for a number of years and originally had a monopoly in this territory; but taking the pleadings more strongly against the plaintiff, as we must, they now control less than half of the retailers' outlets in that section, the remainder being controlled by, or devoted to the sale of, gasoline by competitive companies which, it is alleged, pursue similar methods in selling their products.

The question is, where the requirement that a sale of gasoline in tank cars and at a less price than in case of delivery in smaller quantities by tank trucks will only be made in case the retailer agrees to sell only the defendants' products, results in a lessening of competition in interstate transactions between the plaintiff and stations operated by the Standard Companies and by others in the same competitive territory, to the damage of the plaintiff.

It is obvious from his declarations that the defendants' policy does not affect the amount of sales by the plaintiff of the defendants' products, but only his profits, since the inference is clear that he has supplied all demands of his customers for "Socony" gasoline, though at a less profit

than if he could buy on the tank car market. He does not allege, however, in his amended declaration, that he is equipped to accept gasoline at his filling station in tank cars, or that his profits are so small that he must give up supplying his customers with "Socony" products. The inference is also clear that he buys and sells the products of other integrated or independent companies on the same terms as those of the defendants. There is obviously no discrimination in terms or price between him and other retail customers of the defendants. He is offered the same terms by the defendants as any other retail customer; and since it is alleged that all retailers sell at the same price, which is posted on their pumps at their retail outlets, and that the selling price of all gasoline is the same, at least throughout Massachusetts, competition in price, therefore, cannot result as between him and other retailers, though they deal exclusively in "Socony" products.

Competition is defined as "The effort of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable terms." Webster's Dict. "The struggle between rivals for the same trade at the same time; the act of seeking or endeavoring to gain what another is endeavoring to gain at the same time." 12 C. J. 237. This, according to the plaintiff's declaration, his competitors are not seeking to do by offering more favorable terms of sale of Socony products to purchasers.

While we think it is alleged with substantial certainty that the defendants have fixed lower prices for their products in case of the importation of gasoline in tank car lots direct to their customers, provided the customer agrees to deal only in their products, yet it does not appear, owing to there being no competition in price between the plaintiff and other retailers of gasoline, that the result of defendants' policy is to substantially lessen competition in gasoline and other petroleum products between the plaintiff and stations operated by the Standard Companies, or those dealing exclusively in defendants' products, in the same competitive territory. If the plaintiff chooses to sell petroleum products of other competing companies of the defendants rather than to deal in the defendants' products exclusively, it does not follow, as a matter of law, that a refusal by the defendants to sell gasoline to the plaintiff at tank car prices constitutes a violation of the Clayton Act by the defendants.

The judgments of the District Court are affirmed, with costs.

[¶ 55,147] T. M. B. Hicks, Jr., v. Bekins Moving & Storage Co. (a corporation), Teamsters, Chauffeurs and Helpers Union of Seattle. No. 174, an Unincorporated Association, Dave D. Beck, Sam S. DeMoss, J. D. McEwen, B. Irwin Bowen, Frank M. Brewster, J. R. Onstott, S. Elmer Burnett, Members of the Executive Board and Claude P. O'Reilly, Business Agent, of said Teamsters, Chauffeurs and Helpers Union of Seattle, No. 174, and Claude P. O'Reilly and Pearl H. O'Reilly (his wife).

United States Circuit Court of Appeals for the Ninth Circuit. January 19, 1937.

A conspiracy between a labor union and others to establish and maintain a closed shop is held unlawful when it interferes with interstate commerce.

An action to recover damages resulting from a violation of the Sherman Anti-Trust Act is not an action to recover a penalty, but does survive the death of the injured party and is assignable.

A suit for treble damages under the Anti-Trust Laws is held to state only one cause of action, violation of the Sherman Act, and defendants' contention that there are two causes of action improperly joined, one in tort and one arising on a contract, is overruled.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Before Wilbur, Mathews and Haney, Circuit Judges.

Moore, Fullerton and Moore of Seattle, Washington, for appellant.

Karr & Gregory, Day Karr, Payne Karr and Howard Tuttle, all of Seattle, Washington, for appellee Bekins Moving Co.

Vanderveer and Bassett, of Seattle, Washington, for all other appellees.

Mathews, Circuit Judge: Appellant brought this action against appellees under

§ 4 of the Clayton Act of October 15, 1914, c. 323, 38 Stat. 731 (15 USCA § 15), to recover three-fold damages for injuries alleged to have been sustained by reason of a combination or conspiracy in violation of the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, 210 (15 USCA § 1-7). The amended complaint (hereinafter called the complaint) is in two counts, stating or purporting to state two causes of action. The first is for damages alleged to have been sustained by K. H. Mesharer, whose cause of action was assigned to appellant. The second is for damages alleged to have been sustained by appellant himself. The District Court sustained demurrers to the complaint and to each count thereof and (appellant having declined to plead further) entered a judgment of dismissal. This appeal followed.

Each count of the complaint alleges that appellant's assignor, Mesharer, was "engaged in the business in interstate commerce as a common carrier and contract hauler from State to State"; that appellee Bekins Moving & Storage Company (hereinafter called the Bekins Company) was engaged in the business of moving, warehousing and storing household goods, furniture and other personal property and in the business of transporting such goods, furniture and other property from State to State; that appellee Teamsters, Chauffeurs and Helpers Union of Seattle, No. 174 (hereinafter called the Union) is an unincorporated association; that at all times mentioned in the complaint appellees Beck, DeMoss, McEwen, Bowen, Brewster, Onstott and Burnett constituted and do now constitute the executive board of the Union; and that appellee Claude P. O'Reilly was and is the business manager of the Union and is the husband of appellee Pearl H. O'Reilly.

Each count alleges that on December 30, 1932, appellant "delivered to and left with" the Bekins Company certain household goods, furniture and other personal property (hereinafter called appellant's property), to be stored and kept for appellant in the Bekins Company's warehouse at Seattle, Washington, for a consideration of $12 a month, and to be redelivered to appellant on request; that on June 1, 1935, appellant and Mesharer entered into a contract whereby Mersharer agreed, for a consideration of $400, to transport appellant's property from Seattle, Washington, to Wilkes-Barre, Pennsylvania; that, pursuant to said contract, Mesharer sent two of her employees, with a motor truck, to the Bekins Company's warehouse in Seattle, with instructions from her and authority from appellant to demand and receive delivery of appellant's property; and that her said employees did on June 28, 1935, demand of the Bekins Company delivery of said property, so that it might be transported from Seattle to Wilkes-Barre, as provided in said contract.

[*Conspiracy charged*]

Each count further alleges that prior to June 28, 1935, appellees had "entered into a combination and conspiracy among themselves the object of which was to prevent the movement of household goods, furniture and other personal property from the warehouses of [the Bekins Company] out of Seattle and through the State of Washington in interstate commerce in vans or motor trucks other than vans or motor trucks manned and operated by duly affiliated members of [the Union]"; that "said combination and conspiracy was in existence and full force and effect" on June 28, 1935; that by reason of said combination and conspiracy, the Bekins Company "endeavors to and does prohibit and prevent the movement of any such personal property from its said Seattle warehouse to any point within or without the State of Washington in any except its own motor trucks, vans and lift vans or those operated by its own union employees as aforesaid, thereby interfering with and restraining interstate commerce;" and that pursuant to said combination and conspiracy, the Union "endeavors to and does prohibit and prevent any of its members, not employees of [the Bekins Company] from using their own motor trucks or operating the motor trucks of others in the movement of household goods, furniture and other personal property from the warehouse of [the Bekins Company] in interstate commerce or otherwise, thereby intending to interfere with and restrain interstate commerce."

Each count further alleges that, pursuant to said combination and conspiracy, the Bekins Company, on June 28, 1935, refused to deliver appellant's property to Mesharer's employees, they not being members of the Union, and said employees were then and there threatened by members of the Union with "bodily harm" should they attempt to remove said property, and were thereby prevented from obtaining possession of said property and from transporting it from Seattle, Washington, to Wilkes-Barre, Pennsylvania; and that all of the acts complained of were contrary to the provisions of the Sherman Anti-Trust Act.

The first count alleges that, by reason of the acts complained of, Mesharer was prevented from earning and collecting the sum which was to have been paid her for

transporting appellant's property from Seattle to Wilkes-Barre and was obliged to incur other losses and expenses, being thereby damaged in the aggregate sum of $647.73, and that her cause of action was assigned to appellant on December 12, 1935. The second count alleges that, by reason of said acts, appellant was obliged to pay additional storage charges and to incur other losses and expenses, being thereby damaged in the aggregate sum of $2,004.60.

[*Action survives death*]

The first ground of demurrer is that appellant has no legal capacity to sue. This contention is here urged only as to the first count, which, as previously stated, is based on a cause of action assigned to appellant by Mesharer, who is alleged to have been damaged by a violation of the Sherman Anti-Trust Act. Appellees contend that such an action is one to recover a penalty, and that such a cause of action does not survive the death of the injured party and, therefore, is not assignable. This contention must be rejected. An action to recover damages resulting from a violation of the Sherman Anti-Trust Act is not an action to recover a penalty. *Chattanooga Foundry & Pipe Works v. Atlanta,* 203 U. S. 390, 397. Such a cause of action does survive the death of the injured party and is assignable. *Moore v. Backus* (C. C. A. 7), 78 F. (2d) 571, 573-576; *Fazakerly v. E. Kahn's Sons Company* (C. C. A. 5), 75 F. (2d) 110, 114; *United Copper Securities Co. v. Amalgamated Copper Co.* (C. C. A. 2), 232 F. 574, 577.

[*Action not extinguished by assignment*]

It is also contended by appellees that Mesharer's cause of action was against appellant, and was extinguished by the assignment. There is no merit in this contention. The complaint does not allege, nor does it state any fact from which it may be inferred, that Mesharer was to receive any payment for the transportation of appellant's property unless or until such transportation was completed. It does allege that, by the acts complained of, Mesharer was prevented from transporting appellant's property and from earning or collecting the amount which appellant had agreed to pay for such transportation, and was also obliged to incur other losses and expenses. Her cause of action was not against appellant and was not extinquished by the assignment.

[*Violation of Sherman Act only cause of action*]

The second ground of demurrer is that in each count of the complaint two causes of action are improperly united. This contention is here urged only as to the second count. The two causes of action there said to have been united are (1) a cause of action in tort for a violation of the Sherman Anti-Trust Act (2) a cause of action arising on the contract between appellant and the Bekins Company. This contract is referred to in each count of the complaint, but neither count states or attempts to state a cause of action predicated thereon. The only cause of action stated or attempted to be stated in either count is for a violation of the Sherman Anti-Trust Act. There was no attempt to invoke the trial court's jurisdiction on any other ground or for any other purpose.[1] It therefore cannot be said that two causes of action are united, improperly or otherwise in either count of the complaint.

[*Complaint states facts not conclusions*]

The third and last ground of demurrer is that neither count of the complaint states facts sufficient to constitute a cause of action. Appellees contend that the allegations of the complaint regarding the combination or conspiracy therein mentioned are mere conclusions of law, and that these conclusions are negatived by the facts alleged in the complaint. These contentions are without merit. It is true, of course, that, to show a violation of the Sherman Anti-Trust Act, mere statements of legal conclusions are not sufficient. *Glenn Coal Co. v. Dickinson Fuel Co.* (C. C. A. 4), 72 F. (2d) 885, 888; *Witherell & Dobbins Co. v. United Shoe Machinery Co.* (C. C. A. 1), 267 F. 950, 955.

But the complaint in this case states more than mere conclusions. Each count thereof alleges, in substance, that appellees combined and conspired to prevent, and did prevent, the transportation of personal property form the Bekins Company's warehouses in Seattle, Washington, to points outside the State of Washington, in vans or motor trucks other than those manned and operated by members of the Union; that, in pursuance of said combination and conspiracy, appellees prevented the transportation of appellant's property from Seattle, Washington, to Wilkes-Barre, Pennsylvania; and that, by reason thereof, appellant and his assignor were injured and damaged in the amounts stated. These are specific allegations of fact which, if true, warrant a judgment for appellant. *Buyer v. Guillan* (C. C. A. 2), 271 F. 65; *Steers v. United States* (C. C. A. 6), 192 F. 1, 4. The combination and conspiracy and the acts done in pursuance thereof are set forth with definiteness and certainty. Ap-

[1] Diverse citizenship is not alleged.

pellant was not required to plead evidentiary matters or to set out in his complaint a detailed description of the alleged conspiracy. *Mitchell Woodbury Corp. v. Albert Pick Barth Co.* (C. C. A. 1), 41 F. (2d) 148, 150; *Ballard Oil Terminal Corp. v. Mexican Petroleum Corp.* (C. C. A. 1), 28 F. (2d) 91, 98.

[*Object of conspiracy to maintain closed shop*]

Appellees say the complaint shows that "the *real object* of the so-called conspiracy was to establish and maintain a closed shop in the City of Seattle". That does appear to have been one object of the conspiracy, but, if the allegations of the complaint be true, that object was to be accomplished by unlawful means, that is to say, by doing that which the Sherman Anti-Trust Act forbids. Such a violation of the Act cannot be justified or excused on the pretext that its object was to establish or maintain a closed shop. *Loewe v. Lawlor,* 208 U. S. 274, 285-309; *Lawlor v. Loewe,* 235 U. S. 522, 534; *Duplex Printing Press Co. v. Deering,* 254 U. S. 443, 462-468.

The cases cited in appellees' brief do not support their contention on this point. The conspiracies dealt with in *United Mine Workers v. Coronado Coal Co.,* 259 U. S. 344; *Levering & Garrigues Co. v. Morrin,* 289 U. S. 103; *Silverstein v. Local No. 280, Journeymen Tailors' Union* (C. C. A. 8), 284 F. 833; *Konecky v. Jewish Press* (C. C. A. 8), 288 F. 179; and *United States v. Hency* (D. C., N. D. Tex.), 286 F. 165, were aimed at intrastate businesses and activities, and had only an indirect and incidental effect on interstate commerce. Here, if appellant's allegations be true, restraint of interstate commerce was the immediate aim and object of the conspiracy. The case of *Schechter Poultry Corp. v. United States,* 295 U. S. 495, also cited in appellees' brief, arose under the National Industrial Recovery Act, and has no bearing on the question here considered.

[*Demurrers overruled*]

Judgment reversed and case remanded, with directions to overrule the demurrers to the amended complaint and to each count thereof.

[¶ 55,148] Federal Trade Commission v. F. A. Martoccio Company, a corporation, in its own name and right, and trading as Hollywood Candy Company.

United States Circuit Court of Appeals, Eighth Circuit. January 23, 1937.

On Application for Enforcement of an Order of The Federal Trade Commission.

Sales to wholesale dealers and jobbers of candy so packed and assembled that sales to the public are to be made, or may be made, by means of a lottery, gaming device, or gift enterprise, and furnishing to dealers a "punch board" or "push card" are enjoined, in affirmance of a Federal Trade Commission cease and desist order. This method of sale is held to be against public interest because it is in the nature of a gambling game, and it is held to be unfair competition because it places competitors in the position where they must unwillingly adopt such method or run the risk of losing business if they refrain from so doing.

Affirming Federal Trade Commission Order No. 2283.

Mr. Martin A. Morrison, Assistant Chief Counsel, Federal Trade Commission (Mr. W. T. Kelley, Chief Counsel, Federal Trade Commission, Mr. Henry C. Lank and Mr. James W. Nichol, Special Attorneys, Federal Trade Commission, were with him on the brief) for petitioner.
Mr. Arnold L. Guesmer for respondent.

Before STONE, SANBORN and WOODROUGH, Circuit Judges.

[*Facts*]

STONE, Circuit Judge, delivered the opinion of the court.—This is a proceeding brought by the Federal Trade Commission for the enforcement of a "cease and desist" order entered by it against the respondent.

Respondent is a manufacturer of candy selling its product, in interstate commerce, to wholesalers and jobbers. The candy was packed in cartons, each containing a large number of uniform small candy bars, a smaller number of one-quarter pound bars, a yet smaller number of one-half pound bars and a "push card." The candy is of good quality. The smallest bars are of the size and kind usually retailing for five cents each. A push card is a stiff pasteboard card with covered holes in each of which is a concealed number. On the card is set forth certain numbers which entitle the purchaser (who uncovers one of them) to a quarter pound bar and certain other numbers entitling to a half-pound bar. For five cents, any purchaser may uncover a number on the card. He may secure a number calling for one of the two larger size bars. If he does not, he gets a

five cent bar which is reasonably worth what he pays. The purchaser may buy a five cent bar and pay no attention to the card. There is no requirement that the purchaser use the card in buying the small bars. These cartons of candy are sold by the wholesalers and jobbers to retailers who may use the card or not in selling the candy.

[*Commission order*]

The essential portions of the "cease and desist" order are as follows:

"(1) Selling and distributing to wholesale dealers and jobbers, for resale to retail dealers, candy so packed and assembled that sales of said candy to the general public are to be made, or may be made, by means of a lottery, gaming device, or gift enterprise;

"(2) Supplying to, or placing in the hands of wholesale dealers and jobbers, packages or assortments of candy which are used, or may be used, without alteration or rearrangement of the contents of said packages or assortments, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy or candy products, contained in said assortment, to the public;

"(3) Supplying to, or placing in the hands of, wholesale dealers and jobbers assortments of candy together with a device, commonly called a 'punch board' or 'push card,' for use, or which may be used, in distributing or selling said candy to the public at retail;

"(4) Furnishing to wholesale dealers and jobbers a device, commonly called a 'punch board' or 'push card', either with packages or assortments of candy or candy products, or separately, bearing a legend, or legends, or statements, informing the purchasing public that the candy, or candy products, are being sold to the public by lot or chance, or in accordance with a sales plan which constitutes a lottery, gaming device, or gift enterprise."

Respondent has filed here its "petition to set aside Commission's order" wherein it presents thirty-four challenges to the findings, the conclusions or the order of the Commission.

[*Keppel case*]

For convenience, we treat the case by consideration of the grounds and reasons advanced by respondent in its brief why the order of the Commission should not be enforced but should be set aside. At the threshold of our inquiry we are faced with a decision of the Supreme Court upon a situation so near to this one before us that the heavy burden is upon respondent to distinguish that case from this one. In fact, this is the main task of respondent in this litigation and we find it convenient to treat most of respondent's arguments in connection therewith.

The case of *Federal Trade Commission v. R. F. Keppel & Brother, Incorporated,* 291 U. S. 304, involved against a candy manufacturer using a candy sales plan known as the "break and take," which is described in the opinion (p. 307), as follows:

"The break and take assortments are so arranged and offered for sale to consumers as to avail of the element of chance as an inducement to the retail purchasers. One assortment, consisting of 120 pieces retailing at 1 cent each, includes four pieces, each having concealed within its wrapper a single cent, so that the purchasers of those particular pieces of candy receive back the amount of the purchase price and thus obtain the candy without cost. Another contains 60 pieces of candy, each having its retail price marked on a slip of paper concealed within its wrapper; 10 pieces retail at 1 cent each, 10 at 2 cents, and 40 at 3 cents. The price paid for each piece is that named on the price ticket, ascertained only after the purchaser has selected the candy and the wrapper has been removed. A third assortment consists of 200 pieces of candy, a few of which have concealed centers of different colors, the remainder having white centers. The purchasers of the candy found to have colored centers are given prizes, packed with the candy, consisting of other pieces of candy or a package containing lead pencils, penholder and ruler. Each assortment is accompanied by a display card, attractive to children, prepared by respondent for exhibition and use by the dealer in selling the candy, explaining the plan by which either the price or the amount of candy or other merchandise which the purchaser receives is affected by chance. The pieces of candy in the break and take packages are either smaller than those of the competing straight goods packages, which are sold at a comparable price without the aid of any chance feature, or they are of inferior quality."

After stating "that the practice complained of is a method of competition in interstate commerce and that it is successful in diverting trade from competitors who do not employ it" (p. 308) and that "a practice so widespread and so far reaching in its consequences is of public concern" (p. 308), the Court discussed and determined the unfairness of the method. After stating that the case of *Federal Trade Commission v. Winsted Hosiery Co.,* 258 U. S. 483, had decided that "A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought to involve the kind of unfairness at which the statute was aimed" (p. 313), the Court continued (p. 313), as follows:

"The practice in this case presents the same dilemma to competitors, and we can perceive no reason for distinguishing between the element of chance as employed here and the element of deception involved in labelling cotton goods 'Natural Wool', as in the *Winstead* case. It is true that the statute does not authorize regulation which has no purpose other than that of relieving merchants from troublesome competition or of censoring the morals of business men. But here the competitive method is shown to exploit consumers, children, who are unable to protect themselves. It employs a device whereby the amount of the return they receive from the expenditure of money is made to depend upon chance. Such devices have met with condemnation throughout the community. Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of the states, it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy. For these reasons a large share of the industry holds out against the device, despite ensuing loss in trade, or bows reluctantly to what it brands unscrupulous. It would seem a gross

perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the method is not 'unfair'. See *Federal Trade Comm'n v. Royal Milling Co., supra,* at 217; *Federal Trade Comm'n v. Algoma Lumber Co., supra,* at 81."

From the above statements concerning the issues in and the above quotations from the *Keppel* case, appear two matters vital here. One of these is that the Court broadly asserted that "the element of chance as employed" there was an unfair method of competition within the Trade Commission Act. The other is that the "element of chance" there employed would seem to be not different in essentials from the method employed here. We now turn to consideration of the reasons advanced by respondent to distinguish this case.

(1) Respondent contends there is no element of "chance" in a true sense present in its method because there is no possibility of loss to the consumer, since he gets five cents worth of good candy in any event and may get several times that amount for the same money. This distinction is not valid. Under the *Keppel* case, the vice of the method there condemned is that the element of chance is employed as a factor in competitive sales. While most gambling or chance games involve possible loss to the player as well as possible gain, it does not change the character of the game as one of chance merely to remove the possibility of loss. In fact, to remove all possibility of loss would make more effective the incentive to play by removing the most forceful natural reason to refrain.

In connection with this same point, respondent argues this situation comes exactly within the statement in the *Keppel* case (p. 313) that "the statute does not authorize regulation which has no purpose other than that of relieving merchants from troublesome competition or of censoring the morals of business men." The answer to this argument is that the *Keppel* case determined that the use of elements of chance of this character in competitive merchandising comes within the statute.

(2) Two further contentions of respondent are related in thought and will be treated together. They are that even if the method were unethical it would not authorize proscription "regardless of consequences" to the consuming public but that the Commission can act only when there is "commercial or financial injury to the consuming public." Essentially, this presents the question of "public interest" (required by the Act). It is obvious that no financial loss to *consumers* can result from the method employed by respondent. But the *Keppel* case seems to declare, or at least necessarily infer, that there is an injury to the consuming public through violation of the public policy opposing games of chance and to competitors through compelling them to participate in such violation or to lose business. We understand the *Keppel* case as holding that it is in the public interest to prevent sales based upon games of chance and we hold that the method here used involves such a game of chance (*Walter H. Johnson Candy Co. v. Federal Trade Commission,* 78 Fed. (2d) 717, 718, C. C. A. 7). In a closely related contention, respondent asserts that even if competitors would be benefited by the order, it should not be upheld if it would work a practical disadvantage to the public. By "public" respondent means small candy manufacturers, retailers and consumers. The argument is that this method of selling provides an economical and effective method of "advertising" which can be and is used by small manufacturing concerns which lack the financial resources to compete with large manufacturers in ordinary advertising methods, thus enabling the small concern to survive where it otherwise could not or only precariously. Further, that this method aids the retailer by increasing his volume of sales. Also, it benefits the consumer by always giving him full value (both in quality and quantity) for his expenditure and at the same time affording him an opportunity to secure more than his money value. This record abundantly establishes that the above advantages—financial and otherwise—are the natural results of this character of method of selling. However, we understand the main grounds for sustaining the order in the *Keppel* case to be the public interest and policy in suppressing games of chance and the harmful effect upon competitors flowing from the use of such in sales. If this view is sound, the above advantages are impotent to justify this method of selling which employs an element of chance (in the sense of a gambling chance).

(3) Under several headings, respondent argues that the element of chance involved here has no connection with interstate commerce and is, therefore, outside the jurisdiction of the Commission. It argues that the use or non-use of the push board is entirely within the control of the retailer after the carton has ceased to be an article of commerce and is a purely local transaction; that the board is entirely separate from the candy which can be and sometimes is sold without regard to the board; that interstate commerce in so far as respondent is concerned ceased with receipt of the carton by the wholesaler or jobber; that if there is violation of public policy, it is purely local and is the affair solely of local authorities and not of the Commission. These arguments contain really two propositions: Interstate commerce and choice of use of the push board. Both are met by the language in *Federal Trade Commission v. Winstead Hosiery Co.,* 258 U. S. 483, 494: "That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition." Also see *Reed, Murdock & Co. v. H. P. Coffee Co.,* 48 Fed. (2d) 817, 819-820, C. C. A. 8; *Andrew Jergens Co. v. Bonded Products Corporation,* 21 Fed. (2d) 419, 424, C. C. A. 2; *Coca Cola Co. v. Gay-Ola Co.,* 200 Fed. 720, 722, C. C. A. 6; *Von Mumm v. Frash,* 56 Fed. 830, 836, C. C. N. Y.; *New England Awl & Needle Co. v. Marlborough Awl & Needle Co.,* 168 Mass. 154, 155.

(4) A further contention is that this method of selling "is so old and well established and so well understood and so fully approved by the public" that an order destroying it should not be sustained.

The supporting argument is as follows:

"'There is no bar through lapse of time to a proceeding in the public interest to set an industry in order by removing the occasion for *deception* or *mistake,* unless submission has gone so far that the occasion for misunderstanding, or for any so widespread as to be worthy of action, is wholly at an end. Competition may then be fair irrespective of its origin.' [Italics inserted by respondent.] *F. T. C. v. Algoma Lumber Co.,* 291 U. S. 67, 80.

In this instance, 'the occasion for misunderstanding, or for any so widespread as to be worthy of action, is wholly at an end', even if there ever was any such occasion. The people have had over 25 years of experience with this simple selling and advertising method and thoroughly understand it, and approve it by patronage. It is with them an accepted thing.

In the retailing of goods various customs grow up, which the public does not want to have changed until it gets ready to make the change itself, which it then does without asking anybody's permission.

The customary use of this card-system of selling and advertising is similar to some other customs, new and old. It is like the New Orleans custom of giving laignappe. There the retailer's customer expects him to give something extra with the purchase made. Here, instead of giving the something extra, the customer uses the board to determine whether he is going to get something extra by way of the larger piece.

We now hear, over the radio, announcements that every third person coming into a specified drugstore will get something free.

Merchants must do things to attract the public. They have to deal with the people as they are.

They must give them what pleases them. The people have these matters in their own hands. It is not for someone else to tell them what they should want. They decide that. What they decide should not be vetoed or censored, unless it is substantially harmful, and then the public itself will act. The Supreme Court recognizes that practical factor.

'In such matters, the public is entitled to get what it chooses, though the choice be dictated by caprice, or by fashion, or perhaps by ignorance.' *F. T. C. v. Algoma Lumber Co.*, 291 U. S. 67, 78.

Many persons have no taste for commerce. Hence they enter other vocations or the government service. Being without experience as to what appeals to the public in merchandising, most of the rough and tumble things common to business offend the concepts which unfit them for business, and which they would have to get rid of if they were to hold a job with a commercial concern or were to succeed in a business of their own. If people in business give the public what it wants, they succeed; if they try to bring the public up to genteel ideals, they will fail and go broke. Experience has demonstrated that. Commercial men have to study closely the reactions of the public to their methods. If those not experienced in commercial work were to enter it, they would discover their error. They would learn to give the public what it reacts favorably to and approves, not what they think it ought to have. That is bound to be the case where people have individual liberty to follow their own inclinations. Bureaucrats think they can regiment the public and make people conform to their ideas; the merchant knows he must cater to the public. He must design his packages to appeal to the rank and file, though his designs may offend the artistic. He must use slogans and advertising matter that appeal to the rank and file, though they offend the literary. When by the use of the card customers get the big bar, the bargain becomes more strikingly realistic to them. The card serves to attract their attention and interest. As said by an experienced newspaper editor, 'While we should like to confine our homage to the god of things as they ought to be, we cannot deny homage to the god of things as they are, the public.' "

What constitutes "public interest" and "unfair methods of competition" within the Act is a matter of definition through judicial inclusion and exclusion declared in the various situations in cases presented to the courts. Where the Supreme Court has determined that a certain situation is within the Act (as in the *Keppel* case) the basis and reasons for such inclusion stated by that Court are binding as to all similar situations subject to such basis and reasoning. The reasons advanced in support of the contention just above stated do not distinguish the *Keppel* case.

(5) A further contention is that "there is no evil in spending for advertising some of the candy in the big pieces." The supporting argument is as follows:

"It is said that those who get one of the big bars for 5¢, get more than the others do. That is true in the case of any bargain purchase. The consumer who gets one of the big bars is benefited: but the one who gets one of the small bars is *not hurt*, because he gets his money's worth. That lack of hurt to anyone is the crucial thing. Consumers are not 'exploited'.

If the big pieces were eliminated, then the consumers would not get the advertising expenditure and the other advantages of this method, such as getting the candy fresher, reduction of price by obviating waste and by increasing volume.

Then none of the candy would be devoted to advertising. All consumers would have to pay in money, which would go for advertising to someone else.

Is it to the public interest to reduce the opportunities and advantages of consumers, so that some consumers will get less than they would under the system in question?

If it were possible to get along without advertising, we should have an entirely different situation: and it would not then be necessary to use the big bars.

If it were not necessary to have advertising, to pay rent, or to pay taxes, no doubt everyone could be given still larger bars for 5¢ each. However, we have to deal with the situation as it is.

The retailer's customers know that some get the large bar for 5¢. Thus they are informed how much candy is devoted to advertising, a thing they could not know if other advertising methods were used.

The method is in all respects beneficial to the consumers. Hence, they like it and approve it."

The "evil", if it be such, of this selling method is not that the larger pieces of candy are given away but that the entire sales method is a game of chance and such method has been declared within the Act by the Supreme Court in the *Keppel* case.

(6) Another contention is that the "moral objection to including push cards in their cartons" by some manufacturers furnishes no ground for action by the Commission. Obviously, action by the Commission cannot rest solely upon moral or ethical views of competitors. However, there is here something beyond the mere views of others in the trade. There is the public view and public policy against gambling and games of chance and that public policy is given full force in the *Keppel* case (*Walter H. Johnson Candy Co. v. Federal Trade Commission*, 78 Fed. (2d) 717, 718, C. C. A. 7).

(7) Respondent urges that the *Keppel* (as well as other cases) is unlike this one in that it involved exploitation of consumers (particularly children) through under size and under quality candy. Undoubtedly, the exploitation of children by the underweight and inferior quality of candy was a consideration in the *Keppel* case opinion but we think the Supreme Court did not regard such consideration as essential to the result reached by it (*Hofeller v. Federal Trade Commission*, 82 Fed. (2d) 647, 648, C. C. A. 7).

Review of evidence

Respondent urges that it is the duty of this Court to examine the evidence before the Commission and to determine for itself whether such evidence "supports" (15 U. S. C. A., Section 45, p. 255) the findings of the Commission upon which its order is based. We find no necessity to determine this point of law. There is no dispute in the evidence as to the method of sales used by respondent nor as to any other fact necessary to full consideration of the various propositions and contentions advanced by respondent and treated hereinabove. The differences here are as to inferences from facts and as to rules of law.

Validity of Act

Respondent challenges the validity of the Act. This it does under two headings. The first is really not a true challenge of the Act but rather a contention that the order is directed against actions which are no part of interstate commerce. Of course, if such actions were intrastate purely, as contended, they would be outside the Act itself. Hereinbefore, we have determined such actions to be within interstate commerce.

The other and accented challenge is that the Act is invalid because it combines in the Commission the functions of complain-

ant, prosecutor and judge. This matter has been determined against the position of respondent in several cases (*Federal Trade Commission v. Klesner,* 280 U. S. 19, 27; *Chamber of Commerce v. Federal Trade Commission,* 280 Fed. 45, 48 C. C. A. 8; *Federal Trade Commission v. McLean & Son,* 84 Fed. (2d) 910, 912, C. C. A. 7; *National Harness Mfrs' Ass'n v. Federal Trade Commission,* 268 Fed. 705, 707, C. C. A. 6; *Sears, Roebuck & Co. v. Federal Trade Commission,* 258 Fed. 307, 311, C. C. A. 7).

Conclusion

We conclude that this case is ruled by the *Keppel* case. We so conclude since we construe the *Keppel* case to determine that a method of sale which employs the element of chance as an essential feature is against public interest because it is in the nature of a gambling game and that such a method is unfair competition because it places competitors in the position where they must unwillingly adopt such method or run the risk of losing business if they refrain from so doing. Since we are unable to distinguish, in essentials, the situation in this case from the one presented in the *Keppel* case, the enforcement of the order of the Commission here involved will be ordered and the petition to set aside the order will be denied.

[¶ 55,149] Henry C. Hill, Warden, United States Northeastern Penitentiary v. United States ex rel. Joseph Weiner.

Supreme Court of the United States. February 1, 1937.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

It is held that contempt of a decree enjoining violation of the Anti-Trust laws, rendered in a suit brought by the United States, can be punished by imprisonment in excess of six months. Section 22 of the Clayton Act, which establishes a maximum imprisonment of six months, is held to be limited to suits by private litigants under the provisions of Section 24.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

[Facts]

The relator, Weiner, was convicted in a federal district court for violating a decree entered against him and numerous others by that court in a suit in equity brought by the United States under the Sherman Anti-Trust Act. Title 15 U. S. C. § 1, 2, 4. He, with others, was charged by information with the commission of several specified acts in violation of the decree, constituting criminal contempts. Upon a trial before the court sitting without a jury, he was found guilty and sentenced for certain of the contempts to imprisonment for six months in the House of Detention, and for other contempts for two years additional in the penitentiary. Upon his application and consent, the first part of the sentence was increased from six months in the House of Detention to a year and a day in the penitentiary, but to run *concurrently* with the two years' imprisonment.

On June 5, 1935, he was committed to the penitentiary. At the end of eleven months, he applied by petition to another federal district court to be discharged on habeas corpus, on the ground that the first court was without power to sentence him for a period of more than six months; and, having served that long, that he was entitled to be set at liberty.

The district court accepted that view, granted the writ, and ordered the relator discharged. 11 F. Supp. 195. Upon appeal, the court below affirmed the order. 84 F. (2d) 27.

[Clayton Act sections involved]

The case involves a consideration of § 21, 22 and 24 of the Clayton Act, Title 28 U. S. C. § 386, 387 and 389.* Section 21, so far as pertinent, provides that any per-

* Sec. 21. Any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided. [Title 28 U. S. C. § 386.]

Sec. 22. . . . In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; . . .

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct,

son who shall willfully disobey any lawful decree of the federal district court by doing any act or thing thereby forbidden to be done by him, if of a character to constitute also a criminal offense under any statute of the United States or laws of any state in which the act was committed, shall be proceeded against as thereafter provided. Section 22 provides for trial by the court or, upon demand of the accused, by a jury. If found guilty, punishment is to be either by fine or imprisonment or both, in the discretion of the court, "but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months." Section 24, however, provides that "nothing herein contained [§ 21, 22, 23, 25] shall be construed to relate to contempts committed in disobedience of any lawful . . . decree . . . entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one . . . may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914." If § 24 applies, the sentence was within the statutory authority of the court.

[*Sec. 24 limits Sec. 22 to private suits*]

First. The court below held, and relator here contends, that the limitation of imprisonment to six months is not affected by the provisions of § 24. A similar question was before this court in *United States v. Goldman,* 277 U. S. 299, and was there decided contrary to the views of the court below. In that case, an information was presented by the United States to a federal district court, charging Goldman and others with criminal contempts committed by acts in violation of an injunction decreed by that court in an equity suit brought by the United States. The information was dismissed on the ground that under § 25 of the Clayton Act, the prosecution was barred by the statute of limitations. This court reversed. Section 25 provides that no proceeding for contempt shall be instituted unless begun within one year of the act complained of; but we held that the specific exception contained in § 24—"nothing herein contained"—applied to all provisions of the act relating to prosecutions for criminal contempts, and therefore applied to § 25, "as well as to the other sections," and that the one-year limitation prescribed by § 25 was without application to a case brought for the disobedience of a decree entered in a suit prosecuted by the United States.

That decision controls here. The object of § 24 clearly was to limit the application of the provisions of § 22, and the other sections named, to prosecutions for contempt arising out of cases instituted by private litigants.

[*No undue discrimination*]

Second. We find nothing in the further contention that this view of the statute results in a discrimination in the matter of punishment so arbitrary as to deny due process of law to relator. Whatever may be the restraint against discriminatory legislation imposed by the due process of law clause of the Fifth Amendment, it is not encountered by the legislation here. The constitutional power of Congress to prescribe greater punishment for an offense involving the rights and property of the United States than for a like offense involving the rights or property of a private person reasonably cannot be doubted Compare *Pace v. Alabama,* 106 U. S. 583.

Judgment reversed.

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but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months. [Title 28 U. S. C. § 387.]

Sec. 24. Nothing herein contained [that is in § 21, 22, 23, 25] shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914. [Title 28 U. S. C. § 389.]

[¶ 55,150] Dr. Miles California Co. v. Sontag Chain Stores Co., Ltd.

California Supreme Court, January 20, 1937.

The Court sustains a suit asking for an injunction restraining defendant from selling plaintiff's trade-marked articles at prices lower than those established in contracts between plaintiff and other dealers under the California Fair Trade Act.

[*Counsel*]

For Appellant—Newlin & Ashburn, Edward S. Rogers.

Amici Curiae for the Stationers Association of Southern California, etc.—Landels, Weigel & Crocker.

For Respondent—Loeb, Walker & Loeb; Herman S. Selvin, of Counsel.

[*Facts*]

WASTE, C. J.—Plaintiff prosecutes this appeal from a judgment of dismissal entered after a demurrer to its amended complaint had been sustained. The action was brought to restrain defendant from selling plaintiff's trademarked articles at cut-rate prices, and in violation of a system of contracts, of which defendant had knowledge, between plaintiff and its distributors, both wholesale and retail, fixing the resale price of plaintiff's products. The complaint alleges that defendant was tendered such a contract but refused to execute it. The activities of defendant are described in detail, and it is alleged that such tactics have been indulged in for the purpose of inducing other distributors to break their contracts with plaintiff. The relief prayed for is that defendant be enjoined from selling plaintiff's trademarked articles at prices less than the resale price fixed by plaintiff in its contracts with other distributors.

The amended complaint was filed in August, 1932, and judgment of dismissal was entered in January, 1933. Subsequent to the rendition of the judgment herein, the legislature amended the Fair Trade Act (Stats. 1931, p. 583) by adding thereto section 1½ (Stats. 1933, p. 793). This amendment prohibits the selling of any trademarked commodity at less than the price stipulated in resale contracts such as are described in the complaint "whether the person so . . . selling is or is not a party to such contract," and defines such activities as unfair competition, and permits injunctive relief. It is obvious that if the 1933 amendment is applicable to the instant case, and if it is constitutional, plaintiff is entitled to the relief prayed for. This is conceded by respondent.

[*Change of law*]

In *Tulare Dist. v. Lindsay-Strathmore Dist.*, 3 Cal. (2d) 489, 527, we had occasion to review at length the question as to the effect, on an appealed case, of a change in the law pending the appeal. After an extensive review of the authorities it was held that "whatever may be the law applicable to appeals generally, the rule is well settled that on appeals involving injunction decrees, the law in effect when the appellate court renders its opinion must be applied."

[*Constitutionality*]

The constitutionality of section 1½ of the Fair Trade Act was upheld by this court in *Max Factor & Co. v. Kunsman*, 3 Cal. (2d) 446, and in *Pyroil Sales Co., Inc., v. The Pep Boys*, 3 Cal. (2d) 784. These cases were affirmed by the United States Supreme Court in December of 1936 (57 Sup. Ct. Rep. 147) upon the authority of *Old Dearborn D. Co. v. Seagram-Distillers Corp.*, 57 Sup. Ct. Rep. 139.

For the foregoing reasons, and upon the authority of the above cases, the judgment appealed from is reversed.

We concur: Langdon, J., Shenk, J. Thompson, J., Curtis, J., Seawell, J.

[¶ 55,151] Federal Trade Commission v. National Biscuit Company.

United States District Court, Southern District of New York. February 16, 1937.

The power of the Federal Trade Commission to compel disclosure of information from persons under Section 6(a) of the Federal Trade Commission Act and under Public Resolution 61, 74th Congress, authorizing an investigation of agricultural income, is not limited to disclosures relating to breaches of the law in or affecting interstate commerce, but is for the purpose of enabling Congress to frame legislation, and a writ of mandamus will issue to compel a biscuit manufacturer to furnish information as to total volume of sales and as to transactions with particular customers.

[*Counsel*]

LAMAR HARDY, United States Attorney.

RUSSELL HARDY, Special Assistant to the Attorney General.

DAVIS POLK WARDWELL GARDINER & REED, Attorneys for Respondent, By John W. Davis, Of Counsel.

[*Court proceedings*]

GODDARD, District Judge: The Federal Trade Commission on September 2, 1936 filed a petition praying for an alternative writ of mandamus commanding the respondent, the National Biscuit Company, to furnish and file with the Federal Trade Commission, the petitioner, certain information regarding its business. After notice to respondent and a hearing, the writ was issued on September 16, 1936. The writ commanded the National Biscuit Company to show cause why it should not furnish the Federal Trade Commission with the information called for in certain blank forms, schedules and questionnaires which were attached to and made a part of the writ. On the return of the writ, the respondent filed its Answer and Objections to the petition with its reasons for refusing to furnish the information and the Commission filed and served its Objections to respondent's Answer and Objections in the form of a general demurrer.

[*Investigation of agricultural income*]

It appears from the papers filed that the Federal Trade Commission bases its authority and demand for the information sought on a Resolution passed by both Houses of Congress and approved by the President on August 27, 1935 (Public Resolution 61—74th Congress) "Authorizing the Federal Trade Commission to make an investigation with respect to agricultural income and the financial and economical conditions of agricultural producers generally," for the purpose of enabling Congress to "to consider whether new legislation should be enacted or existing legislation amended on any of the subjects referred to." The Resolution is somewhat lengthy and it is unnecessary to set it forth here in full. It required the Commission to make an investigation to ascertain the facts with regard to the causes of the unequal distribution between the farmer and others of the income from the principal farm products, particularly as to the existence of certain supposed causes of this condition which are described in the resolution as concentration of control, combinations and monopolies, price fixing and manipulation. Included in the preamble of the Resolution is the following:

"Whereas it is charged that through the payment of high and excessive salaries and other devices said middlemen, warehousemen, processors, manufacturers, packers, and others escape just taxation by the United States, that said salaries tend unduly to diminish the tax revenues of the United States and tend to burden and restrain interstate and foreign commerce in farm products, and to divert and conceal the earnings and profits of the concerns paying said salaries, and that by various devices those receiving said salaries escape their just share of Federal taxation * * *."

, and the Commission was directed to investigate and report upon the salaries received by the officers of such companies and

"The extent to which said corporations avoid income taxes, if at all, and the extent to which officers receiving such salaries paid income taxes thereon."

[*Questionnaires issued*]

On September 19, 1935 the Federal Trade Commission, purporting to act pursuant to the authority of this Resolution, resolved to "investigate and report at the next session of Congress" upon the matters referred to in the Resolution, and on February 4, 1936 the National Biscuit Company received from the Federal Trade Commission two questionnaires designated as Schedule A-7 and Schedule B. At the head of each of these schedules was the following:

"This schedule is called for under the terms of Section 6 (a) of the Federal Trade Commission Act, copy of which is annexed, and of S. J. Resolution 9, 74th Congress, First Session, approved August 27, 1935, authorizing and directing the Federal Trade Commission to investigate and report at the next session of Congress the extent of the increases or decreases in recent years in the income of principal corporations engaged in the sale, manufacturing, warehousing, and/or processing of the principal farm products and of other principal sellers * * * compared with the decline in agricultural income including the amount and percentage of such changes, etc., copy of which is enclosed.

Your Attention is directed to Section 10 of the Federal Trade Commission Act providing penalties for false reports and for failure to file reports."

No charge of any violation of law by the National Biscuit Company was made in either of the questionnaires which was the only notice respondent received as to the subject and purpose of the inquiry.

[*Business of respondent*]

The petition alleges and the return admits "that National Biscuit Company directly and through numerous corporations owned and controlled by it, has been purchasing, producing, manufacturing, selling, distributing, transporting, and shipping, in, from, to and through the several States in and in connection with commerce among the States, substantial quantities of food products, farm products, and products made from farm products, that is to say, wheat flour, sugar, molasses, milk, butter, cheese, eggs, raisins, peanuts, bread, biscuits, cakes, crackers, and other bakery products and other commodities to petitioner unknown." But in the return respondent alleges "that in addition to the business therein described a large and substantial portion of respondent's business, such as, the manufacturing

and processing of the commodities and products which it sells and the sales of products within the confines of a single State, is purely intrastate in character and has no direct effect upon intrastate commerce or the interstate business conducted by respondent."

[*Objections of respondent*]

In its Answer and Objections to the petition, respondent alleges:

"13. That the compulsory disclosure of the confidential information which petitioner seeks to exact from the respondent, including the dissemination in the trade of said information relating to respondent's business with particular customers and to respondent's total volume of business, would place respondent at a distinct disadvantage in competing with its business rivals and in dealing with its customers and would otherwise impose a great hardship on respondent in excess of the legitimate public purpose, if any, to be served by the disclosure of said information."

It is also alleged that respondent has been at all times and is now ready and willing to answer the questionnaires involved in this proceeding on the condition that the information in such answers would not be disclosed to the public or to competitors or customers of the respondent, but that the Federal Trade Commission has as yet been unable or unwilling to assure respondent that said information would be confidential.

The schedules received by the National Biscuit Company in substance called for the following information:

"SCHEDULE A-7

(Bread and Bakery Products)

Question (1) The number of barrels of wheat flour purchased in the year 1935 from each of various types of distributors such as brokers, mill agents, wholesale grocers, jobbers, including own flour mills.

Question (2) The names and addresses of the five principal companies in each group from whom you purchased wheat flour during the period reported in Question (1).

Question (3) The amount of your purchases of wheat flour in the year 1935 in quantities and dollars from each of a list of companies including General Mills, Inc., Pillsbury Flour Mills and others, and then your purchases from all other companies, the total being your total wheat flour purchases in quantities and dollars.

Question (4) The quantity of bread in pounds and the net dollar sales of all other bakery products sold in the year 1935 to each of various types of customers including chain stores, cooperative and voluntary chains, etc. and then sales to all other types of consumers, the total being your total sales of bread and all other bakery products in the year 1935.

Question (5) The names and addresses of the five principal companies in each of certain groups of distributors to whom you sold wheat flour bread in the year 1935 and the amount of net sales in quantities and dollars sold to each."

On April 1, 1936 respondent supplied the Federal Trade Commission with the information requested in this schedule with the exception of that called for in Questions (4) and (5).

"SCHEDULE B

(Manufacturers and/or Processors of Farm Products)

Question (1) List of all subsidiary companies included in your report.

Question (2) The quantity and dollar value of all wheat flour, other flour, wheat and other materials purchased in the year 1935 and the quantity and dollar value of the portion thereof resold without further processing.

Question (3) Net sales of bread, flour and wheat in quantities and dollars and the net dollar sales of all other products for the year 1935 divided according to whether sold without further processing or whether manufactured or processed by you.

Schedule 3(A) Cost of products bought and resold without further processing or manufacturing and then your net cost of materials entering into manufactured products sold.

Question (4) Names of predecessor companies whose data are included in following questions 5 to 9 inclusive.

Question (5) Consolidated balance sheets of your company and subsidiaries for the years 1914, 1917, 1920, 1923, and 1926, and net sales for the same periods.

Question (6) Amounts of capital stock and bonds at par value issued in each of the years from 1914 to 1935 inclusive and the purpose for which the same were issued.

Question (7) The amounts of additions to and deductions from surplus and the causes thereof in detail in each of the years 1914 to 1935 inclusive.

Question (8) Consolidated Assets and Liabilities in detail including all subsidiary companies, controlled companies and predecessor companies for the years 1928 to 1935 inclusive.

Question (9) Consolidated Income and Expense Statements in detail including all subsidiary companies, controlled companies and predecessor companies for the years 1929 to 1935 inclusive.

Question (10) Name, position, annual cash salary and other compensation paid to each officer of the corporation for the years 1929 to 1935 inclusive."

On May 8, 1936 respondent returned to the Federal Trade Commission Schedule B, having answered all the questions in that schedule except Questions (3), (3A), (5), and so much of Question (9) as called for information with respect to the amount of total sales and total cost of goods sold, and Question (10).

The respondent contends that the compulsory disclosure of information now demanded would constitute an unreasonable search and seizure in violation of the Fourth Amendment of the Constitution of the United States; that the Congress has not authorized the Federal Trade Commission to demand, or this court to compel the disclosure of this information involved in this proceeding; also that the questions which respondent have not answered have no direct connection with interstate commerce or with any violation of law, and that the questions concern respondent's intrastate as well as its interstate activities.

The respondent also takes the position that from the Commission's refusal to assure respondent that any of this information now sought will be used confidentially, it is to be inferred that the Commission will, or at least is likely, to publish all of it and that respondent knows of no means

of preventing the Commission from doing so, if it obtains the information.

[*Commission authorized to compel disclosure*]

Taking up first the question whether Congress has authorized the Commission to compel the disclosures to be made. Section 4 of the Joint Resolution provides:

"For the purpose of carrying out this resolution the Federal Trade Commission, the Attorney General, and the courts of the United States shall have and may exercise all of the powers and jurisdiction severally conferred upon them by the Act entitled 'An Act to create a Eederal Trade Commission, to define its powers and duties, and for other purposes,' approved September 28, 1914."

Section (a) (b) of the Federal Trade Commission Act (15 U. S. C. A. § 46) provides that it shall have power—

"INVESTIGATION OF CORPORATIONS. (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

REPORTS BY CORPORATIONS. (b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commission may prescribe, and shall be filed with the Commission within such reasonable period as the Commission may prescribe, unless additional time be granted in any case by the Commission."

Section 9 of the Act (Title 15 U. S. C. A. § 49) in the fourth paragraph provides—

"Upon the application of the Attorney General of the United States, at the request of the Commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this subdivision of this chapter or any order of the Commission made in pursuance thereof."

[*Information relevant to legislation*]

Respondent takes the position that the power of the Commission to compel information must therefore be limited to disclosures relating to breaches of the law which occur in or which directly affect interstate commerce. This, I think, is not so. On the contrary, it seems to me that the Joint Resolution reflects the intention of the Congress to authorize the Commission to exercise similar powers for the purpose of securing the desired information relevant to the various named subjects on which legislation is contemplated. Unless the Congress intended to give the Commission additional power for the purpose of securing the information, Section 4 of the Joint Resolution was unnecessary, for the Commission already had authority to demand the facts relating to a breach of the law.

It was alleged in the petition and admitted in the petition that respondent was engaged in interstate commerce in a substantial degree in the various commodities.

The Fourth Amendment to the Constitution of the United States is not violated by Congress conducting an inquiry and compelling the production of testimony concerning matters on which it is essential that Congress be informed in order to frame legislation. *McGrain v. Daugherty,* 273 U. S. 135.

The Joint Resolution stated "that the Congress should consider whether new legislation should be enacted on existing legislation amended on [or] any of the subjects hereinbefore described and in aid thereof should be informed on all of said subjects."

Certainly burdens on interstate commerce, monopolies, and taxation referred to in the Joint Resolution, are subjects under the control of the Congress and upon which it is entitled to information. It is true that the facts requested do include some information regarding respondent's activities that are not solely interstate, but the presumption is that the Congress intends to make use of all the facts obtained in aid of legislation affecting interstate commerce only. In the judgment of the Congress the information requested does directly relate to interstate commerce and lack of such relation is not so clearly nonexistent as to justify the court in saying to the contrary. This is a matter for the Congress to decide, at least in the first instance. *Stafford v. Wallace,* 258 U. S. 521.

To support its position respondent relies largely upon *Federal Trade Commission v. American Tobacco Co.,* 264 U. S. 298. But in that case the question was—has the Federal Trade Commission an unlimited right to obtain the books and records of a corporation with reference to a possible existence of unfair competition in violation of the Federal Trade Commission Act? Any question regarding the power of the Congress to obtain information for legislation purposes was eliminated, and the writs of mandamus seem to have been denied on the ground that the demands were too broad and not only included records and papers that were relevant, but those which clearly were not. In the case at bar the demand is for information deemed by the Congress to be relevant to future legislation on subjects within its jurisdiction.

[*Mandamus compelling information*]

Accordingly, I think the writ of mandamus must be allowed.

[¶ 55,152] **F. A. D. Andrea, Inc., v. Radio Corporation of America.**

United States Circuit Court of Appeals, for the Third Circuit. Filed February 16, 1937.

Appeal from the District Court of the United States for the District of Delaware.

Section 16 of the Clayton Anti-Trust Act, granting injunctive relief from violation of the Anti-Trust Laws, is held not to sustain a suit to compel a patentee to issue a license to plaintiff on the ground that patentee has denied plaintiff a license in furtherance of an alleged conspiracy to restrain trade by a system of pooling patents.

Opinion

Before BUFFINGTON, DAVIS and THOMPSON, Circuit Judges.

PER CURIAM. In the final analysis, this is a bill praying a mandamus ordering a defendant who owns patents, but has no trust or contractual relation with the plaintiff, to grant licenses thereunder. On hearing, the court below, following its opinion, reported in — to which reference avoids needless repetition of the facts in the case—dismissed the bill. Thereupon plaintiff took this appeal.

[*Question involved*]

As stated in its brief, the question involved is whether a patent owner who is in an alleged dominating and controlling position "with respect to a pool or combination of all of the pertinent patent rights to all of the large companies of the industry, can be compelled by Court decree (under the provisions of Section 16 of the Clayton Act) to grant plaintiff a license under the patents of the pool on the same terms and conditions that such licenses have been granted to others."

[*Right to license denied*]

After argument and consideration had, we find ourselves in accord with the trial Judge's reasoning and construction, and as a further opinion would be but an attempt by this court to clothe in different wording what has been already said by the court below, we limit ourselves to affirming the court's decree on its own opinion.

[¶ 55,153] National Silver Company v. Federal Trade Commission.

United States Circuit Court of Appeals for the Second Circuit. March 1, 1937.

The Court affirms an order of the Federal Trade Commission directing a seller of silverware to cease stamping, branding, or advertising silverware with the term "sectional overlay" when in fact it does not have an extra deposit of silver at the points of wear. Petitioner's contention that the sectional overlay is visible to the naked eye is overruled on the ground that a purchaser is not by law charged with the duty of making a critical inspection of the product to be guided by his own judgment. A mere discontinuance of the unfair competition method is no defense nor is it sufficient to deny the enforcement order particularly where the petitioner insists it has the right to continue.

Affirming cease and desist order in Federal Trade Commission Complaint No. 2512.

Before: MANTON, A. N. HAND and CHASE, Circuit Judges.

Petition to review an order of the Federal Trade Commission. The National Silver Company files the petition. Order sustained.

[*Counsel*]

Brill, Bergenfeld & Brill, Attorneys for Petitioner. Abraham Brill, Frank F. Bergenfeld, Herbert Baer Brill, of Counsel.

W. T. Kelley, Chief Counsel, Federal Trade Commission. Martin A. Morrison, Asst. Chief Counsel. John Darsey, James W. Nichol, Special Attorneys, Attorneys for Respondent.

[*Review sought*]

MANTON, Circuit Judge. This petition seeks a review of an order by the respondent directing the petitioner, who is engaged in the sale of silverware, to cease and desist "Representing through the use of the term 'sectional overlay' or any term, word or phrase of like import or meaning, in advertisements or printed matter or in stamping or branding of its said silverware, or in any other manner whatsoever, that said silverware has extra deposits of silver at the points of wear, where such is not the case." In this proceeding, pursuant to § 5 of the Federal Trade Commission Act (38 Stat. 719, 15 U. S. C. A. 45), the Commission found on sufficient evidence that "in promoting the sale of its 'Martha Washington' pattern of silverware, the respondent (petitioner) caused the quality mark or words 'sectional overlay'

to be stamped on each and every piece of said pattern, when in truth and in fact the ornamental pieces of said sets of silverware did not have an extra deposit of silver at the points of wear so as to be properly represented, designed or referred to by the quality mark 'sectional overlay'."

[*Term "sectional overlay"*]

The Commission further found that through long usage, the term "sectional overlay" used in association with silverware had become known by the trade and purchasing public to mean an extra deposit of silver at the points of wear and that it indicated a quality mark denoting additional value in the silverware. It found that the practice of the petitioner in stamping the term "sectional overlay" upon its ornamental pieces of silverware was misleading, had the capacity and tendency to deceive purchasers into buying what they did not intend to buy. Moreover, that in so doing, the petitioner placed in the hands of wholesalers or retailers the means of deceiving ultimate purchasers; that the petitioner thus unfairly competed in trade in interstate commerce to the prejudice of the public in violation of § 5 of the Federal Trade Commission Act.

[*Findings*]

Pursuant to § 5, petitioner filed this petition seeking to set aside the order. Our duty therefore is to examine the record to ascertain whether the findings are supported by the evidence. *F. T. C. v. Curtis Pub. Co.*, 260 U. S. 568; *F. T. C. v. Paramount Famous-Lasky Corp.*, 57 Fed. 2, 152 (CCA 2). To sustain the order of the Commission, it is essential to find that the methods used are unfair and that they are used in interstate commerce and that the proceeding instituted for a cessation thereof is in the interest of the public.

Petitioner admits it is engaged in interstate commerce. We therefore inquire into the evidence of unfair competition and public interest. The Commission found "sectional overlay" to mean in the trade a quality mark denoting additional value in silverware. This finding, supported by evidence, is conclusive. F. T. C. Act, § 5; *F. T. C. v. Winsted Hosiery Co.*, 258 U. S. 483; *F. T. C. v. Algoma Lumber Co.*, 291 U. S. 67. Misleading representation of a product constitutes an unfair method of competition within the intent of § 5. *F. T. C. v. Winsted Hosiery Co., supra; Indiana Quartered Oak Co. v. F. T. C.*, 26 Fed. 2, 340 (CCA 2), cert. den. 278 U. S. 623.

On this record, it is established that the petitioner who sells silverware in interstate commerce caused its silver known as the "Martha Washington" pattern to be manufactured with all pieces stamped "sectional overlay." Its sets are known as staples and ornamental pieces. Its staples were in fact overlaid but its ornamentals were not. Letters and words stamped on ornamental pieces which are not overlaid tend to mislead purchasers. Buyers testified to being so misled. If a purchaser is induced to purchase because petitioner's product is represented as sectionally overlaid, that violates § 5 even if the purchaser did not lose actual value or quality by reason of the false representation. *F. T. C. v. Algoma Lumber Co., supra; F. T. C. v. Balme*, 23 Fed. 2, 620 (CCA 2). Indeed, even where the purchaser benefits by the deception it is misleading. See, *Pillsbury v. Pillsbury-Washburn*, 64 Fed. 841 (CCA 7). But it is shown by the evidence that the term "sectional overlay" indicated to the public additional value and increased use and permanency of the article. Petitioner's contention that the sectional overlay is visible to the naked eye is disputed. At any rate, each purchaser is not by law charged with the duty of making a critical inspection of the petitioner's product to be guided by his own judgment. *Indiana Quartered Oak Co. v. F. T. C., supra.* See, *Florence Mfg. Co. v. Dowd*, 178 Fed. 73, 75 (CCA 2).

The universally recognized custom to stamp a set of silverware with the words "overlay" where the staples only were in fact sectionally overlaid is insufficient excuse. Witnesses, both dealers and purchasers, testified that, except in the instance of very few manufacturers, they did not stamp ornamental pieces "sectionally overlaid." The petitioner's conduct cannot be condoned. The petitioner argues that the custom was changed when the code authority under the N. I. R. A. established a new standard of industry and that since December 1933 it has not stamped staples or ornamental pieces "sectionally overlaid." Even if this were so, since the petitioner asserts the legal right to use its misleading designation, it is the continuing duty of the Commission to issue and of the court to affirm and enforce an order to cease and desist. Here, there is no assurance that there would be a permanent discontinuance. *Sears Roebuck v. F. T. C.*, 258 Fed. 307 (CCA 7); *Fox Film v. F. T. C.*, 296 Fed. 353 (CCA 2). A mere discontinuance of the unfair competition method is no defense

nor is it sufficient to deny the enforcement order particularly where the petitioner insists it has the right to continue. *F. T. C. v. Wallace,* 75 Fed. 2, 733 (CCA 8); *Guarantee Veterinary Co. v. F. T. C.,* 285 Fed. 853 (CCA 2).

Clearly this proceeding is in the public interest and well within the requirement of the Act. *F. T. C. v. Balme, supra.*

[*Commission's order affirmed*]

Order sustained.

[¶ 55,154] United States of America v. Louis Buchalter and Jacob Shapiro.

United States Circuit Court of Appeals for the Second Circuit. March 8, 1937.

Convictions of conspiracy to restrain and monopolize commerce in rabbit skins in violation of Sections 1 and 2 of the Sherman Anti-Trust Act are reversed as to one defendant, concerning whom the proof was insufficient, and affirmed as to another defendant, concerning whom proof was direct. Although it was technically error to receive certain testimony as evidence against the latter defendant, there was so much competent proof of his guilt apart from this testimony that he was denied no substantial right or prevented from having a fair trial. It is therefore held that he has failed to show prejudicial error which is ground for reversal.

A conspiracy to restrain interstate commerce in violation of Section 1 of the Sherman Anti-Trust Act is not identical with a conspiracy to monopolize interstate commerce in violation of Section 2. An acquittal or conviction under an indictment drawn under one section would not bar subsequent prosecution for the same acts under the other section. A sentence of fine and imprisonment for violation of Section 1 and a further sentence of imprisonment for violation of Section 2, to begin at the expiration of the first sentence, are therefore upheld as they are not for the same crime.

Before: MANTON, AUGUSTUS N. HAND and CHASE, Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York on the verdict of a jury convicting the appellants on an indictment charging violation of the Sherman Anti-Trust Act (15 U. S. C. A. Secs. 1 and 2). Affirmed in part and reversed in part.

[*Counsel*]

J. Arthur Adler, Schwartz & Frolich, Attorneys for Defendants—I. Maurice Wormser, J. Arthur, Appellants. Wadler, Counsel.

Lamar Hardy, United States Attorney, John Harlan Amen, Albert J. Law, Joseph A. Barrett, Special Assistants to Attorney General.

[*Facts*]

CHASE, Circuit Judge: The appellants, with eleven other individuals and twenty corporations, were indicted under the Sherman Anti-Trust Act. They were charged in the first count with conspiring to restrain interstate commerce in rabbit skins; in the second with conspiring to monopolize interstate commerce in such skins; in the third with attempting to monopolize such commerce; and in the fourth with monopolizing it. Before the trial most of the defendants pleaded guilty and as to others there was either severance or dismissal leaving only the two appellants as defendants when the action was tried. They were both convicted and sentenced on all counts.

As neither of the appellants now question the sufficiency of the proof of the violation by others of the Sherman Anti-Trust Act as alleged in the indictment, it will be neither necessary nor useful to state what was proved in detail. It is enough for present purposes to know that one of the defendants indicted, the Protective Fur Dressers Corporation, had in its membership most of the persons and corporations engaged in the business of dressing rabbit skins in New York and New Jersey and was formed and operated to enable its members to monopolize that industry there. Its methods included threats, violence, and other unlawful acts. It was enabled to carry on its unlawful business with the aid of a so-called Left Wing Union known as the Needle Trades Workers Industrial Union and of a so-called Right Wing Union known as the Lamb and Rabbit Workers Union. Each of these unions controlled the labor in certain shops in the industry and were in some respects antagonistic to each other while cooperating with the Protective Association in furtherance of its unlawful schemes.

[*Motion to dismiss overruled*]

It is also claimed by the government and denied by both appellants that they were

the men behind the scenes who directed the unlawful activities proved. At the close of the government's case neither appellant introduced any evidence but moved to dismiss on the ground that as to them the proof was insufficient to support a conviction. Their motions were overruled after the government had been permitted to reopen the case and introduce further evidence. Then the cause was submitted to the jury with the result above stated.

[*Evidence as to phone calls not substantial*]

All that can be, or is, claimed to be proof of any connection of appellant Buchalter with the violations of the Sherman Act alleged and proved is evidence of numerous calls to and from a room in the Arlington Hotel in New York City which was shown to have been a gathering place used by the conspirators from which at one time an armed attack was made on the headquarters of the Left Wing Union. There was no proof, however, that Buchalter was ever there or that he ever participated in any of the telephone calls. Nothing was shown of what was said or who did talk at any time. The most that can be said about them is that they were fairly numerous and were made to or from the hotel room and various places Buchalter frequented and from some of which he telephoned somewhere. At one time a message was received at one of the places for Buchalter and soon after it was delivered someone called the Arlington Hotel room but it was not shown that it was Buchalter. We are urged to treat this as circumstantial evidence of Buchalter's participation in the conspiracy, it being suggested that other proof is impossible. Even so, the suggestion merely points to a fact requiring the granting of his motion to dismiss. Difficulty of proof is no substitute for actuality of proof and an accused is presumed to be innocent and entitled to be acquitted until proved guilty as charged beyond a reasonable doubt. Here there were, indeed, many suspicious circumstances to lead to the conclusion that Buchalter was guilty but there was no substantial evidence to overcome the presumption of innocence and so it was error to deny his motion. *Nosowitz v. United States,* 282 Fed. 575. (C. C. A. 2), *Reed v. United States,* 51 Fed. (2) 941; *Graceffo v. United States,* 46 Fed. (2) 852; *Karchmer v. United States,* 61 Fed. (2) 623.

[*Direct evidence involving Shapiro*]

Not so, however, in respect to Shapiro. Not only did the government prove the suspicious circumstances of the telephone calls of which a few were made to his home and to the offices of a firm of which he was a member, though it is but fair to say that this so-called evidence in general was no more potent proof as to him than it was as to Buchalter, but there was direct evidence to connect him with the conspiracy and the unlawful acts charged and proved. One Potash who was the secretary of the New York branch of the so-called Left Wing Union testified both before the grand jury and at the trial. Rather reluctantly, though positively, he testified at the trial that he gave before the grand jury the testimony below quoted in part and that it was true. He had a conference at the Governor Clinton Hotel in New York City in September 1932 with one Mittelman, then president of the Protective Corporation, regarding a dispute as to the amount to be paid by the Protective Corporation to the unemployment fund of the Left Wing Union. Of course, this was a part of the unlawful scheme being carried out. The following partial quotation from the testimony of Potash speaks for itself;

"I recall the meeting in the Governor Clinton Hotel in September, 1932. I was called on the phone at that time by Mr. Mittelman, who told me that he had certain matters to discuss with me in connection with the conditions of dispute that he had with a representative of the union and he asked me to be at the Governor Clinton Hotel and we would discuss the matter there.

Pursuant to that appointment I went to the Governor Clinton Hotel and met Mr. Mittelman and another gentleman in the lobby of the hotel. I cannot recall the time. That was about four years ago. The other gentleman is known as Mr. Gurrah. His correct name is, I think, Shapiro, I am not certain.

Q. Do you see him here? Yes, I see him; the gentleman, the first gentleman sitting there (witness indicates defendant Shapiro). I had a conversation with those two gentlemen at that time, very brief.

As I recall, Mr. Mittelman introduced me to Mr. Shapiro. I asked him why that introduction, what Mr. Shapiro had to do with the conference to which he called me. He said, "Well, we will meet together," something to that effect. I can not recall the words. If I recall he said, "We will sit down and take up that matter" he wanted to take up with me. I said I would have nothing to do with Mr. Shapiro, we were dealing with the president of the Protective Association and nobody else. Mr. Mittelman insisted that we go upstairs and meet jointly. It will be very difficult to use the words used four years ago if you press me on that. If I recall I do not think Mr. Shapiro said anything at that time. Mr. Mittelman did all the talking. I testified before the grand jury.

Q. I will read you from your testimony.

Mr. Amen: Is it stipulated to be the evidence of the witness in this case?

Mr. Mattuck: The evidence before the grand jury?

Mr. Amen: Yes.

Mr. Mattuck: Yes.

Q. "Q. Was there anybody else there with you at the time? A. No; just the three of us. Mr. Mittelman said, 'You will have to deal with Mr. Gurrah because Mr. Gurrah is the association.' Well, I refused to deal with him. I said, 'If you wish to take up any matters with me concerning the labor matters you will have to do that yourself and I will

not deal with Mr. Gurrah.' He then asked Mr. Gurrah to excuse him, and Gurrah said to me then, 'Potash, you will have to deal with me whether you like or not,' and he went out."

Is that correct? A. Well, if I testified to that effect; at that time I certainly was more sure of what happened than I am right now.

By the Court:

Well, all I can say is what I testified to then was the truth. It is very difficult to say exactly in the words that we used so long ago. The whole conversation lasted just about three minutes. Well, that is about what transpired then.

By Mr. Amen:

Well, it was in substance the same; that is what you read to me.

By Mr. Amen:

I remember that Gurrah said to me, "You will have to deal with me whether you like it or not," or words to that effect. I do remember he said that. He wanted to take up with us, take up these matters. He insisted on going up. I do recall that he said words to that effect, something like it; nothing different, not that I recall at this moment. I am not disputing the truth of the testimony in any way, directly or indirectly. I continued to negotiate with Mr. Mittelman alone and Mr. Gurrah departed after saying that I would have to deal with him whether I liked it or not, or words to that effect—Yes, Mr. Mittelman asked him to go and he went. I refused to deal, to go through with the deal.

Q. You deliberately refused to deal while he was there? A. Absolutely."

After Shapiro left, the witness and Mittelman then went upstairs to a room where conferred regarding the dispute.

[*Error not prejudicial*]

This evidence could have been, and doubtless was, believed by the jury and supplied the necessary connection to put Shapiro into the conspiracy and make the government's evidence applicable to the extent that it was ample to prove his guilt. *Wiborg v. United States,* 163 U. S. 632; *Vause v. United States,* 53 Fed. (2) 364. Granting that it was technically error to receive most of the telephone call testimony as evidence against Shapiro, there was so much competent proof of his guilt apart from the telephone calls that he was denied no substantial right or prevented from having a fair trial. He has, therefore, failed to show prejudicial error which is ground for reversal. 28 U. S. C. A. Sec. 391; *Luke v. United States,* 84 Fed. (2) 711; *Rich v. United States,* 271 Fed. 566; *Heywood et al. v. United States,* 268 Fed. 795; *Sneierson v. United States,* 264 Fed. 268. A general exception was taken to a supplemental charge giving illustrations in explaining circumstantial evidence and what constitutes conspiracy but it pointed out no specific thing claimed to be erroneous and we find nothing which warrants reversal.

[*Offenses under Secs. 1, 2, Sherman Act, not identical*]

The sentence on the first count drawn under Sec. 1 of the Sherman Act was to imprisonment for one year and to pay a fine of $5000.00; that on the second count drawn under Sec. 2 of the Sherman Act was the same imprisonment to begin at the expiration of that on the first count. On counts 3 and 4 no fines were imposed but instead imprisonment sentences of one year on each count to run concurrently with each other and with the prison sentence under count 2. It is said that these sentences cannot be upheld in that they are all for the same crime. That depends upon whether or not a conspiracy to restrain interstate commerce made unlawful by Sec. 1 is the same crime as a conspiracy to monopolize such commerce made unlawful under Sec. 2 so that an acquittal or conviction under an indictment drawn under one section would be a bar to subsequent prosecution for the same acts under the other. If the offenses are identical in law the sentences are erroneous but otherwise not. In this case it is true that it was the success of a combination in restraint of interstate commerce which brought about the monopoly of such commerce. But as Judge Hough said in *United States v. MacAndrews & Forbes Co.,* 149 Fed. 836, in holding that offenses under sections one and two of the Sherman Act were not identical,

"The offense under the first count was complete when the combination was actually formed with intent to bring about restraint of interstate commerce. The additional overt acts were but cumulative evidence from which the true intent, purpose, and continuance of the combination might be inferred. But they were themselves proof of the monopoly, and the monopoly consisted of their aggregate effect. That the prosecution in overwhelmingly proving the existence, and intent, and continuance of the combination proved the monopoly does not in my opinion render the offenses identical, merely because all the evidence offered was in a sense applicable to both counts."

With this we agree and so find no error.

[*Reversed in part, affirmed in part*]

The judgment as to Buchalter is reversed but as to Shapiro it is affirmed.

[¶ 55,155] **Bourjois Sales Corporation v. Abraham Dorfman.**

New York Court of Appeals. Decided March 9, 1937.

APPEAL by the plaintiff from judgment of Special Term which dismissed the complaint.

Section 2 of the New York Fair Trade Act, forbidding sales of trade-marked commodities at prices below those specified by the manufacturer or distributor, is held constitutional, on the authority of the U. S. Supreme Court in Old Dearborn Distributing Co. v. Seagram-Distillers Corp'n. The contrary holding in the Doubleday, Doran & Co. case is expressly overruled.

[*Counsel*]

Mark Eisner, James F. Donnelly and Samuel Michelman for appellant.

Frances Kneitel, Leon Lauterstein, Melbourne Bergerman and Emanuel Dannett for respondent.

W. H. Crichton Clarke for American Booksellers' Association, *amicus curiae*.

Morris L. Ernst, Jerome N. Frank, Callman Gottesman and Harriet F. Pilpel for Doubleday, Doran & Company, Inc., *amicus curiae*.

John C. Watson for John G. Myers Co., Inc., *amicus curiae*.

Joseph J. Hammer for New York State Pharmaceutical Association, Inc., *amicus curiae*.

[*N. Y. holding different from U. S. Sup. Ct.*]

CRANE, Ch. J. The complaint in this action has been dismissed upon the authority of our decision in *Doubleday, Doran & Co. v. Macy & Co.* (269 N. Y. 272), decided January 7, 1936. Mr. Justice STEINBRINK at Special Term felt obliged to follow this case, although later, in the October term of the same year, the United States Supreme Court took a different view of the law in *Old Dearborn Distributing Company v. Seagram-Distillers Corporation.* The justice was quite right as it is our duty to determine what we shall do with our former decision in the light of the more recent case.

[*N. Y. Fair Trade Act*]

In chapter 976 of the Laws of 1935 the Legislature undertook to prevent price cutting in the sale of commodities. In section 1 of the act a contract was declared to be legal which provides that a buyer of a commodity bearing the label, trade-mark, brand or name of the producer, will not resell such commodity except at the price stipulated by the vendor. This was nothing new as such contracts were legal under court decisions.

Section 2, however, went much further, and read:

"§ 2. Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section one of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

[*Doubleday, Doran & Co. case overruled*]

Doubleday, Doran & Company, Inc., the publisher, made a contract with Doubleday, Doran Book Shops, Inc., a seller and distributor, as to the price at which certain books could be sold. Later the publisher sold these books to R. H. Macy & Co. without any contract or restriction as to price or even a request for a contract. When Macy & Co. undertook to sell these books at its own figure, the publisher sought an injunction to compel Macy to sell the books at the price it had fixed with the other Doubleday corporation.

We thought this to be a clear case of unauthorized restriction upon the disposition of one's own property and unconstitutional within former decisions of the United States Supreme Court. That court has taken a different view in the case above mentioned, *Old Dearborn Distributing Co. v. Seagram-Distillers Corporation*, 299 U. S. 183, (Dec. 7, 1936). The Illinois Free [Fair] Trade Act there under review is similar to our own. The complaint in this appeal now before us is no way different from that before the Supreme Court under the Illinois act, so that we feel it to be our duty to submit our own judgment to the rulings of the Supreme Court on the Constitution of the United States and the interpretation of its own decisions. (*People ex rel. Tipaldo v. Morehead*, 270 N. Y. 233 235.) True it is that the facts of the *Doubleday* case are much bolder than those in the *Seagram* case, and distinctions may be drawn, but these are matters of emphasis, not of principle. The *Seeck & Kade, Inc. v. Tomshinsky* case, (269 N. Y. 613) decided at the same time on the authority of the *Doubleday* case, was similar to the *Seagram* case in that the facts establishing good will were set forth in full. Had the *Seagram* case been decided before argument in the *Doubleday* case we certainly would have followed the Supreme Court's ruling on the Federal Constitution. We do so now by sustaining the complaint in this case and reversing the order of the Special Term.

[*Motion dismissing complaint denied*]

The judgment should be reversed and the motion denied, with costs in all courts.

LEHMAN, HUBBS, LOUGHRAN and RIPPEY, JJ., concur; O'BRIEN, J., dissents; FINCH, J., taking no part.

Judgment reversed, etc.

[¶ 55,156] Opinion of Attorney General of California.

Addressed to the State Purchasing Agent of California, February 26, 1937.

The Robinson-Patman Price Discrimination Act is construed to be applicable to Government contracts, but to permit price differentials based on quantity purchases, absence of credit risk, solicitation expense and other factors.

[*Question*]

I have before me your letter of February 17, 1937, which reads as follows:

"I am enclosing copy of an opinion rendered by the U. S. Attorney General, in reference to the Robinson-Patman Act. I would like to know if under the same reasoning used in making his opinion, whether or not the State or its political sub-divisions would likewise be exempt from the provisions of the Robinson-Patman Act.

"We have had several attempts made on the part of various vendors to remove quantity discounts which have been applicable to state purchases, blaming such action on their part on the Robinson-Patman Act."

[*Opinion of U. S. Attorney General*]

The opinion of Honorable Homer Cummings, Attorney General of the United States, referred to was rendered to the Secretary of War on December 28, 1936. As pointed out in said opinion, the so-called Robinson-Patman Act (approved June 19, 1936, c. 592, 49 Stat. 1526) merely amended the act of October 15, 1914, known as the Clayton Act. The said amendment reads in part as follows:

"Sec. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where wither or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line or commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

The opinion of the Attorney General states in part that:

"The Act of June 19, 1936, merely amended the Act of October 15, 1914, as above pointed out, and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts. The practice in this respect indicates that it has been customary in the past for those dealing with the various agencies of the Federal Government to grant to them special prices on contracts for supplies. Such prices are often below the regular market for similar material supplied to the regular trade —due, perhaps to an estimated lower cost of doing business with the Government because of quantity purchases and absence of credit risk, solicitation expense, etc., although it may often be impossible to evaluate such factors with exactness. * * *

"It is therefore my opinion that the Act of October 15, 1914, as amended by the Act of June 19, 1936, is not applicable to Government contracts for supplies."

[*Act held applicable to Government contracts*]

If the said opinion is to be construed as expressing the view that the Robinson-Patman Act has no application in any case where a government contract for supplies is involved we do not agree therewith. On principle it would seem that there could be no justification for permitting discrimination on the part of two bidders which discrimination would substantially lessen competition or tend to create monopoly or to injure, destroy or prevent competition, solely because a government contract was involved.

Moreover, the Supreme Court of the United States has recognized that the Clayton Act prior to its amendment in June, 1936, was applicable to government contracts. *International Business Machines Corp. v. U. S.,* (April 1936) 298 U. S. 131, 56 S. C. R. 701.

In that case the court held that certain provisions contained in leases of tabulating and other machines to the federal government were in violation of Section 3 of the Clayton Act.

Likewise it has been held that a city is a person within the provisions of the anti-trust acts. *Chattanooga Foundry etc. v. City of Atlanta,* 27 S. C. R. 65, 203 U. S. 390.

We therefore conclude that the Robinson-Patman Act would not be held inapplicable in cases where there would otherwise be a violation of that act merely because the acts constituting the violation occurred in connection with a government contract, federal, state or municipal.

[*Lawful differentials in Government contracts*]

However, it is provided in the act itself that nothing therein contained "shall prevent differentials which make only due allowance for differences in the cost of manufacture, *sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.*"

That provision in itself would authorize the practice referred to by the Attorney General, namely, the granting to governmental agencies of special prices on contracts for supplies. Undoubtedly the cost of doing business with the State, and its political subdivisions, would be less than the cost of doing business with the regular trade because of quantity purchases, absence of credit risk, solicitation expense and perhaps other factors. The act itself permits differentials resulting from those factors and there is, in our opinion, no ground for the contention that the Robinson-Patman Act prohibits the granting of quantity discounts which have heretofore been applicable to state purchases.

[*Interstate commerce*]

It is perhaps unnecessary to mention that the Robinson-Patman Act applies only to interstate commerce and is not applicable to intrastate transactions.

[¶ 55,157] Opinion of Attorney General of Minnesota.

Addressed to the Purchasing Agent, State Board of Control. March 4, 1937.

The Robinson-Patman Price Discrimination Act is held not to be applicable to the purchasing departments of the State of Minnesota when purchasing materials and supplies for the State, nor applicable to business concerns within the State submitting bids for State purchases.

In your letter of February 10 to Attorney General William S. Ervin, you state:

"I would like to have your Department render an opinion regarding the effect of the Robinson-Patman Bill has upon the purchasing of materials and supplies for the State, by the Purchasing Department; also, with a business concern within the State, bidding on State business, is effected by this Robinson-Patman Bill."

We are of the opinion that the Robinson-Patman Act is not applicable to the purchasing departments of the state when purchasing materials and supplies for the state, nor is it applicable to business concerns within the state submitting bids for state purchases.

We herewith enclose a copy of opinion rendered by the Attorney General of the United States holding that the Robinson-Patman Act has no application to government contracts. The reasoning therein applies to the situation under discussion.

[The opinion of the Attorney General of the United States is reported in full text at ¶ 55,145, and is omitted here.]

[¶ 55,158] The Prairie Farmer Publishing Company, Wallace Publishing Company, The Wisconsin Farmer Company, The McKelvie Publishing Company, Webb Publishing Company and Midwest Farm Paper Unit, Inc., v. The Indiana Farmer's Guide Publishing Company.

United States Circuit Court of Appeals for the Seventh Circuit. March 23, 1937.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

An arrangement between defendant newspapers and a common advertising agency whereby the cost of advertising in all of the newspapers was considerably lower than the total separate advertising charges, which caused loss of advertising business to plaintiff newspaper which was not included in the group arrangement, was held not to be sufficient evidence to support a verdict finding defendants' intent to bring about a monopoly and to restrain interstate commerce. The evidence is held to indicate rather a proper step to bring about economy of cost of procuring advertisements, the effect of which was only indirectly and incidentally to put plaintiff in the position of a less favored competitor.

"If a combination or merger is brought into existence for lawful purpose and as a result decreases overhead and costs of production and thereby reduces prices and only incidentally places a less favored competitor in a position where he is unable to compete in interstate commerce, no offense results because of the competition."

Before EVANS and SPARKS, Circuit Judges, and LINDLEY, District Judge.

[*Nature of litigation*]

LINDLEY, District Judge. The nature of this litigation is fully disclosed in prior decisions. *Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co. et al.,* 70 F. (2d) 3 (C. C. A. 7); *Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co. et al.,* 293 U. S. 268; *Prairie Farmer Pub. Co. et al. v. Indiana Farmer's Guide Pub. Co.,* 82 F. (2d) 704 (C. C. A. 7); *The Prairie Farmer Pub. Co., et al., v. The Indiana Farmer's Guide Pub. Co.,* 299 U. S. 156, December 7, 1936. It having been authoritatively established that the complaint stated a good cause of action under the Sherman Anti-Trust Act and a verdict having been returned in favor of appellee, there remains for determination by this court, the question of whether the evidence was sufficient to sustain the verdict.

The material and pertinent facts are partially outlined in the decisions above mentioned. It is necessary, however, to examine the evidence in greater detail in order to determine satisfactorily the question confronting us, for a cause must be submitted to the jury unless the testimony is of such conclusive character as to require the court to set aside a verdict in opposition to it. *Phoenix Insurance Co. v. Doster,* 106 U. S. 30. In other words, it is the duty of the trial judge to take that view of the evidence most favorable to the prevailing party. Not only must the court assume that such party's evidence is true, but it must also extend credit to every fair inference therefrom. Contradictions in testimony do not vary the rule, for the credibility of witnesses is a question for the jury. *Shedoan v. Cincinnati, etc. Ry. Co.,* 220 Fed. 68. The inquiry, then, is whether plaintiff's evidence, unaffected by questions of credibility, is sufficient to support a verdict in a civil action brought to recover damages for violation of Sections one and two of the Sherman Anti-Trust Act, 15 U. S. C. A.

[*Facts*]

Appellee published in Indiana, a state farm paper, the Indiana Farmer's Guide, which circulates in that state and to a lesser degree in neighboring states. Appellants published papers of the same character in the eight states constituting in common parlance, the corn belt. Specifically the Prairie Farmer Company published a similar paper in Illinois and for some years past has published a special edition for circulation principally in Indiana, called "The Prairie Farmer, Indiana Edition." Prior to that time this appellant covered both Illinois and Indiana with one edition. The publications of the other appellant publishing companies are general state farm papers covering the states of Iowa, Wisconsin, Nebraska, Minnesota and the Dakotas. Appellant Mid-West Farm Paper Unit first existed as a voluntary association but was incorporated in 1931. It was formed and operated as an advertising agency for the appellant publishing companies.

There is no dispute that, acting through the Mid-West Company, appellants solicited and obtained advertising by methods whereby, as an illustration, the cost of a one page display advertisement in all of the papers of the five appellant publishers was $4,870.00 whereas advertising in all but the Indiana edition of the Prairie Farmer, would cost $5,167.20. In other words, the Mid-West Company, as agent for the other appellants, quoted and obtained a price of $4,870.00 for advertising in all of the magazines, whereas, if one were omitted, the cost was $5,167.20, or $297.80 less [more] than the amount charged for the smaller number. If the Indiana Farmer's Guide was included with the other publications other than the Indiana Prairie Farmer, the price was $5,951.20. If the Indiana Farmer's Guide was dropped and the Prairie Farmer, Indiana Edition, substituted, the total cost was substantially less than the quoted rates applicable when the advertisement was placed in all of appellants' publications except the Indiana Prairie Farmer.

The specific evidence upon which appellee most relies is that appellants sent to advertisers printed circulars emphasizing the advantages of using Prairie Farmer, Indiana Edition, instead of Indiana Farmer's Guide. This circular set up the comparative cost as above stated and demonstrated that if the Prairie Farmer, Indiana Edition, should be substituted for the Indiana Farmer's Guide, for a one page advertisement covering all the eight states, the advertiser would save $1,081.20. Stated otherwise the cost to an advertiser to cover one page in all the publications of appellants, including Prairie Farmer, Indiana Edition, was $297.80 less than it would cost him if he omitted Prairie Farmer, Indiana Edition, from the list and

advertised in the remaining appellants' publications. In other words, the Mid-West Company quoted a group price upon all of appellants' papers less than the rate upon all of the same except that for the state of Indiana. The lesser group was the more expensive. The cost of advertising in eight states was less than that in seven states. Similar inducements were offered buyers of display advertisements occupying less space.

The parties agree that advertising is the life blood of publications such as these; that every state or comparatively local farm paper comes into competition with national farm papers in advertising merchandise bought by all classes in all parts of the country, and that to that extent, state or sectional papers are competitors with national papers. To the extent that advertisers desired to advertise in the entire territory of the middle west, they were interested in the group rates. It is obvious, therefore, that other things being equal, the lower rates in the combination would attract those advertisers who desired to cover all the territory in which the appellant group circulated and the natural effect would be just so much of a handicap to other papers in the same field who were not in the combination and not able to make a similar one. Thus papers in any one state, not included in the group, inevitably, all other elements being equal, would see advertisers covering the entire territory drifting away into the group papers. To such extent the sustaining element of the non-group paper, advertising, would decrease and if the degree of that alienation should become great enough, it is easy to see that a non-group paper might eventually have left insufficient advertising to maintain its existence. The evidence is that such was the tendency.

The depression carried with it a decrease in the amount of advertising of all of the papers in question but that of those of appellants decreased in a much less degree than did that of appellee. The volume of display advertising of the group papers decreased more than 54 per cent between the years 1928 and 1932 and that of appellee more than 80 per cent. Appellee's additional loss of advertising was nearly 20 per cent. In spite of the fact that its circulation did not grow less but in fact increased, many advertisers of general character who advertised in 1928 in appellee's paper did not do so in the years following; some who advertised in 1929 did not do so thereafter; some who advertised in 1930-1931 did not do so thereafter. The number of national advertisers who retired from patronage of appellee was substantial, and appellee's business decreased from a profit of $72,000 in 1928 and $54,000 in 1929 to a deficit in each of the following three years. Its auditor testified that without additional overhead and but for the losses thus experienced, appellee's receipts from display advertising for the years 1928 to 1932 would have been $146,405 more than they were. The depression affected all the papers, but, as stated, the losses of appellee were much more pronounced in volume of advertising, in income therefrom and in net profits, in the face of a rising circulation. Furthermore, whereas in 1928 the Mid-West group carried 54 per cent of the display advertising of all state farm papers in the territory, in 1932 they carried 84 per cent. In the four years, in states other than Indiana, the Mid-West group absorbed various competing state papers.

[*Question*]

The question thus narrowed is whether, under the facts stated, giving full credence to appellee's evidence, it is sufficient, under the rules stated to sustain the verdict.

[*Discrimination not relied on for recovery*]

Appellee disclaims any contention to rely upon discrimination in prices as ground for recovery. Its own statement of its cause of action is as follows:

"The complaint is predicated on Sections 1, 2 and 7 of the Sherman Act, and not on Section 2 of the Clayton Act. The complaint does not charge appellants with mere price discriminations for carrying advertisements, but it charges appellants with having entered into a contract, combination and conspiracy in restraint of trade and commerce for the purpose of monopolizing the business of publishing and circulating farm papers within the several states and territory wherein their publications are mainly circulated. Their combination rate schedule for advertisements was simply a device and design conceived and adopted to aid them in the accomplishment of their ulterior purpose to restrain and break down competition and to further their efforts in obtaining a monopoly. For appellants to urge that the case is one for price discrimination within the meaning of Section 2 of the Clayton Act is to overlook the complaint as a whole, as well as to assume that each of the several courts to which the cause has been submitted failed to understand the theory of the action."

It does not contend that a publisher may not vary the rates scheduled for advertising in proportion to the space used and as the publisher may deem advisable." It does contend that the combination rate schedule was a device to break down competition and build up a monopoly and thus to injure appellee's business. Appellants, on the contrary, contend that their purpose was, in good faith, to improve the methods of soliciting and obtaining advertising and working out more efficient methods of competition to the extent the same existed with the national farm papers and that any resulting effect on appellee's

business is only incidental to a legal transaction.

[*Legality of concerted action*]

Clearly, the purpose of the Sherman Anti-Trust Act is to secure equality of opportunity and to prohibit abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition. *Paramount Famous Lasky Corp. v. U. S.*, 282 U. S. 42. Nor is the legality of the combination complained of to be determined by innocence of motives; the prohibition of the statute may not be evaded by good intentions. The legislation is declarative of economic policy, violation of which is deemed detrimental to common welfare, irrespective of motive or other wrongful intent. *Standard Sanitary Mfg. Co., v. U. S.*, 226 U. S. 20; *Bedford Co. v. Stone Cutters Assn.*, 274 U. S. 37; *Eastman Kodak Co. v. Southern Photo Co.*, 273 U. S. 359; *Eastern States Lumber Assn. v. U. S.*, 234 U. S. 600. But while good intentions will not save a plan otherwise objectionable, knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences. *Appalachian Coals Inc. v. U. S.*, 288 U. S. 344, 372. And an act which might be done lawfully by one, may, when done by many acting in concert, take on the form of a conspiracy and become a public wrong, violative of the legislative policy and thus prohibited by law, if the result be hurtful to the public or to individuals against whom such concerted action is directed. *Bedford Co. v. Stone Cutters Assn.*, 274 U. S. 37.

The immediate question then is whether the group action of appellants, otherwise wholly proper, becomes, because of its effect upon appellee, a violation of the law, —whether the result of their admitted action in the respects mentioned amounts to an unreasonable restraint of trade or an attempt to monopolize in a combination, the inevitable effect of which is to suppress competition in interstate commerce directly, and not merely indirectly, and which, when put into effect, unduly obstructs trade. If a combination or merger is brought into existence for lawful purpose and as a result decreases overhead and costs of production and thereby reduces prices and only incidentally places a less favored competitor in a position where he is unable to compete in interstate commerce, no offense results because of the competition. As Mr. Chief Justice Hughes, in *Appalachian Coals, Inc. v. U. S., supra*, says:

"Nothing in theory or experience indicates that the selection of a common selling agency to represent a number of producers should be deemed to be more abnormal than the formation of a huge corporation bringing various independent units into one ownership. Either may be prompted by business exigencies, and the statute gives to neither a special privilege. The question in either case is whether there is an unreasonable restraint of trade or an attempt to monopolize. If there is, the combination cannot escape because it has chosen corporate form; and, if there is not, it is not to be condemned because of the absence of corporate integration. As we stated at the outset, the question under the Act is not simply whether the parties have restrained competition between themselves but as to the nature and effect of that restraint."

[*Evidence insufficient to support finding of monopoly and restraint*]

With these principles in mind, was there sufficient evidence to submit to the jury, evidence upon which it might base a finding of intent to bring about a monopoly and unduly to restrain interstate commerce; or does the evidence indicate rather a proper step by appellants in their efforts to bring about economy of cost of procuring advertisements, in their competition with national magazines, the effect of which was only indirectly and incidentally to put appellee in the position of a less favored competitor.

In our opinion the latter proposition must prevail. Thus in *Paramount Famous Lasky Corporation v. United States*, 282 U. S. 30, the court said:

"'Founded upon broad conceptions of public policy, the prohibitions of the statute (Sherman Act) were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute but the remedies which it provided were co-extensive with such conceptions.' *Wilder Mfg. Co. v. Corn Products Co.*, 236 U. S. 165, 174. 'The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade.' *United States v. Colgate & Co.*, 250 U. S. 300, 307 * * * 'The Sherman Act was intended to secure equality of opportunity and to protect the public against evils commonly incident to monopolies and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition—the plan of the contending forces ordinarily engendered by an honest desire for gain.' *United States v. American Oil Co.*, 262 U. S. 371, 388."

The laws call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce

"but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis." *Appalachian Coals, Inc., v. United States*, 288 U. S. 344.

Here, appellants, it seems to us, brought about a situation by agreement amongst themselves whereby in association they

could reduce the cost of securing sustenance in the way of advertising in competition to a certain degree with national farm papers. What they sought in that respect was conducive to reduction of cost and to efficiency of operation of their businesses. Unfortunately, appellee was not in position to meet that competition; but that fact, it seems to us, is one of the fortunes of development of industrial practices, and its existence should not stamp with the stigma of illegality the act of appellants. We deem the language of *Arkansas Brokerage Co. v. Dunn & Powell, Inc.*, 173 Fed. 899 (CCA8), pertinent. There the court said:

"From these cases, and many others to which attention might be called, it seems clear that the Pine Bluff jobbers merely resorted to a common expedient, recognized by law and sanctioned by practice, of forming a subsidiary corporation to promote economy in the management of their existing business and to extend it into other fields of legitimate enterprise. If the new expedient affected interstate commerce at all, it was not in that direct, immediate, or necessary way which alone would make it obnoxious to the law, but only in an indirect, incidental, and unimportant way not within the denunciation of the law. The worst that can be said is that the parties availed themselves of certain advantages and opportunities which their relation to the brokerage business gave them and which materially aided them in the race of competition. If this resulted in injury to the plaintiff, it was *damnum absque injuria.* Free competition is the life of trade and commerce, and it is quite as important to approve all lawful, fair and reasonable expedients devised to promote individual success as it is to condemn vicious and unlawful practices which violate individual right and the public weal.

"The learned trial judge should have given the requested instruction to the jury that plaintiff was not entitled to recover. The judgment is therefore reversed, and the cause remanded to the Circuit Court for a new trial in harmony with the views here announced."

We conclude, therefore, that there was not sufficient evidence to sustain a verdict for appellee upon the issue of unlawful restraint.

If we are wrong in our analysis of the evidence and the application of the law thereto, there arises the further question of whether there was sufficient evidence to go to the jury upon the question of legal damage to appellee. The facts, we believe, demonstrate that, so far as damages are concerned, the evidence was sufficient to require submission to the jury and to support the verdict which followed. From the facts produced the jury might rightfully infer the existence and fix the amount of damages.

[*Judgment reversed*]

The judgment of the District Court is reversed with directions to proceed in accord with the views here expressed.

[¶ 55,159] Johnson & Johnson, a corporation of the State of New Jersey, et al., v. Harry Weissbard and Max Weissbard, partners trading as Weissbard Brothers.

New Jersey Court of Errors and Appeals. Decided April 30, 1937.

On appeal from Court of Chancery.

The New Jersey Fair Trade Act is held constitutional. The Court holds that the Act does not affect interstate commerce. Section 1(b) is held to be sufficiently clear in meaning although there is apparently an omission.

For complainants-appellants, Merritt Lane.
For defendants-respondents, Bilder, Bilder & Kaufman, Samuel Kaufman, Morris M. Schnitzer.

The opinion of the court was delivered by BODINE, J. The appellants have for years been engaged in the production, sale and distribution of pharmaceutical preparations bearing distinctive trademarks, brands or names. They sought to restrain the defendants from selling and advertising for sale, or offering for sale in their stores products made by appellants for a less price than that fixed for resale. Chapter 58, P. L. 1935, p. 140, was designed to secure to the appellants this right. Our statute is a counterpart of the statute recently adopted in many states, notably Illinois and New York.

[*U. S. Supreme Court decision*]

The court of chancery held the act unconstitutional, but this decision was before the unanimous decision of the Supreme Court of the United States holding the Illinois statute constitutional. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp. McNeil v. Joseph Triner Corporation*, 57 Sup. Ct., 139. A reading of that decision is a complete answer to every argument advanced against the statute. Nor do we perceive how the requirements of our statute affect interstate commerce. It is a mere direction to a resident merchant that he must not resell trade marked or branded articles at less than the price fixed by the producer or owner of such marked commodities. If the merchant would profit by

the good will built up by the owner or producer he must comply with the requirements of the legislature. He may remove the mark or brand and sell the goods he owns at his own price. But he may not utilize the good will of another without complying with the statute which brands as unfair the sale of identified goods at less than the price fixed by the "producer."

[*Omission in text of Act*]

Section 1, subdivision 2 of the Illinois Act declared constitutional by the Supreme Court of the United States is as follows:

"(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, *that such purchaser* agree that he will not, in turn, resell except at the price stipulated by such producer or vendee."

The words in italics seem to have been omitted from sec. 1, subdivision (b) of our statute, so that the same reads as follows:

"That the vendee or producer require in delivery to whom he may resell such commodity *to agree* that he will not, in turn, resell except at the price stipulated by such vendor or such vendee."

The omission results in a somewhat ungrammatical expression by our legislature, but the intent seems perfectly clear and in accordance with the precise meaning adopted in Illinois and declared constitutional by the Supreme Court of the United States. If for the words *to agree* we read the words *an agreement*, the meaning is not only clear but grammatical. The intent of the act is not to prevent a resale of merchandise but a destruction of the producer's good will often established at great cost.

[*New York decision*]

In the case of *Bourjois Sales Corporation v. Dorfman*, 7 N. E. (2d) 30 (273 N. Y. 167), the Court of Appeals of New York said:

"Doubleday, Doran & Co., Inc., the publisher, made a contract with Doubleday, Doran Book Shops, Inc., a seller and distributor, as to the price at which certain books could be sold. Later the publisher sold these books to R. H. Macy & Co., without any contract or restriction as to price or even a request for a contract. When Macy & Co. undertook to sell these books at its own figure, the publisher sought an injunction to compel Macy to sell the books at the price it had fixed with the other Doubleday corporation. We thought this to be a clear case of unauthorized restriction upon the disposition of one's own property and unconstitutional within former decisions of the United States Supreme Court. That court has taken a different view in the case above mentioned, *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183. 57 S. Ct., 139, 81 L. Ed. —, 106 A. L. R. 1476 (December 7, 1936). The Illinois Free Trade Act (Smith-Hurd Ill. Stats. c. 121½, sec. 188 et seq.) there under review is similar to our own. The complaint in this appeal now before us is in no way different from that before the Supreme Court under the Illinois act, so that we feel it to be our duty to submit our own judgment to the rulings of the Supreme Court on the Constitution of the United States and the interpretation of its own decisions."

[*Lower court reversed*]

The decree is reversed.

[¶ 55,160] Federal Trade Commission v. Real Products Corporation.

United States Circuit Court of Appeals for the Second Circuit. June 7, 1937.

A manufacturer of automotive and metal specialties, including spark plugs, is prohibited from using the name "Champion," which has been used for fifteen years by another manufacturer of similar products. The existence of public interest here may rest either on the deception suffered by the public or on the prejudice occasioned to competitors. It is not material that respondents have copyrighted the box label "Champion Spark Plug Set," as a copyright is not a license to engage in unfair competition.

Before: MANTON, HAND and HAND, Circuit Judges.

This application seeks the enforcement of an order of the Federal Trade Commission issued against the respondents to cease and desist unfair practices in trade. 38 Stat. 719, 15 U. S. C. A. § 45. Order granted.

W. T. Kelley, Chief Counsel, Federal Trade Commission. Martin A. Morrison, Assistant Chief Counsel. John W. Hilldrop, James W. Nichol, Special Attorneys, Attorneys for Petitioner.

Irving Beck, President, Real Products Corporation, Appearing in Person.

MANTON, Circuit Judge. Respondents are corporations, organized under the laws of the State of New York, engaged in joint enterprises, manufacturing automotive and metal specialties, including spark plug cable sets, which are sold and distributed throughout the various states of the United States. Their products are transported in interstate commerce from their place of business in New York.

The charge against them is the use of unfair methods of competition in the sale of their products in interstate commerce

in violation of § 5 of the Federal Trade Commission Act (38 Stat. 719; 15 U. S. C. A. § 45). The order entered directed that they cease and desist from

(a) "Representing in any manner that the automotive and metal specialties, including spark plug cable sets, manufactured and sold by the respondents are the products of or are made by the Champion Spark Plug Company of Toledo, Ohio. (b) Using the word 'Champion' alone or in connection or conjunction with any other word or words * * * to describe or designate automotive and metal specialties, including spark plug cable sets, made by respondents, and from using any other word or words so as to import or imply that said products are made by the Champion Spark Plug Company of Toledo, Ohio. (c) Using and displaying the word 'Champion' in their advertising * * * on cartons, boxes or other containers * * *. (d) The use, by any method, manner or means of advertising * * * in newspapers and circulars, of the device or picture of a spark plug at the bottom of which a simulation of electricity is displayed and containing the word 'Champion' therein."

The Commission made complete and specific findings, which have evidence to support them, and which justify the order entered to cease and desist. The Champion Spark Plug Company has been in the field fifteen years, engaged in the manufacture of automotive and metal specialties, including spark plugs and porcelains and in their sale and distribution in interstate commerce. It applied the word and trade designation "Champion" to its products, including spark plugs and used it on its stationery and in its corporate name and on its cartons and printed advertising matter. The name thus signified to the trade and purchasing public that such automotive and metal specialties including spark plugs and porcelains were the products of the Champion Spark Plug Company. There was evidence to support the finding that the respondents, without the permission or consent of the Champion Spark Plug Company, used and continued to use the trade designation "Champion" for their automotive and metal specialties, including spark plug cable sets, and on their price list, cartons and advertising matters.

The Commission found, with evidence to support it, that the use of the word "Champion" by respondents as set forth was false, deceptive and misleading to the retail trade and the purchasing public and had a tendency to and did deceive the purchasing public by creating the impression that the products of the respondents were those of the Champion Spark Plug Company. It had a like tendency to unfairly divert trade to respondents from their competitors.

False and misleading representations of respondents' products constituted an unfair method of competition within the intent and meaning of § 5 of the Act. *Fed. Trade Comm. v. Realty Milling Co.*, 288 U. S. 212; *Fed. Trade Comm. v. Winsted Hosiery Co.*, 258 U. S. 483; *Indiana Quartered Oak Co. v. Fed. Trade Comm.*, 26 Fed. 2, 340 (CCA. 2); cert. den. 278 U. S. 623. The use of an identical name for kindred products necessarily was deceptive to the public and indicated a purpose to use it unfairly in competition. *Standard Oil Co. of N. M. v. Standard Oil Co. of Cal.*, 56 Fed. 2, 973, 980 (CCA. 10); *Del Monte Special Food Co. v. California Packing Corp.*, 34 Fed. 2, 776 (CCA. 9). The purchasing public would be likely to buy respondents' product on the strength of the first user's reputation where the word "Champion" was connected with the sale of spark plugs spark plug cable sets and porcelains.

[*Public interest*]

The existence of a public interest here may rest either on the deception suffered by the public [*F. T. C. v. Royal Milling Co.*, 288 U. S. 212; cf. *F. T. C. v. Klesner*, 280 U. S. 19] or the prejudice occasioned to competitors. *F. T. C. v. Raladam*, 283 U. S. 643. On either ground the public is entitled to be protected against unfair practices and its interest in such protection is specific and substantial. *F. T. C. v. Royal Milling Co., supra.* Nor is it necessary that the product misrepresented be inferior or harmful to the public. The deceptive misrepresentation suffices. See, *National Silver Co. v. F. T. C.*, 88 Fed. 2, 425, 427 (CCA. 2).

[*Potential competitors*]

The principle of the *Raladam* case, *supra,* that potential competitors are equally to be protected with actual competitors is an integral part of the law of unfair competition. All persons are free to enter the trade at any time and are therefore potential competitors. Here, however, it is clear that competition was wrongfully affected. The respondents obtained an advantage over their competitors.

[*Effect of copyright*]

Finally, it is not material that respondents have copyrighted the box label, "Champion Spark Plug Set." A copyright is not a license to engage in unfair competition. *Marietta Mfg. Co. v. F. T. C.*, 50 Fed. 2, 641 (CCA. 7); *N. Fluegelman & Co. v. F. T. C.* 39 Fed. 2. 61 (CCA. 2).

[*Enforcement granted*]

The order of enforcement is granted. Order granted.

[¶ 55,161] **Wm. Filene's Sons Company v. Fashion Originators' Guild of America, Inc.**

United States Circuit Court of Appeals for the First Circuit, June 1, 1937.

Appeal from the District Court of the United States for the District of Massachusetts.

The essential elements of an unreasonable restraint of trade or monopoly in violation of the Sherman Act are held to be price control, production control, and deterioration in quality. The fundamental test is held to be a detriment to the public. The Sherman Act is held not to preclude the members of an industry in which evils exist, disorganizing trade in such industry, from acting collectively in the elimination of such evils and establishing fair competitive practices.

The methods employed to achieve the ends and purposes of any trade association, if reasonable, are illegal only if the ends and purposes themselves are illegal. The important thing in cases under an anti-trust law is the result achieved, or sought to be achieved, and the legality and means depend upon whether they are reasonably adapted to achieve a fair and legitimate purpose. Activities of a guild of dress manufacturers, designed to prevent style piracy, are held to be lawful.

Before BINGHAM, WILSON and MORTON, JJ.

Opinion of the Court

[*Facts of case*]

WILSON, J. This is an appeal from a decree of the District Court of Massachusetts in a bill in equity praying for an injunction against the continuance of an alleged conspiracy in the restraint of and to monopolize interstate commerce in violation of Sec. 1 and 2 of Chap. 1 of Title 15 U. S. C. A. known as the Sherman Act, and for relief under Sec. 16 of the Clayton Act (Title 15 U. S. C. A., Sec. 26) against threatened loss and damage by the violation of the Sherman Act.

The case was first heard before a judge of the District Court on motion for a preliminary injunction, which was denied. The case was then referred to a special master to hear the parties and their evidence and report to the court his findings of fact and his conclusions of law thereon. The evidence before the master was not reported and the District Court in a final decision stated that, so far as the report presents findings of fact, they are adopted by the District Court as the statement of facts required by Equity Rule No. 70½. We must accept the facts as found by the master.

[*Master's findings*]

The master reported the following facts: The plaintiff, Wm. Filene's Sons Company, hereinafter referred to as Filene's, owns and operates a ready-to-wear specialty store in Boston, with numerous branches in other parts of Massachusetts, and owns all the capital stock of R. H. White Company, hereinafter called White's which operates a department store in Boston.

The defendant, Fashion Originators' Guild of America, Inc., hereinafter called The Guild, is a corporation organized under the laws of New York on March 7, 1932.

Prior to the war the ladies' ready-to-wear industry was of small consequence. Shortly after the war the manufacture and sale of ready-to-wear dresses became more common, and the volume of sales of such dresses became more common, and the volume of sales of such dresses increased year by year, until in 1934 the dollar vollume of such sales in this country reached a level of $430,000,000.

Some manufacturers of ready-to-wear dresses originate their own styles for the dresses they make. Other manufacturers do not originate their own styles, but copy the styles and designs of other manufacturers. Manufacturers who originate their own styles and designs are called "original creators," and manufacturers who copy the styles and designs of other manufacturers are called "copyists."

The copying of other manufacturers' styles and designs is commonly called in the trade "style piracy" or "design piracy." The terms "style" and "design" are sometimes used as though they were synonymous. But strictly speaking, "style" as applied to a dress refers to its general characteristics, such as the length of the skirt, the size of the sleeves, the height of the waist, etc., while "design" as applied to a dress includes all the details involved in its make-up. A style is a type, while a design is an interpretation of the style. A single style, therefore, may be followed in almost any number of different designs.

Styles in ladies' dresses are usually determined in the so-called style centers of the world, of which Paris is the principal one. A manufacturer who is an original creator generally sends his stylists and designers to Paris for inspiration. After making observations and determinations, such stylists and designers prepare their

own designs and use their knowledge of the probable requirements of their employers' customers and their own ideas as to what will be popular with the buying public which they serve. Styles and designs prepared in this way are considered in the industry to be original creations

There are five seasons a year in the dress industry, the spring season, the summer season, the fall season, the winter season and the winter resort season.

A manufacturer makes up a line of samples for each season The cost to produce a single line is between $30,000 and $50,000. When a line has been prepared it is put on display in the manufacturer's showroom and is there shown to prospective retail buyers.

The period between the first order of a dress of a particular style and design and the last substantial re-order of it is called the "style life" of the dress, which is usually not more than three months.

A manufacturer who is a copyist does not send stylists or designers to Paris for inspiration. Instead he copies original designs of other manufacturers, which is accomplished in different ways. Sometimes a copyist buys dresses from retailers who have purchased them from original creators. Sometimes employees of copyists visit the showrooms of original creators and memorize or take notes of the details of the original design there displayed. Sometimes copyists obtain sketches or photographs of successful designs of original creators from agencies which make a business of supplying such sketches and photographs. Sometimes copyists bribe employees of original creators to furnish samples of their employers' original designs or to let them see samples from which they make sketches, and occasionally the original designs are stolen from the original creators.

Copying destroys the style value of dresses which are copied. Women will not buy dresses at a good price at one store if dresses which look about the same are offered for sale at another store at half those prices. For this reason copying substantially reduces the number and amount of re-orders which the original creators get. With this uncertainty with respect to re-orders, original creators cannot afford to buy materials in large quantities as they otherwise would. This tends to increase the cost of their dresses and the prices at which they must be sold.

Reputation for honesty, style and service is an important asset of retailers. Copying often injures such a reputation. A customer who has bought a dress at one store and later sees a copy of it at another store at a lower price is quite likely to think that the retailer from whom she bought the dress lacks ability to select distinctive models and that she has been overcharged. Dresses are returned and customers are lost.

In the spring of 1935 in dollar volume a very large per cent of the total ready-to-wear dress business in the United States was in copies. Prior to the activities of the Guild, manufacturers of cheaper dresses copied most of their designs.

With the dress industry in a seriously chaotic state, due in large part to the prevalence of "style piracy," a group of dress manufacturers who were original creators organized The Guild in 1932. The purposes for which The Guild was formed as set forth in its certificate of incorporation are as follows:

"To protect the originators of fashions and styles against copying and piracy of styles of any trade or industry; to promote co-operation and friendly intercourse in the wearing apparel industries; to establish and maintain uniformity and certainty in the customs and commercial usages of trade; to acquire, preserve and disseminate information and literature which will tend to augment the sale of the commodities manufactured or sold; to advance the trade and commercial industries of its members throughout the Americas and to promote the sale, identification and recognition of original style and merchandise of the industries of its members."

A registration bureau was established by The Guild in 1933. Its purpose was to record the fact that an applicant for registration claimed that the dress whose registration he sought was his own original design. A regulation of The Guild required that when registered dresses were shipped to customers they should bear Guild labels, to the effect that the dress was an original design registered by a member of the Fashion Originators' Guild.

At the time of the formation of The Guild its members comprised principally manufacturers selling dresses at wholesale at $22.50 and up. Later other manufacturers became members of or were affiliated with The Guild, who were engaged principally in manufacturing dresses which sold at wholesale at $16.75 and above. In the latter part of 1936 the Association of Buying Offices, representing some 1700 retail stores, requested The Guild to extend its style protection program to lower priced dresses, and later manufacturers of dresses wholesaling as low as $3.75 were admitted as protective affiliates of The Guild. At the end of 1935 a total of about 12,000 retailers were cooperating with The Guild. When members or affiliates of The Guild received orders from retailers who were not in fact cooperating with The Guild or

who had not signed declarations of cooperation, they declined to accept such orders

When it is established to the satisfaction of the The Guild that the retailer is not cooperating with The Guild in its efforts to suppress style piracy, The Guild notifies all its members and affiliates by sending them red cards stating the facts. After a retailer has been so notified, members and affiliates of The Guild are not to sell any merchandise to the retailer unless and until he evidences his intention to cooperate with The Guild.

The rules and regulations of The Guild are enforced by fines and by expulsion from The Guild for a third offense in any one year, which the master found to be reasonable regulations.

In the spring of 1936 there were about 3,000 dress manufacturers in the United States. Of these 2,130 were in New York City and about 870 outside New York City. Of the 2,130 manufacturers in New York City *only 130* were Guild members or affiliates. Of the 870 manufacturers outside New York City *only 14* were Guild members or affiliates.

During the year ending May, 1935, dress manufacturers in the United States produced about 84,000,000 dresses. Of this number of dresses manufacturers who were members or affiliates of The Guild on May 27, 1936, produced less than 4,600,000, or less than 6 per cent of the total. Of the more than 80,000,000 dresses produced in the New York market, less than 43,000,000 were produced by manufacturers who were members or affiliates of The Guild on May 27, 1936. Of the less than 4,000,000 dresses produced outside of the New York market, less than 330,000 dresses were produced by manufacturers who were members or affiliates of The Guild.

The master found that, although the members and affiliates of The Guild held a very important position in the New York market so far as dresses wholesaling at $16.75 and above were concerned, they did not dominate the dress industry of the country. In 1933 Filene's entered into an agreement to cooperate with The Guild in eliminating "piracy" in the trade, but in 1936 it repudiated the agreement. Although the red carding of Filene's cut down the number of manufacturers from whom Filene's could buy, there remained many manufacturers, including many in the higher priced ranges, from whom it could buy and who, it appears, might copy styles and designs of members of The Guild. At no time did The Guild refuse to permit Filene's to cooperate with it and to enjoy the advantages resulting from such cooperation. Filene's by failing to cooperate with the efforts of The Guild to eliminate this unfair business practice, which Filene's in a letter to The Guild under date of July 5, 1933, characterized as an *"evil,"* cut itself off from certain sources of supply, but in spite of that fact there remained substantial and reasonably adequate markets to which it could resort for the purchase of ready-to-wear dresses.

[*Characteristics of restraint or monopoly*]

The master's report does not disclose any of the characteristics of an unreasonable restraint of trade or monopoly in violation of the Sherman Act, the essential elements of which are (1) price control, (2) production control, (3) deterioration in quality. The fundamental test, as pointed out in *Standard Oil Co. of New Jersey et al., v. United States,* 221 U. S. 1, 52; *Sugar Institute, Inc. v. United States,* 297 U. S. 553, 597-598, is a detriment to the public.

The master concluded his report by finding:

"I find that the object of The Guild and its members and affiliates was to protect the dress industry from injurious and unfair practices—the principal one of which was the injurious and unfair practice of style piracy—and to promote competition in that industry upon a sound and fair basis. I find that The Guild and its members and affiliates have not fixed or tried to fix prices, have not limited or tried to limit production and have not caused or tried to cause any deterioration in the quality of their products. I find that the object of The Guild and its members and affiliates was beneficial, rather than prejudicial, not only to the interests of the dress industry but as well to the interests of the public. I find that the activities of The Guild and its members and affiliates have carried with them no monopolistic menace and have not unduly restrained competition or unduly obstructed the course of trade.

"I conclude that the activities of The Guild, in the protection of the original creations of its members and affiliates, do not tend to create a monopoly or unduly restrain interstate commerce in violation of the anti-trust laws of the United States; that the fair-trade practice regulations of The Guild are reasonable in contemplation of law and do not tend to create a monopoly or unduly restrain interstate commerce in violation of such anti-trust laws; that the red card system, adopted and enforced by The Guild, does not constitute or result in an illegal boycott; that the concerted refusal on the part of members and affiliates of The Guild to sell to retailers who refuse to protect the original creations of such members and affiliates involves no denial or abridgement of the right of fair competition either as between manufacturers or as between retailers; that there is nothing arbitrary, capricious, unreasonable or unduly coercive as a matter of law in either the anti-piracy activities or the fair-trade practice regulations of The Guild; and that the means adopted by The Guild for carrying out its anti-piracy program are reasonable and do not unduly restrain interstate commerce."

The District Court on the coming in of the report and the plaintiff's exceptions thereto, confirmed the master's report and ordered that the plaintiff's bill be dismissed.

[*Errors assigned*]

The plaintiff assigned as errors (1) that

the District Court erred in dismissing the bill of complaint and in holding that the facts reported by the master did not constitute a violation of Sec. 1 and Sec. 2 of the Sherman Anti-Trust Act; (2) that the defendants have combined and conspired to monopolize in interstate commerce dress designs to the extent of from 40,000 to 50,000 styles a year; (3) that in violation of Sec. 1 of the Anti-Trust Act the defendants combined and conspired in unreasonable restraint of interstate commerce by creating and maintaining a blacklist of those retailers who declined to boycott non-combining manufacturers of such styles and designs, or to break their contracts with such manufacturers; (4) that the District Court erred in overruling the exceptions to the master's report in denying the plaintiff an injunction.

[*Rule of reason*]

It is now well settled that in interpreting and applying the Sherman Act the courts are guided by the so-called "rule of reason." In *Standard Oil Co. v. United States,* 221 U. S. 1, the court laid down the rule that contracts or combinations alleged to be in restraint of interstate commerce are not objectionable unless they impose an unreasonable restraint, such as to give a monopoly to one who enjoyed it to fix the price and thereby injure the public, or impose a limitation on production. Also see *Nash v. United States,* 229 U. S. 373, 376.

The mere fact that a contract or combination regulates or imposes some restraint upon the trade in interstate commerce, does not necessarily make it illegal. In the case of *Board of Trade of the City of Chicago v. United States,* 246 U. S. 231, 238, the Supreme Court said:

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

The Sherman Act, therefore, does not preclude the members of an industry in which evils exist disorganizing trade in such industry from acting collectively in the elimination of such evils and establishing fair competitive practices. The Supreme Court further said in *Appalachian Coals, Inc., et al. v. United States,* 288 U. S. 344, 373-374:

"A co-operative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. Voluntary action to rescue and preserve these opportunities, and thus to aid in relieving a depressed industry and in reviving commerce by placing competition upon a sounder basis, may be more efficacious than an attempt to provide remedies through legal processes. The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected, or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade."

In the more recent case of *Sugar Institute, Inc., et al. v. United States,* 297 U. S. 553, 597-598, the Supreme Court said:

"The restrictions imposed by the Sherman Act are not mechanical or artificial. We have repeatedly said that they set up the essential standard of reasonableness. *Standard Oil Co. v. United States,* 221 U. S. 1; *United States v. American Tobacco Co.,* 221 U. S. 106. They are aimed at contracts and combinations which 'by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restraining competition or unduly obstructing the course of trade'. *Nash v. United States,* 229 U. S. 373, 376; *United States v. Linseed Oil Company,* 262 U. S. 371, 388, 389. Designed to frustrate unreasonable restraints, they do not prevent the adoption of reasonable means to protect interstate commerce from destructive or injurious practices and to promote competition upon a sound basis. Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes. And cooperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law. Nor does the fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, require that abuses should go uncorrected or that an effort to correct them should for that reason alone be stamped as an unreasonable restraint of trade. Accordingly we have held that a cooperative enterprise otherwise free from objection, which carriers with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. *Appalachian Coals v. United States,* 288 U. S. 344, 373, 374."

The language of the court in *Appalachian Coals, Inc., v. United States, supra,* page 372, applies particularly to the aims and purposes of The Guild:

"The evidence leaves no doubt of the existence of the evils at which defendants' plan was aimed. . . . It was afflicted by injurious practices within itself, —practices which demanded correction. If evil conditions could not be entirely cured, they at least might be alleviated. The unfortunate state of the industry would not justify any attempt unduly to restrain competition or to monopolize, but the existing situation prompted defendants to make, and the statute did not preclude them from making, an honest effort to remove abuses, to make competition fairer, and thus to promote the essential interests of commerce."

The Supreme Court has also laid down the rule that the methods employed to achieve the ends and purposes of any trade association, if reasonable, are illegal only if the ends and purposes themselves are illegal. *Cement Manufacturers' Protective Association v. United States,* 268 U. S. 588, 604.

It is now settled that the important thing in cases under an anti-trust law is the result achieved or sought to be achieved, and the legality and means depends upon whether they are reasonably adapted to achieve a fair and legitimate purpose.

The plaintiff stresses a finding of the master that members and affiliates of The Guild register as original creations from 40,000 to 50,000 "styles" each year; but it is quite evident that the master here was using the word "styles" as synonymous with "designs." As the master defined these terms: "A style is a type, while a design is an interpretation of a style." A single style may be followed in almost any number of different designs. The registration of 50,000 different designs in a year is, therefore, quite different from the registration of 50,000 different styles.

The imposition of reasonable fines and the penalty of expulsion in the event of repeated violations as a means of making effective the rules of a trade association, is permissible. *Anderson v. United States,* 171 U. S. 604, 616-617; *United States v. Fur Dressers' & Fur Dyers' Association, Inc.,* 5 Fed (2d) 869, 872.

[*No illegal or unreasonable method*]

The master also found there was nothing illegal or in any way unreasonable in the method of determining whether or not dresses alleged to be copies of the original designs of Guild manufacturers were in fact copies, as they are submitted to a committee of retailers and if the alleged violator is not satisfied with the committee selected, he may demand another committee, and if then dissatisfied he may select one member, the Guild manufacturers another, and these two may select a third. This method of procedure is one frequently adopted to afford parties in dispute fair and reasonable protection.

It appeared from the findings of the master that Filene's had a reasonably adequate market outside of The Guild, and any alleged loss or damage due to the withdrawal of the privileges of The Guild was not shown to have been the result of The Guild's action.

[*Millinery case distinguished*]

Our attention has been called to a decision of the Federal Trade Commission in the matter of *Millinery Quality Guild, Inc., et al.;* but the facts found by the Trade Commission are quite different from those found by the master and adopted by the District Court in the case at bar. In the matter of the Millinery Guild the Commission found that the Guild formed a substantial majority of the originators of the leading style of high grade millinery for women. The master found the facts otherwise in the case at bar. The Commission found that the plan of the Millinery Guild, its acts and practices were to hinder competition and to create a monopoly in the sale of women's hats in interstate commerce by increasing the price and limiting production to the injury and prejudice of the public, while the master in the case at bar found to the contrary.

Upon the facts found by the master in this case the mandate will be:

[*Injunction denied*]

The decree of the District Court is affirmed with costs.

[¶ 55,162] H. J. Jaeger Research Laboratories, Inc., by Maude J. Lange and David Wolf, Surviving Directors and Trustees, v. Radio Corporation of America.

United States Circuit Court of Appeals, for the Third Circuit. Filed June 10, 1937.

Appeal from the District Court of the United States for the District of New Jersey.

An action to recover damages for violation of the Sherman Anti-Trust Act is held to be an action on the case, governed by the State Statute of Limitations on actions on the case.

Before Buffington, Thompson and Biggs, Circuit Judges.

Opinion

[*Whether action on the case*]

Buffington, J. In this case, an action to recover damages for violation, by the defendant, of the Sherman Anti-Trust law, the decisive factor is the several years delay of the plaintiff in bringing this suit. In point of fact, such suit was not brought for over eight years, and the question is whether it was barred by the New Jersey statute of limitations. The question arises in this way. The New Jersey statute of

limitations, which it is conceded governs, limits actions on the case to six years. The plaintiff contends his suit is not an action on the case; the defendant says it is. The court below held with the defendant and dismissed the suit. Thereupon plaintiff took this appeal.

[*Nature of action on the case*]

Confining ourselves to the statutes of limitations of the states in this circuit, we note that the Acts of New Jersey and Pennsylvania are, so far as pertinent to the question here involved, the same, and both followed the British statute of James I in limiting actions of case to six years. That action was created to meet a recognized need in the administration of justice, namely, a special form of action for particular cases where the ancient form of action did not provide a remedy. This is recognized by cases and commentators and the broad, inclusive remedial purpose of its origin authoritatively stated. Thus Blackstone, Vol. 4, *442, referring to the adopting of process by courts to a particular case, speaks of them as

"extending the remedial influence of the equitable writ of trespass on the case according to its primitive institution by King Edward I to almost every instance of injustice not remedied by any other process."

So again, Vol. 3, *122, that great commentator says:

"Where any special consequential damage arises which could not be foreseen and provided in the ordinary course of justice, the party injured is allowed both by common law and the statute of Westminster, 2 C. 24, to bring a special action on his own case by a writ form according to the peculiar circumstance of his own particular grievance."

So also Bouvier, Vol. I, page 425, says:

"Case—A form of action which lies to recover damages for injuries for which the more ancient forms of action will not lie. Steph. Pl. And. ed. Sec. 52."

Moreover, instancing the need where a statute grants a right but does not prescribe the remedy to enforce such, and citing how the law provides a remedy by an action of case, Bouvier, Vol. I, page 426, says:

"Case lies for the infringement of rights given by statute; *Sharp v. Curtiss*, 15 Conn. 526; *Riddle v. Proprietors of Locks and Canals*, 7 Mass. 169, 5 Am. Dec. 35; *Savings Inst. v. Makin*, 23 Me. 371; *Hunt v. Town of Pownal*, 9 Vt. 411; *Hull v. Richmond*, 2 Woodb. & M. 337, Fed. Cas. No. 6,861."

To which may be added 1 Chit. Pl. 133:

"Actions on the case are founded on common law or upon acts of parliament, and lie generally to recover damages for torts not committed with force, actual or implied;"

and page 142:

"Wherever the statute prohibits an act, and provides for a recovery of damages caused by its violation, the remedy is an action on the case."

This application of the statutory limitations to an action of case brought for damages under the Sherman Act has arisen in cases in this circuit. By reference to *Buckeye Powder Co. v. DuPont DeNemours*, 223 Fed. 881; 248 U. S. 55, it will be seen that on September 18, 1911 an action similar to the present one was brought in the District of New Jersey. The alleged wrongs were committed from 1903 to the date of the suit. The trial Judge held that the plaintiff was barred by the New Jersey statute of limitations as to all damages suffered before September 18, 1905, and left to the jury to decide whether any damage was proven during that six years period. The jury found for the defendant. On appeal by the plaintiff this Court (223 Fed. 881) affirmed the judgment, as did also the Supreme Court (248 U. S. 55). In this court the ruling of the court was assigned as error, but it was not discussed by counsel or alluded to in the court's opinion, seemingly it not being regarded as a matter of moment; but it was not overlooked, for Justice Holmes, in his opinion said:

"Elaborate exceptions were taken, but they were overruled by the circuit court of appeals."

Apparently both reviewing courts regarded the question as rightly settled. Later, in a like case, the limitation of the Pennsylvania statute, which, as stated above, was substantially the same as the New Jersey one, was held to control: 243 Fed. 1; affirmed 248 U. S. 55. In this court's opinion it was said:

"The only question is whether the six year limitation of the Pennsylvania act was properly applied. We are of opinion that the defendant (should be plaintiff) did not suffer from error in having applied to its case the six year limitation of the Pennsylvania act."

These cases were followed in 277 Fed. 433, a case also arising in this circuit, wherein the trial judge held:

"The case is, however, I think, controlled by *Thomson v. Clanmorris*, 1 Chancery, 718".

[*Anti-trust suit held to be action on the case*]

So regarding, we hold the court below did not err, but its decision is in line with the holdings of this circuit. In so deciding we have not overlooked the decisions of the courts of New Jersey, which it is urged constrain a decision to the contrary. Without discussing and differentiating such cases, we find no case which presents the question here involved. The Sherman Act created a new tort damage right for damages actually suffered, but also imposed a statutory trebling penalty. For this new legislative damage and penalty it created no remedy. But the law, by its flexibility, provided for this particular situation a remedy by an action of case, but with that remedy provided, for the protection of de-

fendants, the barrier of a six year limitation which, as has been said in 9 Wall. 282, "is a mere declaration of the law-making power to the plaintiff, that having voluntarily slept so long upon his rights, he shall not now be permitted to assert them, to the injury of individuals and the disturbance of society."

Accordingly, the judgment below is affirmed.

[¶ 55,163] **Indianapolis Amusement Company v. Metro-Goldwyn-Mayer Distributing Corp., Universal Film Exchanges, Inc.**

United States Circuit Court of Appeals for the Seventh Circuit. June 12, 1937.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

A defendant in an action at law alleging conspiracy to violate the anti-trust laws is entitled to a bill for discovery on the subject matter of damages.

Before SPARKS and MAJOR, Circuit Judges, and LINDLEY, District Judge.

[*Suit for anti-trust conspiracy*]

LINDLEY, District Judge. Appellant, proprietor of a moving picture theatre in Indianapolis from 1922 to 1927, began an action at law against appellees, film distributors, charging them with conspiracy to violate the Anti-Trust laws of the United States. It alleged that by such illegal action, it was forced to exhibit pictures of an inferior quality and to contract and pay for more reels than needed, with resulting loss of customers, business and good will.

[*Bill for discovery filed*]

Appellees answered and, later, before trial, filed their bill in equity for discovery, averring that, in order properly to prepare for defense of the action at law, it was necessary that they have discovery as to various matters, including the name of the theatre, the period of operation, the interest of appellant, the substance of and names of parties to contracts showing appellant's interest, the names of pictures exhibited, attendance at the theatre, scale of admission, daily receipts and expense, contracts between appellant and appellees, amounts paid for films, the names of films claimed to be inferior in character, the character of liquidation of appellant's property and full information concerning the same, final disposition of the assets and the specific transactions upon which appellant relied in its claim for damages.

Appellant moved to dismiss the bill. The motion was overruled, and appellant thereupon answered, denying that it was necessary, in order to make proper defense, that appellees have discovery; that to allow same would in no way speed the trial; that the information requested was not material to the issues but, if pertinent, was a part of appellant's burden in the law action and then was, or had been, within the knowledge of appellees; that the only purpose of the bill was unreasonably to attempt to delve into appellant's records and that appellees have an adequate remedy at law.

Upon the face of the pleadings, the court entered an order directing appellant to answer certain of the interrogatories propounded. Thereupon this appeal was perfected.

[*Adequacy of legal remedy*]

Immediately confronting us is the question of adequacy of appellees' legal remedy. 2 Burns Ind. Stat. Ann., 1933, Sec. 2-1644 p. 279, provides that the court may, upon proper showing, compel either party to produce books, records and documents at or before the trial. However, Congress itself has enacted legislation upon the same subject matter. Title 28 U. S. C. A., Sec. 636 provides that in trials of actions at law, the court may require parties to produce books or writings which contain evidence pertinent to the suit, under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery. Despite the Conformity Act, Title 28 U. S. C. A., Sec. 724, the federal legislation controls in trials in the federal courts, and the production of books and papers therein is regulated by Sec. 636, previously cited, and the statutory provisions of a state upon such subject matter do not apply to procedure in the federal courts. *General Film Co. v. Sampliner*, 232 F. 96 (CCA6); *Ex Parte Fisk*, 113 U. S. 713; *Hanks Dental Ass'n. v. International Tooth Crown Co.*, 194 U. S. 303.

The purpose of Sec. 636 was to give courts of law the power to do what courts of equity could do in the matter of using documents, without the formality of going

into a court of equity with a bill of discovery in aid of an action at law. *Carpenter v. Winn,* 221 U. S. 533. But by the act a party may not be compelled to produce evidence before trial. Consequently, the remedy by a bill for discovery in aid of the action of law is still open to secure evidence before the trial. *Carpenter v. Winn, supra.* There the court remarked that a court of equity does not lose its jurisdiction to entertain a bill for the discovery of evidence because the powers of the court have been enlarged so as to make the equitable remedy unnecessary in some circumstances. Consequently it appears authoritatively established that appellees' remedy by way of bill for discovery in aid of the action of law still exists.

A bill will not lie to pry into the case of an adversary, to learn its strength or weakness. A discovery sought upon suspicion or vagueness is of fishing character and will be dismissed. The province of discovery is not to disclose in what manner the other party intends to make out his case at law. A plaintiff in equity is entitled only to the discovery of such matters within the knowledge of possession of his opponent as will enable him to make out his own case. *Carpenter v. Winn, supra.*

[*Discovery as to damages*]

Appellant insists that appellees' bill was within the category condemned and that they were not entitled to have the interrogatories answered because the latter bear almost entirely upon the question of appellant's damages. They insist that a defendant in an action at law is not entitled to discovery with reference thereto. The language of *Sinclair Refining Co. v. Jenkins Petroleum Proc. Co.,* 289 U. S. 689 seems to us, in its reasoning, decisive against these contentions. The court there said:

"The case according to common law practice must be tried as a unit and not broken into parts. In such circumstances damages may be proved with the aid of a discovery, if the complication of accounts or other practical impediments make it necessary that the evidence be sifted in advance. * * * *Munger v. Firestone Tire & Rubber Co.,* 261 F. 921, is cited by the petitioner as supporting a general rule that the necessity of proving damages is never a sufficient ground for a discovery in equity * * * The point is made in it that damages are not part of the 'issues' in a lawsuit, and that the interrogatories to be answered by a defendant under a bill of discovery are to be directed to the issues and not to anything else. There is indeed a rule of common law pleading that the statement of general damages in the *ad damnum* clause of a complaint is not an issuable allegation. * * * This does not mean, however, that the plaintiff will not have to prove his damages if he wishes to get more than a nominal verdict. Quite to the contrary, it means that he will have to prove them though the defendant has omitted to deny them in the answer. It is a *non sequitur* to argue from this that the quantum of the damage is not a part of the case to be proved through the aid of a discovery if proof upon the trial will be burdensome or difficult."

See Title 28 U. S. C. A. "Equity Rules."

From the court's reasoning, it seems clear that the right to discovery on the subject matter of damages is available to a defendant as well as to a plaintiff. The purpose of discovery is to prevent clumsy or wasteful litigation and there is no distinction in reason in granting the relief to a defendant and allowing the remedy at the suit of a plaintiff. Such relief was granted in *Pape v. Lister,* L. R. 6 Q. B. 242; and *Iroquois Hotel & Apartment Co. v. Iroquois Realty Co.,* 126 App. Div. 814, 111 N. Y. Sup. 172.

[*Equity Rule 58*]

Since the adoption of Equity Rule 58 bills for discovery connected with a prayer for other relief in equity are superseded by the method provided by the rule. The discovery formerly obtained by such bills is now granted under the rule. Though the practice as to bills for discovery in aid of action at law remains, in all essentials, the same as previously, the courts quite generally follow the same reasoning as in cases under the rule. We know of no limitation upon the practice that would forbid discovery to defendants as well as to plaintiffs. The right to discovery as to matters material to the cause of action or defense of the interrogating party will not be defeated by the fact that such matters also involve the ground of defense or action of the interrogated party. *J. H. Day Co. v. Mountain City Mill Co.* (D. C. Tenn. 1915), 225 F. 622.

The Court sustained appellant's objections to some of the interrogatories propounded, evidently having in mind the limitations upon appellees' right to discovery. Appellees may not engage in a fishing expedition, but in the interest of seemingly orderly diligence there is no reason why appellees should not have in advance of the trial at law that which they are entitled to have under the statutes at the time of trial. The information requested enters into the elements of appellant's damages. It relates to the character of its business; the amount thereof; the income; the expense; the tickets sold; the films purchased, all of which are material, not only to appellant but also to appellees in their attempt to show little or no damage and their seeking to know just wherein appellant claims to have been damaged. This extent of the inquiry is largely one of discretion for the District Court. To hold that one is entitled to a discovery is not to say that the remedy will be granted

without limit. *Sinclair Refining Co. v. Jenkins Co., supra.* We have no doubt that the chancellor will exercise a wise discretion in awarding relief under the bill protecting the rights of both appellees and appellant.

[*No necessity for hearing*]

It is contended that the court should have heard evidence. Ordinarily the court may determine from an examination of the bill and answer whether it is proper to allow the relief. It appears that the issue was clearly defined by the bill and answer; that the interrogatories were directed to ascertain the truth upon the issues presented in the common law suit. We can see no necessity of other evidence. The practice under Equity Rule 58 governs and there is no occasion for any hearing or decree upon the bill. *Pressed Steel Car Co. v. Union Pacific R. Co.*, 241 F. 964 (CCA8). We are confirmed in this position by the fact that the record is silent as to any request by either party for opportunity to present additional evidence.

[*Bill for discovery sustained*]

Finding no error in the court's action, the order of the District Court is affirmed.

[¶ 55,164] Federal Trade Commission v. Mid West Mills, Inc.

United States Circuit Court of Appeals for the Seventh Circuit. June 15, 1937.

On Application for Enforcement of an Order of the Federal Trade Commission.

The Court denies enforcement of a Federal Trade Commission order prohibiting use of the word "Mills" in the name of a company which neither owns nor operates mills, without prejudice to an order being entered by the Commission directing respondent company to add appropriate words which will convey to the public the fact that respondent neither owns nor operates a mill.

Denying enforcement of FTC Complaint No. 2526.

Before EVANS and MAJOR, Circuit Judges, and LINDLEY, District Judge.

[*FTC order*]

EVANS, Circuit Judge. After investigation and hearing, the Federal Trade Commission entered an order directing respondent to cease and desist representing itself as a manufacturer or mill owner by the use of its corporate name "Mid West Mills, Inc." The part of the order of which complaint is made reads as follows:

"It is ordered that the respondent, Mid West Mills, Inc., a corporation, its officers, agents, representatives, servants, and employees, in connection with the offering for sale and sale of upholstering fabrics, wooden frames, padding, felt, springs, and all other such material, relative to the construction of furniture, in interstate commerce, cease and desist from:

"Representing, directly or indirectly, through and by use of its corporate or trade name, through letterheads, circulars, advertising literature, or in any other manner, that it is a manufacturer, mill operator, or mill owner."

[*Application to enforce order*]

Petitioner is here with an application to enforce its cease and desist order which respondent has refused to obey.

Petitioner's order is largely based upon the respondent's use of the word "Mills" in its corporate name, because it is suggestive, if not indicative, of a fact which does not exist, namely, that respondent owns and operates mills where its goods are manufactured. Respondent admits it has no mills and manufactures none of the goods which it sells, yet it denies that it thereby violates any unfair trade practices such as are designated by section 5 of the Federal Trade Commission Act.

[*Facts*]

Respondent is a jobber and wholesaler of upholstering fabrics, wooden frames, padding, felt, springs, etc., and all materials used in the construction of furniture. It sells through salesmen in Illinois and other states and is in substantial competition with others engaged in like business. It urges that any possibility of deception through the use of the word "Mills" in its corporate name is overcome by the fact that all the garment labels, tickets, letterheads, invoices, and other printed matter (except envelopes) contain the words "Jobbers and Converters" directly under its corporate name.

In 1922, respondent's president purchased the good will of a defunct corporation, including its name "Mid West Mills, Inc.,"

and he caused to be formed another corporation by the name of "Mid West Mills Supply, Inc.," which name was changed to "Mid West Mills, Inc." in 1927. It conducted a gross business of $525,000 in 1934, and $550,000 in 1935.

We reproduce the names as they appear on letterheads, envelopes, and ticket and garment labels.

Letterhead:

MID WEST MILLS, INC.
Jobbers and Converters

Envelope Heading:

MID WEST MILLS, INC.

Garment or Fabric Label Headings:

Mid West Mills, Inc.
Jobbers and Converters

A converter is described as one who changes patterns produced by the mills. He is one who "changes patterns around to give them a different construction of material and coloring." "He converts the patterns and changes them."

[*Royal Milling Co. case*]

The decision in *Federal Trade Commission v. Royal Milling Company*, 288 U. S. 212, controls the disposition of this appeal. In that case the complaint of the Commission was directed to the use of the words "Milling Company" by one who was not engaged in milling. The Court of Appeals set aside the order of the Commission on the ground that it did not appear to be in the interest of the public. On appeal the decree of the Circuit Court of Appeals was reversed with directions to enter an order directing the milling company to accompany each use of the name "Milling Company" with an "explicit representation that respondent was not a grinder of the grain from which the flour prepared and put out is made, such representation to be fixed as to form and manner by the commission."

The substance of the holding is that while it constituted unfair methods of competition to use words suggestive of activities not followed by the user, yet the Commission should go no further than is reasonably necessary to correct the evils and preserve the rights of competitors and the public; that this can be done in certain cases where value has attached to a trade name by requiring proper qualifying words to be used in immediate connection with the objectionable word in the user's name.

[*Essentials to support Commission's order*]

As we construe this decision a valid order of the Commission must be supported by three essential facts: (a) The objectionable methods must be used in competition in interstate commerce. (b) The methods adopted by the user in interstate commerce must be unfair. (c) The proceeding by the Commission to prevent the use of such methods must appear to be in the interest of the public.

[*Use of "Mills" held unfair*]

We are satisfied that respondent's use of the word "Mills" was prima facie unfair, and it was practiced by the respondent in interstate commerce. If there were no ameliorating circumstances, we would also unhesitatingly say that the Commission's action was in the interest of the public. Respondent's avoidance of liability must find support, if at all, in the fact that it acquired the name through the purchase of a business, and that to a certain extent, it did inform the public that it was merely a jobber and a converter.

It should, we think, however, have gone further. To avoid the false impression which the use of the word "Mills" created, it should have conveyed information to purchasers and prospective customers that it did not own or operate a mill from which its products came.

We are convinced that respondent may avoid any false impressions and implications arising from the use of the word "Mills" if it uses on all of its stationery, garment labels, tickets, invoices, and other printed matter, these words "Jobbers and Converters, Not Mill Owners or Mill Operators." There would then be no possibility of deception. Of course these are not the only words which might be adopted. The Commission must in the first instance determine whether the words sufficiently convey the information that respondent neither owns nor operates a mill.

We are at a loss to understand why the respondent should insist on using the word "Mills" after complaint has been filed with the Commission and objections made to it by that body. It has, it is true, for some years been using the name, and it may be that it believes its business is closely identified with the name.

If it does not see fit to voluntarily strike the word "Mills" from its name, it should clearly inform its prospective customers of the true facts. This can only be done by adding appropriate words such as suggested in the previous paragraph which will leave no room for doubt.

[*Petition for enforcement denied*]

The petition is denied, but without prejudice to an order being entered by the

Commission in accordance with the views here expressed and which will direct the addition of appropriate words which will clearly convey to the public the fact that respondent neither owns nor operates a mill.

[¶ 55,165] Chicago Silk Company v. Federal Trade Commission.

United States Circuit Court of Appeals for the Seventh Circuit. June 24, 1937.

Petition for Review of Order of Federal Trade Commission.

A Federal Trade Commission order prohibiting a distributor of hosiery and lingerie from furnishing punch cards in connection with sales of its products is affirmed.

Affirming Federal Trade Commission order No. 2551.

Before EVANS and MAJOR, Circuit Judges, and LINDLEY, District Judge.

[*Petition to review FTC order*]

MAJOR, Circuit Judge. This matter comes before the Court upon the petition to review an order to cease and desist entered by the Federal Trade Commission under authority of section 5 of the Federal Trade Commission (15 U. S. C. A., Section 45).

[*Facts*]

Petitioner is a corporation located in the city of Chicago, Illinois, engaged in the sale and distribution of hosiery and lingerie throughout the United States. In the conduct of its business it distributes to the public through the United States mails certain literature, instructions, and sales outfits including paper punch cards, order blanks, and advertisements containing illustrations of hosiery and lingerie, together with samples of fabrics and circulars explaining its plan of selling said merchandise and the allowing of premiums or prizes to the operators of the punch board. In order to obtain the address of "prospects" a letter is sent to a woman offering her a pair of ladies' silk hosiery free on condition that she send petitioner the address of ten other women. Upon compliance with this requirement the person is sent a pair of hosiery as promised, and each of the ten other "prospects" are sent the sales literature including a punch card with printed instructions for its operation. This card contains numbers from one to sixty and when pushed out of the card reveal the amount which is to be paid, ranging from one cent to fifteen cents according to the number punched. Certain numbers are free and the operators who push these numbers are required to pay nothing, but have the same chance with the others in winning. $5.95 is the amount collected when all the numbers are sold. The person who sells the card receives two pair of ladies' silk hose free, and certain other persons who push out certain designated numbers likewise receive their hose free.

[*Game of chance involved*]

That the plan involves a game of chance or the sale of a chance to procure petitioner's merchandise is clearly shown, and that the operation of the plan is contrary to established public policy of the United States and the varied states and contrary to the criminal statutes of many of the states is conceded. Petitioner's sales were increased from $25,000.00 in 1932, the year it started in business, to $150,000.00 in 1934, and even more in 1935. The Commission found, among other things, that petitioner is engaged in offering for sale and selling its products in interstate commerce in competition with other persons likewise engaged; that the punch card system of obtaining the business is a species of gambling which many of its competitors do not use for the reason that the method is unethical, unfair, and in violation of law, and that said method injuriously affects the business of petitioner's competitors by diverting business from them. On the basis of these findings of fact it issued the order to cease and desist, which this Court is asked to vacate in these proceedings.

[*Contested issues*]

The contested issues as stated by petitioner are: First, does the method of business followed by the petitioner constitute an unfair method of competition? Second, does the evidence show that petitioner is engaged in competition with others in interstate commerce?

[*Findings conclusive if supported*]

The Act itself provides that the findings of the Commission as to the facts, if supported by testimony, shall be conclusive. This provision of the Act is very forcibly enunciated in *Federal Trade Commission v. Algoma Lumber Company*, 291 U. S. 67, where the Court on Page 73 said:

"'The findings of the Commission as to facts, if supported by testimony, shall be conclusive.' 15 U. S. C. A. § 45. The Court of Appeals, though professing adherence to this mandate, honored it, we think, with lip service only. In form the court determined that the finding of unfair competition had no support whatever. In fact what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision (*Federal Trade Comm'n v. Pacific States Paper Trade Assn.*, 273 U. S. 52, 61, 63) forbid that exercise of power."

[*Respondent accountable for lottery*]

Petitioner, as we understand its position, does not attack the sufficiency of the evidence to justify the findings of the Commission, and under the statute and court decision above cited there is no occasion for us to do so. However, we have investigated the record to the extent of satisfying ourselves that the evidence fully justifies the findings as made. We assume that the question which petitioner seeks to raise is that the facts as found by the Commission do not constitute an unfair method of competition. With this position we are unable to agree. We gather from petitioner's brief that it should not be held accountable for any consequences which result from the activity which it originates. It is claimed, for instance, that there can be no harm in the mailing of the punch cards; that whether they are used for disposing of merchandise by chance is one to be determined by the recipient of such cards and that, inasmuch as the cards are furnished free, petitioner is not engaged in a lottery or in disposing of its merchandise by chance. There is no merit in such contention. The petitioner originated and set in operation the scheme or device in question. Moreover, it sent through the mail specific instructions for the operation of the plan and reaped the benefits from its execution.

[*Keppel case*]

Under the authority of *Federal Trade Commission v. Keppel,* 291 U. S. 304, both questions which petitioner raises must be answered in the affirmative. Other cases might be cited sustaining the order in question, but, in view of the law as announced in the *Keppel* case, it would be useless reiteration so to do.

[*FTC order affirmed*]

The order of the Commission is
Affirmed.

[¶ 55,166] Weco Products Company v. Reed Drug Company.

Supreme Court of Wisconsin. Filed June 21, 1937.

Appeal from a judgment of the Circuit Court for Milwaukee County. Gustave G Gehrz, Circuit Judge. Reversed.

The Wisconsin Fair Trade Act is held to be constitutional, and sales below prices established in contracts under the Act are enjoined.

When an Illinois manufacturer enters into contracts with Wisconsin retailers establishing the minimum prices at which the manufacturer's goods are to be sold by the retailers, the contracts are held to involve intrastate commerce only. As the contracts do not expressly relate to sales between the manufacturer and the retailers, it is immaterial, in a suit to enjoin sales below the minimum prices, that the sales themselves constitute interstate commerce.

The Court indicates that the section of the Wisconsin Fair Trade Act which exempts co-operatives from the necessity of observing minimum prices is unconstitutional in that it is an arbitrary and discriminatory exemption inconsistent with the purpose and object of the Act.

[*Proceedings in case*]

Action brought by Weco Products Company against the Reed Drug Company for a permanent injunction under subsec. (5) of sec. 133.25, Stats., (designated therein the "Fair Trade Act"), to enjoin the defendant from advertising, offering for sale or selling certain trade-marked articles, produced by the plaintiff, at prices below those specified in contracts entered into under the Fair Trade Act between the plaintiff and some six hundred retail druggists in Wisconsin. Upon a trial, without a jury, of the issues of fact raised by the pleadings, the parties agreed upon findings of fact which were made by the court, and upon which it reached conclusions of law on which judgment was entered dismissing the complaint on the merits. Plaintiff appealed from that judgment.

[*Facts*]

FRITZ, J. There is no controversy in respect to the findings of fact upon which the court based its conclusions of law and judgment dismissing the complaint. For consideration of the issues of law presented on this appeal, it suffices to note the following facts. The plaintiff, an Illinois corporation, licensed to do business in Wisconsin since November 5, 1935, is the producer of tooth brushes and tooth paste sold under labels or in containers bearing its trade name and registered trade-mark "Dr. West's," of which it is the owner by virtue of its exclusive use thereof as its trade name and trade-mark for upwards of fifteen years; and in that period the plaintiff by advertising and otherwise created a valuable good will for that trade name and trade-mark and its products sold thereunder, and also created a valuable dealer good will by co-operation, service and the maintenance of prices yielding a fair profit to retailers. Those commodities have been and are widely and extensively sold in Wisconsin under and by that

trade name and trade mark by retail drug stores and others, including the defendant, and are in fair and open competition with many other commodities of the same general class produced by others. In the course of years there developed in the drug trade a practice of cutting prices of commodities sold in such stores, including various well advertised commodities well known to the public, and sold and identified under distinctive trade-marks, brands and names. Under that practice some retail dealers offered such products at prices conspicuously lower than the marked or established prices thereof, as so-called "leaders," as a means to draw trade. Stores at which that practice was prevalent became known as "Cut-Rate Drug Stores," and such retailers considered the use of such "leaders" a valuable trade advantage in that, with other things, it gave them an opportunity to persuade customers who were attracted thereby and the cut-rate prices announced therefor to purchase other merchandise in place of such advertised "leader" or additional merchandise sold at a profit; and, in either event, the profits realized on such other or additional merchandise exceeded the loss necessarily sustained on any "leader" sold as stated. That price cutting practice engendered a condition by which other dealers were forced to meet the cut prices, and one cut produced another in retaliation, so that ultimately in a particular community well known articles identified by trade-marks, brands and names, with prices established by the producers or manufacturers thereof, were offered at prices reduced to a point which yielded little or no profit, and, in some cases, represented an actual loss, so that the dealers' incentive to sell such commodities was destroyed, and that they often refused to handle or stock the same, or were reluctant to sell them when called for by the public, or would urge the sale of other products upon which greater profits could be made. As a further result of those practices, the producer or manufacturer of identified merchandise, which had been handled in that manner by "Cut-Rate" stores, suffered a severe loss of market and facilities for distribution, and his business and good will became seriously interfered with, and, in some cases, was practically destroyed.

[*Fair Trade Act*]

On May 2, 1935, there became effective Ch. 52, L. 1935, which created secs. 133.25 to 133.27, Stats., and designated sec. 133.25 as the "Fair Trade Act." On November 18, 1935, the plaintiff tendered to members of the retail trade in this state handling its products, including the defendant, a proposed fair trade contract, with provisions, including a stipulated price, that were authorized by and in accordance with subsecs. (3) and (4) of sec. 133.25, Stats. Those contracts, after being prepared and signed by the plaintiff's officer in Chicago, were sent to Wisconsin for distribution among retail dealers, and here they were executed and entered into by about six hundred or 50% of such retailers. The defendant, owning and operating six retail "Cut-Rate" drug stores in Milwaukee and one in Kenosha, refused to execute such a fair trade contract, when it was tendered by the plaintiff; but on December 10, 1935, the defendant was notified by the plaintiff of the effectiveness of the contracts which it had entered into with other dealers, as stated above, and also of the Fair Trade Act. The minimum resale prices stipulated in those contracts are fair and reasonable (a) as in comparison with competitive commodities, (b) upon the basis of plaintiff's manufacturing and distribution costs (c) upon the basis of merit, quality and popularity, and (d) upon the basis of the margin of profit allowed to the retail and wholesale trade; and no complaint was filed by the defendant or any other party with the State Department of Agriculture and Markets, under subsec. (7) (a) of sec. 133.25, Stats., in respect to those prices.

[*Sales below contract price*]

In April, 1936, the defendant, with knowledge of those contracts, including the minimum resale prices stipulated therein, and in furtherance of its business in the manner and by the use of the price cutting practices, described above, wilfully and knowingly advertised, offered for sale and sold tooth brushes and tooth paste under plaintiff's trade name and trade-mark "Dr. West's" at prices which were below the minimum resale prices stipulated in those contracts. Those acts and competitive practices of the defendant caused the plaintiff substantial but indeterminable loss and damage, and if they are continued by the defendant, the plaintiff will continue to suffer similar damage for which pecuniary compensation would not afford adequate relief.

[*Lower court decision*]

Before and after the Fair Trade Act went into effect the plaintiff's sales of its products for delivery to wholesale and retail dealers in Wisconsin were consummated and concluded in Illinois and those sales constituted, as the court rightly concluded, interstate commerce. In view of the facts stated above, the court also concluded that the Fair Trade Act by its terms, and the terms of the plaintiff's fair trade contracts, was applicable only to transactions consummated in Wisconsin, and in connection with sales made between the contracting parties; that, therefore, those contracts have no binding effect upon the defendant, who had in no manner become a party thereto; that subsec. (5) of sec. 133.25, Stats., (which provides that price cutting which is in violation of sec. 133.25, Stats., is unfair competition and actionable at the suit of any person damaged thereby) is void and unconstitutional in that it attempts to delegate legislative power to private individuals; and that the plaintiff was not entitled to the injunction prayed for in its complaint.

[*Contention on appeal*]

The appellant's principal contention on this appeal is that the court erred in concluding that subsec. (5) of sec. 133.25, Stats., attempts to delegate legislative power to private individuals, and is therefore void and unconstitutional. However, as the respondent claims that "the price maintenance agreements plaintiff seeks to bind defendant to, by force of subsec. (5) of sec. 133.25 of the Act, are illegal because they are violative of the Federal Anti-Trust Laws," in that "they constitute an agreement to restrain interstate commerce," and that it is therefore not necessary to pass upon the validity of the Fair Trade Act, we shall first consider whether the plaintiff can recover herein because of any such alleged illegality in those agreements.

[*Federal anti-trust laws not involved*]

At the outset it must be noted that, as the court rightly concluded, the "plaintiff brings this action against defendant solely under and pursuant to subsec. (5) of sec. 133.25, Wis. Stats." It is an action for relief based on acts committed by the defendant which are injurious to the plaintiff's good will and its right to profits from the sales of its trade-marked goods in the manner declared wrongful and actionable under sec. 133.25 (5), Stats. The material and essential facts, upon which the plaintiff claims to be entitled to relief herein, are that the defendant wilfully and knowingly advertised, offered and sold the plaintiff's products at less than the minimum resale prices stipulated in the fair trade contracts entered into by the plaintiff under sec. 133.25 (3), Stats., with the six hundred Wisconsin retailers who accepted the contracts and sell the plaintiff's products only in this state, and who agreed therein not to advertise, offer or

sell them in this state under the plaintiff's trade name or trade-mark at less than the stipulated prices. By an express provision therein, those contracts are applicable "only to transactions consummated in the State of Wisconsin and not elsewhere"; and under them there is no sale of any merchandise made by plaintiff, or any purchase thereof made by any party from the plaintiff. Neither is there any provision therein requiring the delivery or acceptance of any merchandise by any party thereto under circumstances which can be deemed to constitute a transaction in interstate commerce. If sec. 133.25, Stats., is valid then, although no *contractual* obligation can, of course, be imposed on the defendant by a contract to which it is not a party, the defendant's conduct in violation of subsec. (5) of sec. 133.25, Stats., is nevertheless actionable in view of the provisions therein, that such conduct "is unfair competition and is actionable at the suit of any person damaged thereby" —"whether or not the person so advertising, offering for sale or selling is a party to such contract." By reason of those provisions, it is wholly immaterial in so far as the plaintiff's cause of action for relief under subsec. (5) of sec. 133.25, Stats., is concerned, that defendant is not a party to, or contractually obligated under, the fair trade contracts made between the plaintiff and its dealers as authorized by subsec. (3) of sec. 133.25, Stats. Consequently, as the plaintiff is not seeking herein to enforce any contractual obligation assumed by the defendant, and its right to relief is not based or dependent upon any contract for the sale or shipment of its merchandise from some other state into Wisconsin, it is immaterial, in so far as plaintiff's cause of action against defendant is concerned, whether the plaintiff's sales of its merchandise to wholesale or retail dealers, under other contracts than its fair trade contracts under sec. 133.25 (3), Stats., constitute interstate commerce. Its fair trade contracts under that subsection and the inhibitions applicable under the Fair Trade Act by reason of the existence of such contracts do not affect interstate commerce. *Johnson v. Weissbard,* N. J. Court of Errors and Appeals (decided April 30, 1937). Under those circumstances the Federal Anti-Trust Act in restraint of monopolies and trusts is not involved in this action, and such cases as *Dr. Miles Medical Co. v. Park & Sons Co.,* 220 U. S. 373, are not in point. On the contrary, there is applicable herein, this court's statement in *Nat. Dist. Co. v. Cream City Imp. Co.,* 86 Wis. 352, 56 N. W. 864—

> "The plaintiff's cause of action is in no legal sense dependent upon, or affected by, the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon in this action to enforce any contract tainted with the illegality or contrary to public policy."

And there is likewise applicable the rule that "the owner of a patent or a trademark can protect his property and enforce his rights against a trespasser and an infringer, even though he may be engaged in business which is in restraint of trade." *Weyman-Bruton Co. v. Old Indian Snuff Mills,* 197 Fed. 1015; *N. W. Consol. Milling Co. v. William Callam & Son,* 177 Fed. 786.

[*Delegation of legislative power*]

In support of its contention that subsec. (5) of sec. 133.25, Stats., does not attempt to delegate legislative power to private individuals, and is therefore not unconstitutional and void because of any such delegation, the appellant relies on the decisions in *Old Dearborn Dist. Co. v. Seagram Dist. Corp.,* and *McNeil v. Jos. Triner Corp.,* 299 U. S. 183, 81 L. Ed. 130; affirming *Seagram Dist. Corp. v. Old Dearborn Corp.,* 363 Ill. 610, 2 N. E. (2) 940, and *Jos. Triner Corp. v. McNeil,* 363 Ill. 559, 2 N. E. (2) 929;—*Kunsman v. Max Factor & Co.,* and *Pep Boys v. Pyroil Sales Co.,* 299 U. S. 198, 81 L. Ed. 138; affirming *Max Factor & Co. v. Kunsman,* 5 Cal. (2) 446, 55 Pac. (2) 177; and *Pep Boys v. Pyroil Sales Co.,* 5 Cal. (2) 784, 55 Pac. (2) 194;—*Johnson v. Weissbard,* (N. J.) *supra; Bourjois v. Dorfman,* 273 N. Y. 167, 7 N. E. (2) 30. The decisions in some of those cases were not announced until after the entry of the judgment under review herein. All of those cases involved state statutes in which there were provisions substantially similar to subsecs. (3) and (5) of sec. 133.25, Stats. The gist of the theory of that section, as well as of the similar statutes in other states, is, as the Supreme Court of Illinois said in *Jos. Triner Corp. v. McNeil, supra,* "that the manufacturer of a trade-marked article sold in competition with articles of similar nature, who has designated a fair price at which he, as well as his distributor and retailer, can make a fair profit, has a property right in the good will towards his product which he has created, and that it is sound public policy to protect that property right against destruction by others who have no interest in it except to employ it in a misleading manner for the purpose of deceiving the public." To the same effect see *Max Factor & Co. v. Kunsman, supra.* In holding that there is no unlawful delegation of legislative power

under such provisions as subsecs. (3) and (5) of sec. 133.25, Stats., the Supreme Court of Illinois said in *Jos. Triner Corp. v. McNeil, supra,*

"The Fair Trade Act of this state does not even attempt to fix or delegate to others the right to fix the price at which any commodity may be sold in the market. * * * Only in the event that manufacturers or distributors elect to avail themselves of its provisions does the statute come into actual operation. This does not mean that the act took effect upon the approval of any authority other than the legislative branch of our state government. *Commonwealth v. Goldburg,* 167 Ky. 96, 180 S. W. 68. When the Fair Trade Act was passed by the General Assembly, it was a complete statute, in no manner dependent for approval or disapproval by any person or group of persons. The defendant's contention that the statute unlawfully delegates legislative power is without merit."

Those conclusions evidently met with the approval of the U. S. Supreme Court when it said in *Old Dearborn Corp. v. Seagram Dist. Co., supra.*

"We find nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others * * *."

Sec. 133.25, Stats., was likewise a complete and effective statute upon its enactment, and there was no occasion for any further act or the exercise of any power of a legislative nature in order to complete or render that section effective as a law. Under and by virtue of the provisions in section 133.25, Stats., and particularly those contained in subsections (3) and (5) thereof (quoted in margin [not reproduced herein]), they were applicable without any further action which was legislative in nature, whenever there existed a state of facts which was within those provisions, including the acts constituting the unfair competition which is made actionable thereunder. In other words, upon and by virtue of solely the enactment and publication of Ch. 52, L. 1935, in which sec. 133.25, Stats., is included, those provisions, including subsec. (5) thereof, were in full force and effect, so that "wilfully and knowingly" advertising, offering for sale or selling a commodity at less than a minimum stipulated resale price, under the circumstances and conditions stated in the Fair Trade Act, constitutes "unfair competition and is actionable" thereunder. The acts of private parties in entering into such a contract and stipulating a price therein constituted but facts in contemplation of which sec. 133.25, Stats., was enacted, and upon the existence of which the terms of subsec. (5) thereof were to be applicable. Under those circumstances those acts were no more legislative in character than are any other acts or conduct of private parties, which afford the basis and occasion for the application of a statute under the terms thereof. In neither instance are the consequences that the statute has become applicable, and conduct in violation thereof has become actionable, due to the exercise of any legislative power on the part of a private party.

[*Title of Act*]

Although the provisions in subsec. (3) and (5) of sec. 133.25, Stats., are substantially like the provisions on the same subject in the Fair Trade Acts of California, Illinois and New York, which have been held valid, the respondent contends that sec. 133.25, Stats., cannot be upheld as an act to prevent unfair competition and protect trade-mark owners because the intent of that section differs materially from the intent of the Fair Trade Acts, as disclosed by the titles thereto, in those other states. It is true that while the titles to their Acts read, "An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade-mark, brand or name," it is declared in sec. 133.27, Stats., that the intent of secs. 133.25, and 133.17 to 133.185, Stats., "is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory practices under which fair and honest competition is destroyed or prevented." However, respondent has apparently overlooked that the title of the act by which sec. 133.25, Stats., was created, in connection with other sections, reads, "An Act: To create Section 133.185 and Sections 133.25 to 133.27; to amend Sections 133.19 and 133.20 of the statutes, relating to fair trade practices and unfair discrimination, and providing a penalty." When that title is considered in connection with the intent "to foster and encourage competition by prohibiting unfair and discriminatory practices under which fair and honest competition is destroyed or prevented," declared in sec. 133.27, Stats., it is obvious that the declared legislative intent in enacting sec. 133.25, Stats., can fairly be considered to include the protection of "trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name" as is stated in the titles to the California, Illinois and New York Acts. It is true that, in so far as the words "to safeguard the public against the creation and perpetuation of monopolies," which appear in the declaration of intent in sec. 133.27, Stats., are concerned, they are more applicable to secs. 133.17 to 133.185, Stats., which are specified in sec. 133.27, Stats., in

conjunction with sec. 133.25, Stats.; and the subject matter of which is "Unfair discrimination in trade; unlawful selling" (sec. 133.17); "Same; unlawful buying" (sec. 133.18); "Secret rebates; unfair trade practice; prohibited; penalty" (sec. 133.185). But the intent declared by those words is also applicable to some extent to sec. 133.25, Stats., in so far as power is conferred by subsec. (7) (a) thereof upon the Department of Agriculture and Markets to set aside contracts made under subsec. (3) thereof, and declare them to be in restraint of trade when, on a hearing pursuant to complaints filed, it finds them to be unfair and unreasonable as to the stipulated minimum resale price provisions. In that respect, it is the intent of sec. 133.25, Stats., also "to safeguard the public against the creation or perpetuation of monopolies," as stated in sec. 133.27, Stats. It follows that that declaration of intent does not compel the conclusion that it was not the intent of sec. 133.25, Stats., to afford the same protection to the owners of trade-marks as was intended under the Fair Trade Acts of California, Illinois and New York.

[*Price fixing*]

Respondent contends that sec. 133.25, Stats., cannot be sustained as legislation prohibiting resales below cost, because there is nothing therein in regard to such resales; and also contends that it is an unconstitutional price fixing act because of the powers given to the Department of Agriculture and Markets in subsec. (7) (a) thereof. It is true that there is no requirement in the statute that the price stipulated in contracts authorized under subsec. (3) thereof must bear any relation to cost or reasonableness; but respondent errs in assuming that the statute is a price fixing act or that any power to fix prices is vested thereby in the Department of Agriculture and Markets. The Fair Trade Act does not fix prices or require that prices be fixed. It does not regulate anything or anybody. It is permissive only. It is limited to merchandise identified by an exclusively owned trade-mark, brand or name, and sold in free competition with other goods of the same class. It does not embrace bulk commodities. Contracts between producers and between distributors are not allowed thereby. There cannot be any horizontal contracts. They must be vertical from the producer down, and not among producers or among wholesalers or among retailers. It allows a single producer or owner of commodities sold under his trade name or trade-mark, and distributors thereof, to make, at their option, contracts stipulating minimum resale prices for such commodities when sold at retail by or under such trade name or trade-mark, to the end that distribution thereof may be facilitated by insuring dealers a profit, and that good will be protected by keeping known and identified merchandise free from deceptive use such as "loss leader" and "bait selling," and thus cheapening it in the public estimation. Therefore, it is not the primary purpose of the Fair Trade Acts to merely prohibit price cutting for the purpose of regulating prices, but rather to prohibit that practice in a legitimate legislative attempt to afford protection to the validly-acquired rights of others. *Max Factor & Co. v. Kunsman, supra; Joseph Triner Corp. v. McNeil, supra.* As the U. S. Supreme Court said in *Old Dearborn Dist. Co. v. Seagram Dist. Corp., supra,* in passing upon the Illinois Fair Trade Act, sec. 1 thereof (our subsec. (3)) "does not attempt to fix prices, nor does it delegate such power to private persons. It permits the designated private persons to contract with respect thereto. It contains no element of compulsion, but simply legalizes their acts, leaving them free to enter into the authorized contract or not as they may see fit"; and sec. 2 of the Illinois Act (our subsec. (5)) "does not deal with the restriction upon the sale of the commodity *qua* commodity, but with that restriction because the commodity is identified by the trade mark, brand or name of the producer or owner." Although there are widely differing views as to the economic aspects and wisdom of such legislation, it was within the province of the legislature to conclude that unrestrained price competition in such identified merchandise and the use thereof as "bait" and "leaders" are not desirable, and that the way to prevent such injurious practices and the resulting evils was by permitting contracts to be made stipulating minimum resale prices, and to protect these contracts by making interference with their operation civilly actionable if it results in damage, as is provided in sec. 133.25, Stats. The apparent purposes and objects of that legislation did not include and it was not solely intended thereby to prohibit resales below cost, or to prescribe price fixing at an amount bearing some particular relation to costs. Consequently, that there are no provisions in the act in regard to such sales does not affect the validity thereof. Neither is its validity impaired by the provisions in subsec. (7) (a). That provision does not authorize the Department of Agriculture and Markets to fix a resale price. It merely authorizes the Department to hear the parties as to why that contract should not be set aside on the filing of a complaint that a

contract containing provisions authorized under subsec. (3) of sec. 133.25, Stats., is unfair and unreasonable; and "if upon such hearing the Department" shall find that such contract is unfair and unreasonable as to its minimum resale price provisions, then it "may by special order declare such contract to be in restraint of trade." That clearly does not confer any power to fix a price. Its sole and obvious purpose is to empower the Department to declare such a contract to be in restraint of trade if it finds the minimum resale provisions thereof to be "unfair and unreasonable," and to thus prevent abuses under sec. 133.25, Stats., by perversion thereof into a price fixing measure. Thus instead of authorizing price fixing, subsec. (7) (a) of the statute authorizes an effective check of any abuse in that respect, in furtherance of the declared intent in sec. 133.27, Stats., "to safeguard the public against the creation or perpetuation of monopolies," which was considered above. In view of the fact that it is not the purpose of subsec. (7) (a) of sec. 133.25, Stats., to authorize the Department of Agriculture and Markets to fix a price, and that the purposes of sec. 133.25, Stats., are as stated above, cases like *Williams v. Standard Oil Co.,* 278 U. S. 235, are not in point. The statute under consideration in that case required an applicant for a permit to sell gasoline to state the prices at which he proposed to sell, and if they were not approved by an official state superintendent, then they were to be determined by that official, subject to a review by a commissioner and the courts. Because the court concluded that the sole purpose of the statute was to empower the superintendent to fix the prices, it was held unconstitutional. That conclusion is clearly not applicable to subsec. (7) (a) of sec. 133.25, Stats., which merely authorizes a proper state department to declare contracts made under the Fair Trade Act to be in restraint of trade if it finds the minimum resale price provision therein to be unfair or unreasonable.

[*Exemption of co-operatives*]

Respondent also contends that sec. 133.25, Stats., is void because of an arbitrary and discriminatory exemption under subsec. (8) thereof, which provides, "This section shall not apply to any co-operative society or association not organized for profit." Respondent argues that if "the primary aim of the law is to protect the property,—namely, the good will,—of the producer which he still owns" (as the U. S. Supreme Court said in the *Old Dearborn Dist. Co. v. Seagram Dist. Corp., supra*), then the provision in sec. 133.25 (8), Stats., exempting co-operative societies and associations not organized for profit is unreasonable and so arbitrary or discriminatory as to be violative of the Fourteenth Amendment, and render the entire Act void. It is true that that exemption is void if there is no proper basis because of which it can be held that such a classification is germane to the legislation under consideration. Although contracts between a co-operative society and its members have been considered of such nature, under some circumstances, as to entitle them to a peculiar status in the law because of which legislation may provide protection or exemptions in respect thereto, which are denied to the contracts of all others (*Northern Wis. Co-op. Tobacco Pool v. Rekkedal,* 182 Wis. 571, 197 N. W. 936; *State ex rel. Saylesville C. Mfg. Co. v. Zimmerman,* 220 Wis. 682; *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Assoc.,* 276 U. S. 71, 48 Sup. Ct. 291, 72 L. Ed. 473), the validity of such legislation is nevertheless subject to the rule that such protection or exemptions by legislation can only be sustained when the classification and resulting protection or exemptions can be held germane to the general and public purpose and object of the particular legislation in question. *State v. Whitcom,* 122 Wis. 110, 99 N. W. 468; *State ex rel. Milwaukee, S. & I. Co. v. R. R. Comm.,* 174 Wis. 458, 183 N. W. 687; *State ex rel. Kemping v. Whyte,* 177 Wis. 541, 188 N. W. 607; *Watts v. Rent-A-Ford Co.,* 205 Wis. 140, 236 N. W. 521; *Whipple v. So. Milwaukee,* 218 Wis. 395, 400, 261 N. W. 235. That cannot be held as to the exemption in question, under the facts in this case. That exemption is not confined to merely transactions between such an association or society and its members. It is equally applicable to sales made by such associations or societies in competition with other retail dealers to the public at large, but as to which such exempted associations or societies would be permitted to sell at less than minimum resale prices stipulated under the Fair Trade Act. Thus there would be defeated its "primary aim to protect the property,—namely, the good will,—of the producer." Consequently, that classification, instead of being germane to, is inconsistent with the general and public purposes and object of the Fair Trade Act, and therefore subsec. (8) of sec. 133.25, Stats., is void because of the arbitrary and discriminatory exemption of the associations and societies mentioned therein. However, there is applicable to that subsec. (8) the provision in sec. 3 of Ch. 52, L. 1935, by which sec. 133.25, Stats., was created, that 'If any provision of this act or the application thereof to any person or circumstances is held unconstitu-

tional, the remainder of the act and the application of such provision to other persons or circumstances shall not be affected thereby." Even without that legislative declaration it is evident that the remaining provisions of the Act, standing alone, would constitute a complete law by which the legislative intent and purposes thereof could be accomplished; and that they are separable provisions, and were probably intended to stand even if subsec. (8) is invalid. But when in addition to the fact that those conclusions are warranted by the remaining provisions, there is also such a legislative declaration as in sec. 3 of Ch. 52, L. 1935, then it serves to assure the courts that the separable provisions of an act, which is valid in part, may be properly sustained "without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part." *Hill v. Wallace,* 259 U. S. 44, 71. Then, as was said in *Williams v. Standard Oil Co., supra,* at p. 242,

"We begin, in the light of the declaration, with the presumption that the legislature intended the act to be divisible; and this presumption must be overcome by considerations which make evident the inseparability of its provisions or the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains."

As it does not appear from sec. 133.25, Stats., itself, that the legislature intended it to be effective only as an entirety, and would not have enacted the valid part alone, there is applicable the well established rule that "the elimination of even material provisions in an act as enacted, because of the invalidity of such provisions, does not render the remaining valid provisions thereof ineffective, if the part upheld constitutes, independently of the invalid portion, a complete law in some reasonable aspect, * * *." *State ex rel. Tel. Co. v. Henry,* 218 Wis. 302, 316, 260 N. W. 486.

[*Violation of act enjoined*]

It follows that the remaining provisions in sec. 133.25, Stats., upon which the appellant's right to recover is based, are not rendered ineffective by the invalidity of subsec. (8) thereof; and that upon the facts found by the court, as stated above, the appellant was entitled to judgment permanently enjoining the defendant, and its agents, servants and employees, as prayed for in the complaint.

By the Court:—Judgment reversed, and cause remanded with directions to enter judgment in accordance with the opinion filed herein.

[¶ 55,167] Benjamin E. J. Odell v. Bausch & Lomb Optical Company et al.

United States Circuit Court of Appeals for the Seventh Circuit, July 7, 1937.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

In contempt proceedings under Section 21 of the Clayton Anti-Trust Act, the right to jury trial is "upon demand of the accused," and where he acquiesced in an order of reference and presented his testimony to the master and did not make his demand for jury trial until six weeks after the master had filed his report, there was no error in the ruling of the Court that he had waived his right to jury trial. Moreover, in proceedings for civil contempt, as this, the accused is not entitled to a jury trial.

Section 25 of the Clayton Anti-Trust Act, regarding the one-year limitation period on contempt proceedings, is held not to limit the right of the Court to punish in civil contempt proceedings offenders who violated their orders to the injury of innocent parties for whose benefit it issued the orders.

Before SPARKS and MAJOR, Circuit Judges, and LINDLEY, District Judge.

[*Nature of case*]

SPARKS, Circuit Judge. This appeal is from a decree in contempt proceedings ordering appellant to pay for the benefit of appellees, fines aggregating $15,000, for violations of three injunctional orders theretofore entered. The decree also ordered that the costs of the contempt proceedings be taxed against appellant and two other defendants against whom additional fines were assessed. Appellant secured an order of severance upon a showing that the other two were not taking any appeal, and therefore prosecutes this appeal alone.

[*Facts*]

Appellant is an attorney who was named a party defendant in a bill of contempt against one Roy Wahlgren and others. The gravamen of the action lay in Wahlgren's breach of certain restrictive cove-

nants in a contract which provided that upon termination of his employment by appellees he should refrain from engaging in a certain business for a certain period within a certain territory. The others, including appellant, were named in the bill of complaint because of the assistance rendered by them to Wahlgren in the violation of the restrictive covenants. Appellees are an optical goods manufacturing company and its subsidiary by whom Wahlgren had been employed for a number of years under a series of contracts. The particular clause of the contract, the breach of which gave rise to the litigation here involved, is set out in the margin.[1] He contended that the restrictive covenants of the contract were unenforcible, hence upon termination of his employment he immediately started in, with the assistance of appellant, to organize a series of corporations to engage in the business he had covenanted not to enter for five years, and persuaded persons in appellees' employ to leave them and enter into the employ of his corporations. Appellees thereupon prayed an injunction to prevent his continuation of these activities, and named all those parties who were thought to be participating in them. A temporary restraining order was issued April 3, 1931, followed by a preliminary injunction May 22, 1931, and a permanent injunction March 22, 1933, the latter being the final decree in the main cause. This court, on January 23, 1934, affirmed this final decree which permanently enjoined Wahlgren from engaging in the business involved, for the time and in the territory covered by the contract, and from receiving any payment in any form from any of the Wahlgren corporations. The decree also enjoined the other defendants from inducing or attempting to induce appellees' employees to leave their employment; from conspiring to injure appellees' business by circulating false statements among their customers; and from entering or remaining after May 1, 1933, in the employ of any business organization with which Wahlgren was in any way connected, for the limited time and area. See *Wahlgren, et al. v. Bausch and Lomb Co., et al.*, 68 F. (2d) 660 (certiorari denied, 292 U. S. 639).

[*Participation of appellant*]

Throughout the proceedings, appellant, as attorney, represented Wahlgren and certain of the other defendants. Upon recommendation of the master to whom the matter was referred for hearing, the bill was dismissed as to him for the reason stated by the master in his report in the main case, that there was no evidence that he conspired with the other defendants or took any part in the enticement of appellees' employees or solicitation of their customers, and that as attorney for Wahlgren, he had advised that the restrictive covenants of the contract were unenforcible, and had acted accordingly. Although the final decree ordering the permanent injunction did dismiss appellant by name from the proceedings, it granted relief to appellees, "against said defendants, their agents, servants, attorneys and counsellors, and anyone acting by, or through, or for them, or any of them, and all to whom notice of this injunction shall come. * * *" Also incorporated in the final decree was a provision reserving jurisdiction of the cause and of all the parties thereto, for the purpose of entering any further orders which might be necessary with respect to the original bill of complaint or any amended or supplemental bills that might be entered, or with respect to any proceedings for contempt or accounting, or for reference to a master for any purpose that might be desirable. On the day this final decree was entered, March 23, 1933, appellees filed a supplemental bill again naming appellant, and during the course of proceedings in court on that day, the court ordered that the record show that his appearance and that of another defendant not here involved, were entered in open court. There was no objection to this procedure.

Following the entry of the order of this court affirming the decree of the District Court, the case was again referred to a master for hearing as to alleged violations of the three injunctional orders, and leave was given appellees to file an additional petition or charges of contempts to which defendants were ruled to file answers. Such additional petition was filed February 7, 1934, naming Odell along with the other defendants, and charging them with remaining in the employ of the Wahlgren companies after May 1, 1933, and helping continue the business of those companies, and charging appellant and another attorney with having willfully and knowingly aided the various defendants in evading and violating the orders of the court, and knowingly obstructed the courts of justice and presented defenses on the facts

[1] "(3) That in case of the termination of his employment by the Riggs Optical Company, the said Wahlgren shall not, and hereby covenants and agrees that he will not, within five (5) years from the date of the termination of such employment, enter the employ of or become or be interested in any corporation, partnership, concern or business engaged in the manufacture or sale of optical instruments or apparatus anywhere within the United States of America west of a line drawn due North and South through the City of Detroit, Michigan."

of the case known by them or which should have been known to be false and fraudulent. For such violations appellees prayed that all defendants be punished by fine or imprisonment. To this petition appellant filed answer denying all the charges.

In accordance with the order of reference, the master heard testimony on the violations by all defendants, including appellant, of the three injunctional orders. He then reported, recommending the imposition of fines aggregating $257,977 against Wahlgren, appellant, and the other attorney, jointly and severally, such fines being based on the loss of profits and the costs and attorneys' fees necessitated by the perjurious defense of the main case. He also recommended disbarment of appellant and the other attorney because of their conduct in the proceedings. The District Court refused to follow the master's recommendation as to disbarment, on the authority of *Ex Parte Robinson,* 19 Wall. 505, which held that disbarment could not be ordered as a punishment for contempt. The court also reduced the amount of fines by eliminating the item of loss of profits, ordering appellant to pay for the benefit of appellees, $15,000, $13,000 of which was to cover his share of attorneys' fees, and $2000 for investigating expenses incurred by appellees. It is from this decree that appellant prosecutes this appeal.

[*Jury trial—Statute of limitations*]

Appellant assigns as error the holding of the court that he was not entitled to jury trial and that the statute of limitations did not bar the proceeding against him. For his right to jury trial and to the application of a one-year statute of limitations, he relies upon the provisions of the Clayton Act, sections 22 and 25, 28 U. S. C. A. sections 387 and 390. The right to jury trial, however, is only "upon demand of the accused," and where, as here, he acquiesced in the order of reference, and presented testimony to the master, and did not make his demand for jury trial until six weeks after the master had filed his report, there was no error in the ruling of the court that he had waived his right to such trial. Moreover, this was clearly a proceeding in civil contempt, as indicated by the character of the punishment meted out. See *Gompers v. Buck Stove and Range Co.,* 221 U. S. 418 at 443. In such a proceeding we do not understand that the accused is entitled to a jury trial.

The same reasoning applies in regard to the applicability of the one-year limitation period. We think that the provisions of the Clayton Act referred to were not intended to limit the right of the court to punish in civil contempt proceedings offenders who violated their orders to the injury of innocent parties for whose benefit they issued the orders. Instead, we are convinced that it was within the power of the court to order punishment for such contempts whenever the proof was brought to its attention. In this case, the need for such interpretation is particularly clear, since it was not shown until the hearing upon the second reference that appellant had procured to be filed false affidavits and had actively participated in the acts enjoined. We have found no cases, and appellant has called our attention to none in support of the proposition that the statute relied upon is a bar to the power of the court to punish by proceedings in civil contempt for the benefit of the injured party whenever it learns of the acts which constitute such contempts. Furthermore, while it is true that many of the acts complained of were done more than a year before appellant was brought back into the proceedings as a named party by the supplemental bill, and the filing of his appearance in open court, there were some acts proved which were done after that date, and as to those there can be no question of the power of the court to punish. We refer particularly to several letters written by appellant to various defendants encouraging them in effect to continue their violations of the injunctive orders. In fact, even after this court had rendered its decision, he advised one defendant that "the business could go along just as it had been." In view of all these facts, we agree with the District Court that the proceeding was not barred by the Clayton Act.

[*Knowledge of acts enjoined*]

Appellant also contends that the decree is erroneous because it holds him guilty of alleged violations of injunctions on matters not enjoined; of acts transpiring prior to the date of the injunctions; of unproven, disproven and abandoned charges and acts of which he was not even charged; of conspiracy in contempt when he had already been dismissed in the conspiracy action; and liable for damages, investigation expenses and attorneys' fees not incurred through his fault.

Wahlgren's breach of his contract was made very clear by the hearing in the main cause, hence the permanent injunction following up the temporary orders previously granted in an attempt to preserve appellees' rights pending the investigation. However, appellant's participation in that breach was not clear at that time, hence the master recommended his dismissal from that cause. The decree, however, ran to the named defendants *and* their agents, attor-

neys, etc. Having been named a party in the first bill, appellant was well aware of his duty to refrain from doing acts enjoined in the preliminary restraining orders. That his acts were not discovered until after the master filed his report on the main cause including therein a recommendation that he be dismissed does not relieve him of liability. We are convinced that the court retained sufficient jurisdiction over him to impose the punishment here complained of in spite of such dismissal.

[*Responsibility of attorney*]

We have not considered it necessary to set out all the specific acts found by the master in his report on the contempt proceedings to have been done by appellant after the issuance of the various orders. It is sufficient to say that that report, and the transcript of testimony and exhibits upon which it was based, are replete with evidence that appellant actively participated in keeping Wahlgren in business in violation of the orders after those orders were issued, and in working out the details of the plan by which the restrictive covenants of the contract were circumvented; that he orally and by letters encouraged lesser members of the group whom he represented in the proceedings and who looked to him for legal advice, to disregard the orders of the court and continue in the business enjoined; and that he, having done all the legal work necessary to incorporate the various companies used to conceal Wahlgren's part in the business, and having actively participated in negotiations for financing those companies, caused to be signed and filed affidavits denying that Wahlgren had procured their incorporation or that he had any interest in them. "There is nothing in the duty of diligence which a lawyer owes to his client which in any way makes it necessary, under any circumstances, for him to practice or attempt to practice a fraud on the court or to swear to that which is not true, and when an attorney at law is willing to perjure himself in the interest of his client, it is, doubtless, with full knowledge and appreciation of the responsibility resting upon him in so doing." *People v. Martin,* 288 Ill. 615. No one was in a better position than appellant to know the utter falsity of such affidavits. That all of this activity on his part imposed upon appellees a vast amount of expense for investigation and litigation cannot be doubted, and that the court may order reimbursement for their benefit from one who knowingly and willfully caused such expense also cannot be doubted. His own personal conviction of the unenforcibility of the contract involved is no defense for his flouting the orders of the court while that question was being determined.

[*Decree affirmed*]

We find no error in the decree of the District Court finding appellant guilty of contempts of its orders and imposing fines upon him for the benefit of appellees, and the decree is accordingly affirmed.

[¶ 55,168] Electro Thermal Company v. Federal Trade Commission.

United States Circuit Court of Appeals for the Ninth Circuit. July 19, 1937.

Upon Petition to Review Order of Federal Trade Commission.

The court affirms an order of the Federal Trade Commission prohibiting misrepresentation of the therapeutic effect of an electrical device.

It is not necessary to have direct evidence to the effect that respondent's misleading advertising claims diverted any business from its competitors, in order to sustain the Commission's jurisdiction to enter a cease and desist order prohibiting such claims. "It would seem to be sufficient to show actual or potential competition and unfair trade practices which reasonably tend to give the perpetrator an advantage in such competition.

The Court has jurisdiction to enter a decree affirming and enforcing a cease and desist order of the Federal Trade Commission even though the matter was brought to the court on the respondent's petition to set aside the Commission's order. The Court is vested with plenary jurisdiction no matter which party brings the cause before it.

Affirming Federal Trade Commission Complaint No. 2243.

Daniel Dougherty of Los Angeles, Calif., for petitioner.
W. T. Kelley, Chief Counsel, Federal Trade Commission, Martin A. Morrison, Assistant Chief Counsel, Daniel Murphy, Morton Nesmith and James W. Nichol, Special Attorneys, all of Washington, D. C., for respondent.

Before: DENMAN, STEPHENS and HEALY, Circuit Judges.

[*Facts of case*]

DENMAN, Circuit Judge: This is a petition by Electro Thermal Company to set aside an order of the Federal Trade Commission requiring the petitioner to cease and desist from certain unfair methods of competition in commerce.

The Commission brought proceedings under the Act of September 26, 1914, as amended, 15 USCA § 45, which gives it power to institute a hearing when it has reason to believe that any person, corporation, etc. is using an unfair method of competition in commerce and that a proceeding would be in the public interest. If the hearing develops facts in accordance with the belief, a cease and desist order may issue.

Electro Thermal Company was cited by the Commission to show cause why an order should not be entered against the use by the company of certain alleged false advertising claims to promote the sale of a device termed Thermal-Aid, the device being manufactured for use in connection with disorders of the prostate gland.

[*Findings of Commission*]

The hearing was had and the Commission made findings of fact substantially in accordance with the complaint, to this effect:

That the petitioner is a corporation of Ohio, engaged in the interstate sale and offering for sale of a device designated "Thermalaid," consisting of a hard rubber unit designed to be inserted in the rectum for the application of heat to the prostate gland and adjacent tissues. It is activated through electricity derived from ordinary electric current or from a battery supply where no electricity is available.

That, "In the course and conduct of its business, the respondent is, and has been, in competition with other individuals, corporations and associations engaged in offering for sale and selling in commerce between and among the different States of the United States various therapeutic devices and appliances designed and intended for the treatment of the prostate gland."

That certain advertising claims issued by the respondent [petitioner here] in connection with its product were false and misleading, e. g.: "the prostate gland slows down in men past middle age and, if unchecked, will swell until surgery is needed"; "if you have a mild case, you may surprise yourself with new joy of living, new energy and enhanced power to do. If you have a fretful, serious, nagging case, by all means waste not one minute in getting Thermalaid"; "Another point worthy of emphasis is the effect of an operation on sexual strength. When you lose your prostate gland you bid goodbye forever to a vital part of the procreative system. In a very real sense the saying is true that a man is no longer a man when his prostate is gone."

It was specifically found that the unfair practices tended to divert trade to respondent, injuring its competitors.

Fake claims were also found to have been made as to the therapeutic effect of the devices on constipation and piles.

The Commission made no complaint of the "Thermalaid" device itself, the unfair practices being confined to advertising. The evidence shows and the Commission found that the use of the device had some salutary effect.

A cease and desist order, based upon the findings, was entered.

[*Existence of competition*]

The Electro Thermal Company then filed in this court a petition for review of the order and prayed to have it set aside. It is not urged that the Commission erred in finding that the practices enjoined were unfair methods. It is contended, however, that there is no evidence to support the finding that competition existed between the company and others.

The statute provides that "the findings of the commission as to facts, if supported by the testimony, shall be conclusive." 15 USCA § 45. "The weight to be given the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the commission." *Fed. Trade Com. v. Pacific Paper Ass.*, 273 U. S. 52, 63.

The finding of competition in the present case must be supported, if it is supported, solely upon testimony and stipulations relative to two devices used for the same general purposes as the Thermalaid. The first is before the Commission by stipulation. It is stipulated that:

"The Williams Institute, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with the principal place of business at 1648 Idlewood Road, Glendale, California, and has been such for the past nine years. It is engaged in the sale of a device known as 'The Simplex Prostate and Rectal Normalizer,' which device is used in the treatment of prostatic troubles, by means of heat applied through the rectum. It was first placed on the market approximately six years ago, and is sold

and shipped principally to doctors and practitioners, but in some cases to the laity, in states other than the State of California."

There is in evidence an advertisement for the Simplex Prostate and Rectal Normalizer claiming that the device "Relaxes tight muscles, calms frayed nerves and offers both a tonic and a sedative effect. A natural way to help prevent a hardened prostate. Indicated in rectal and prostate conditions where better circulation is essential. Of great value in obstinate, chronic constipation. Helpful in many cases of piles."

This stipulation and exhibit warrant an inference that the Simplex device is in competition with the Thermalaid.

The second alleged competitive device, shown by undisputed evidence is the "Prosager," produced by the Midwest Products Company, of Michigan, and shipped in interstate commerce. The device is applied to the tissues near the prostate by way of the rectum, and, by means of air pressure, massages those tissues. It is advertised and sold for treatment of the same ailments as those for which Thermalaid is supposed to be efficacious. Wallace D. Smith, the manufacturer of the Prosager, testified, over objection, that his company was in competition with Thermalaid.

The question on this branch of the case is whether there is sufficient evidence to warrant the Commission's finding of competition. Petitioner relies on *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, where the commission cited the Raladam Co. for unfair competitive practices in vending and advertising an alleged obesity cure, representing it to be harmless and effective when in fact it was harmful. The Supreme Court held that the commission was without jurisdiction because it was not shown that the unfair methods were methods of competition:

"It is obvious that the word 'competition' imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors—that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be, lessened or otherwise injured." 283 U. S. 649.

"Findings of the Commission justify the conclusion that the advertisements naturally would tend to increase the business of respondent; but there is neither finding nor evidence from which the conclusion legitimately can be drawn that these advertisements substantially injured or tended thus to injure the business of any competitor or of competitors generally, whether legitimate or not. None of the supposed competitors appeared or was called upon to show what, if any, effect the misleading advertisements had, or were likely to have, upon his business." 283 U. S. 652.

In this case there are definitely identified parties manufacturing and selling in interstate commerce a device adapted to the same purposes as is the petitioner's. The manner of their competition—how one may divert trade from another—is obvious. There is sufficient evidence to warrant a finding that competition exists.

What the record lacks is any direct evidence to the effect that petitioner's misleading advertising claims diverted any business from its competitors. This, however, is not required by the decision in the *Raladam* case, and would in many cases be impossible to prove. It would seem to be sufficient to show actual or potential competition and unfair trade practices which reasonably tend to give the perpetrator an advantage in such competition. That much certainly was shown here.

[*Legitimate article of commerce*]

The petitioner asserts error in that the Commission's examiner refused to allow reasonable latitude in the cross-examination of Wallace D. Smith to show that the "Prosager" alleged competitive device, was not a legitimate article of commerce. The questions excluded were whether Mr. Smith had "ever had any controversy or difficulty with the Federal Trade Commission?" and whether he had "ever been called before the Federal Trade Commission in connection with the selling" of the Prosager. The examiner sustained objections because the questions were not definite enough as to time and because that was not a proper way to show whether the article was a legitimate article of commerce.

The examiner's action seems correct. The question should have been more definite. A difficulty with or a "calling before" the Commission in themselves mean nothing.

The petitioner complains that the Commission did not sufficiently inquire into the question of whether the alleged competitive devices were legitimate articles of commerce, and in failing to find that they were not legitimate.

There is no merit in this objection. In the first place, it was for the petitioner to show, if it desired it shown, that the competing devices were not legitimate. In the second place, the evidence affirmatively shows that both the petitioner's "Thermalaid" and the two devices found to be in competition with it are all legitimate articles of commerce, used by doctors and laymen for salutary purposes. Petitioner seems to lose sight of the fact that the Commission has never complained of its instrument but only of certain false and misleading advertising issued in connection with it.

This sufficiently answers the last claim of error, that: "* * * a method of com-

petition affecting only outlaws of commerce, engaged in fraudulent or criminal activities, is not within the jurisdiction of the Commission."

[*Decree of affirmance and enforcement proper*]

Therefore, the petition to set aside should be denied.

In its brief (and not otherwise) the Commission asks for a decree of affirmance and enforcement of its cease and desist order. Petitioner moves to strike the "cross petition" because it is not properly before us. Petitioner alleges that before a decree of enforcement can be granted, it must appear that the recipient of the cease and desist order has disregarded it.

" * * * If such person, partnership, or corporation fails or neglects to obey such order * * * the commission may apply to the circuit court of appeals of the United States * * * for the enforcement of its order, * * *. Upon such filing of the application and transcript the court * * * shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter * * * a decree affirming, modifying, or setting aside the order of the commission * * *.

"Any party required by such order of the commission to cease and desist * * * may obtain a review of such order in said circuit court of appeals * * *. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, * * *." 15 USCA § 45.

It would seem, in view of the statute, that the Commission's informal prayer for affirmation of the Commission's order is properly here. It appears that the court is vested with plenary jurisdiction no matter which party brings the cause before it. The same language as to the court's jurisdiction is used in one case as in the other.

The order of the Commission is affirmed.

[¶ 55,169] United States of America v. Ox Fibre Brush Co., Inc.; Indiana Ox Fibre Brush Co., Inc.; National Brush Company; Jos. O. Flatt & Co., Inc.; Empire Brush Works; A. Laitner & Sons; The Osborn Manufacturing Co.; A. Steiert & Son; Phoenix Brush Co., Inc.; Wright-Bernet, Inc.; S. A. Felton & Son Company; Illinois Duster Company; Interchangeable Brush Co., Inc.; Los Angeles Brush Manufacturing Corporation; Maguire Bros. Brush Co.; Michigan Brush Manufacturing Co., Inc.; The Milwaukee Brush Manufacturing Co.; Moran Bros.; Weil-Ransom Company; John H. Galloway; and Thomas A. Unsworth.

In the District Court of the United States for the Southern District of New York. July 30, 1937.

Defendant brush manufacturers and distributors are enjoined by consent decree from agreeing upon or concertedly fixing or maintaining, directly or indirectly, prices or minimum prices of brushes or other products, and from allotting or allocating customers.

Decree

This cause came on to be heard on this 30th day of July 1937, the petitioner being represented by Henry McClernan, Esq., Special Assistant to the Attorney General, and the defendants being represented by J. E. F. Wood, Esq., of their counsel, said defendants having appeared voluntarily and generally and having waived service of process.

[*Consent to decree*]

It appears to the Court that the defendants have consented in writing to the making and entering of this decree;

It further appears to the Court that this decree will provide suitable relief concerning the matters alleged in the petition and that by reason of the aforesaid consent of the parties it is unnecessary to proceed with the trial of the cause or to take testimony therein or that any adjudication be made of the facts.

[*Charge and jurisdiction*]

Now, therefore, upon motion of Petitioner, without taking any testimony or evidence, and without making any adjudication of the facts, and in accordance with said consent, it is hereby ordered, adjudged, and decreed—

1. That the Court has jurisdiction of the subject matter set forth in the petition and of all the parties hereto with full power and authority to enter this decree and that the petition alleges a combination and conspiracy in restraint of interstate trade and commerce in household and industrial brushes in violation of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Antitrust Act, and states a cause of action under said Act.

[*Combination enjoined*]

2. That the defendants and each of them and each and all of their respective officers, directors, agents, servants, and employees, and all persons acting or claim-

ing to act on behalf of the defendants or any of them be and they are hereby perpetually enjoined and restrained from engaging in, carrying out, maintaining, or extending, directly or indirectly, any combination or conspiracy to restrain interstate trade or commerce in household and industrial brushes such as is alleged in the petition and from entering into or carrying out, directly or indirectly, by any means whatsoever, any combination or conspiracy of like character or effect and more particularly (but the enumeration following shall not detract from the inclusiveness of the foregoing) from doing, performing, agreeing upon, entering upon, or carrying out any of the following acts or things:

a. Agreeing upon or concertedly fixing or maintaining, directly or indirectly prices or minimum prices of brushes or other products;

b. Allotting or allocating customers;

c. Aiding, abetting, or assisting, individually or collectively, others to do any of the things which the defendants or any of them are herein restrained from doing.

[*Terms binding*]

3. That the terms of this decree shall be binding upon and shall extend to each and every one of the successors in interest of any and all of the defendant manufacturers herein and to any and all corporations, co-partnerships, and individuals who may acquire the ownership or control, directly or indirectly, of the property, business, and assets of the defendant manufacturers whether by purchase, merger, consolidation, reorganization, or otherwise.

[*Jurisdiction retained*]

4. That jurisdiction of this cause be, and it hereby is, retained by the Court for the purpose of granting such additional or supplemental relief as may become necessary or appropriate for carrying out and enforcing the prohibitions of this decree, and for the purpose of entertaining and acting upon any application made by any party for modification of the decree: Provided, however, that it is not intended that this decree shall bar petitioner from proceeding against any of the defendants in any other court to obtain relief against, or by reason of, any future acts or conduct of the defendants with respect to which petitioner would be entitled to relief in this Court under the provisions of this decree.

JNO. C. KNOX, *Judge*.

[¶ 55,170] **Federal Trade Commission v. Standard Education Society et al.**

Supreme Court of the United States. November 8, 1937.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The Court upholds an order of the Federal Trade Commission prohibiting misrepresentations that encyclopedias are given free with the purchase of loose leaf supplements. The decision reverses the ruling of the Circuit Court of Appeals that the misrepresentations were so obviously false that no one would be misled. The Court says: "The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced."

Mr. Justice BLACK delivered the opinion of the Court.

[*Facts*]

Upon application by the Federal Trade Commission this Court granted certiorari to review that part of a decree of the Circuit Court of Appeals for the Second Circuit, which modified in part and reversed in part a "cease and desist" order of the Commission. 86 F. (2d) 692. The Commission, after service of a complaint, and extensive hearings, made a finding of facts from the testimony and ordered two corporation respondents and three individuals controlling these corporations, to desist from certain practices used by respondents in furthering the sale of encyclopedias and other books in interstate commerce. The Commission not only found the practices to be "unfair" but also "false, deceptive and misleading." The court below modified and weakened the Commission's order in material aspects, and the questions here are whether the testimony supported all the findings of the Commission, and whether these findings justified the entire order as against all the respondents.

[*Commission's findings*]

All "unfair" practices found by the Commission related wholly to methods of sale. The Commission's order against respond-

ents was based, in part, upon the following findings:

That fictitious testimonials and recommendations had been used by respondents; that authorized testimonials and recommendations had been exaggerated and garbled; that authorized testimonials for a "previous work" were later used to further the sale of another "work, quite different in form, in material and in purpose." "For the purpose of selling their publications, Standard Reference Work and New Standard Encyclopedia" respondents advertised "a list headed 'Contributors and Reviewers' and . . . In such list they include many who have not been either contributors or reviewers to either the Standard Reference Work or the New Standard Encyclopedia." Respondents sold "their publications at retail to the public by salesmen on the subscription plan" and in carrying out said plan they represented to prospects that they were selecting a small list of "well connected representative people" in various localities, in order to present them with an "artcraft de luxe edition" of the encyclopedia. Further carrying out respondents' scheme, their agents represented that "they are giving away a set of books; that they are not selling anything; that the books are free; that the books are being given free as an advertising plan . . . that the prospect has been specially selected, and that the only return desired for the gift is permission to use the name of the prospect for advertising purposes and as a reference;" that the "said prospects are paying only for the loose leaf extension service; . . . that the price of $69.50 is a reduced price and that the regular price of the books and the extension service is $150.00, sometimes even as high as $200.00." The statements that the encyclopedia is being given away; that payment is only being made "for the loose leaf extension service"; and that "$69.50 is a reduced price . . . are false, deceptive and misleading as $69.50 is the regular, standard price" for both the encyclopedia and the loose leaf extension and research privileges.

[*Order modified by Court of Appeals*]

The Court of Appeals reversed clauses one and three of the Commission's order. These clauses ordered respondents not to represent falsely to purchasers of their publications that the publishing company was giving encyclopedias to them as a gift, and that purchasers were paying only for loose leaf supplements.

The Court of Appeals affirmed clauses two and six of the Commission's order. These clauses ordered respondents not to represent falsely to purchasers that sets of books had "been reserved to be given away free of cost to selected persons" and that the usual price at which respondents' publications are sold is higher than the price "at which they are offered to such purchasers."

[*All practices part of same plan*]

It is clear, both from the findings of the Commission, and the testimony upon which they rest, that the practices forbidden in clauses one, two, three and six are all tied together as parts of the same sales plan. As a first step under this plan, salesmen obtained an audience with prospective purchasers by representations made to them that by reason of their prestige and influence they had been selected by the Company to receive a set of books free of costs for advertising purposes. After respondents' agents thus gained an audience by the promise of a free set of books, they then moved forward under the same general sales plan, by falsely representing that the regular price of the loose leaf supplement alone was $69.50, and that the usual price of both books and loose leaf supplements was much in excess of $69.50. The Commission ordered respondents not to engage in carrying out any part of this entire sales plan. However, as the Court of Appeals reversed clauses one and three of the Commissions' order, a part of the sales scheme which the Commission condemned as unfair, can yet be carried out by respondents. That is to say—respondents by that reversal, are left free to continue to obtain audiences with prospects and to sell encyclopedias and loose leaf supplements to them, by false representations that the Company gives them a set of encyclopedias free, and that $69.50 paid by them to the Company, is for the loose leaf supplement alone.

[*Statements as to gift held misleading*]

In reaching the conclusion that respondents should be left free to engage in that part of the sales scheme prohibited by clauses one and three of the Commission's order, the court below reasoned as follows:

> "We cannot take too seriously the suggestion that a man who is buying a set of books and a ten years 'extension service' will be fatuous enough to be misled by the mere statement that the first are given away, and that he is paying only for the second. . . . Such trivial niceties are too impalpable for practical affairs, they are will-o-wisps which divert attention from substantial evils."

The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty

resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception.

The practice of promising free books where no free books were intended to be given, and the practice of deceiving unwary purchasers into the false belief that loose leaf supplements alone sell for $69.50, when in reality both books and supplement regularly sell for $69.50, are practices contrary to decent business standards. To fail to prohibit such evil practices would be to elevate deception in business and to give to it the standing and dignity of truth. It was clearly the practice of respondents through their agents, in accordance with a well matured plan, to mislead customers into the belief that they were given an encyclopedia, and that they paid only for the loose leaf supplement. That representations were made justifying this belief; that the plan was outlined in letters going directly from the companies; that men and women were deceived by them—there can be little doubt. Certainly the Commission was justified from the evidence in finding that customers were misled. Testimony in the record from citizens of ten States—teachers, doctors, college professors, club women, business men—proves beyond doubt that the practice was not only the commonly accepted sales method for respondents' encyclopedias, but that it successfully deceived and deluded its victims.

The courts do not have a right to ignore the plain mandate of the statute which makes the findings of the Commission conclusive as to the facts if supported by testimony.[1] The courts cannot pick and choose bits of evidence to make findings of fact contrary to the findings of the Commission. The record in this case is filled with evidence of witnesses under oath which support the Commission's findings. Clauses one and three of the Commission's order should be sustained and enforced.

[*Statements as to contributors*]

The seventh clause of the Commission's order forbade the use of names of persons as contributors or editors who had not consented to such use and who had neither actually contributed to the publications nor helped to edit them.

The Circuit Court upheld this clause except as it might apply to the original contributors to Aiton's encyclopedia saying that "it seems to us not 'unfair' to announce as contributors to the derived works those who have been contributors to the original." Aiton's encyclopedia was published about 1909, and respondents' works represent the result of periodic revisions and expansions of the prior work. The Government concedes in its brief that this clause of the Commission's order does not prevent respondents from representing a person who contributed to the original, as a contributor to their revised publication, if "some of the material originally in Aiton's encyclopedia remained in the new Edition of the revised work." Respondents agree with this interpretation. As between these parties, therefore, this clause permits respondents to represent any person as a contributor to their present revised encyclopedia, if a part of his original material has been carried forward to it. If no part of his contribution to Aiton's encyclopedia has been brought forward, he is not a contributor and should not be represented as such. This clause as originally declared by the Commission would, under this interpretation, properly forbid respondents from falsely representing as contributors or editors those who had actually neither contributed to, nor edited, the publications. The decree of the court below modifying this clause is not in accordance with our conclusion, and clause seven of the Commission's order should be enforced.

[*Testimonials*]

The Court of Appeals reversed the eighth clause of the order of the Commission. The reason given by the court below for this action was as follows:

> "For the eighth, which forbade the use of such testimonials which had not been given by the person whose name was used, we have been able to find no support in the evidence";

We are convinced that the Commission's findings of fact justified this clause of the order and that the testimony supports these findings.[2]

[*Party respondents*]

The Court of Appeals entirely excluded respondent Greener from the operation of the Commission's order, and partially excluded respondents Stanford and Ward. The Commission had found from the testimony that

> "Respondents H. M. Stanford, W. H. Ward, and

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[1] Federal Trade Commission Act, Sept. 26, 1914, 38 Stat. 717, U. S. C. Title 15, Sec. 45.

[2] From paragraphs fourteen and fifteen of the Commission's findings it appears that respondents used the names of various individuals in testimonials and that

"None of these men or this woman ever wrote any testimonial or recommendation of or concerning the New Standard Encyclopedia. The representations that these men and this woman wrote the recommendations for the so-called 'New Standard Encyclopedia' are false, deceptive and misleading.'"

A. J. Greener are the managers and sole stockholders of respondent Standard Education Society, and the managers and sole incorporators of Respondent Standard Encyclopedia Corporation. . . . The Commission concludes and infers from the record in this case and so finds that this corporation was organized by the individual respondents for the purpose of evading any order that might be issued by the Federal Trade Commission against the respondent, the Standard Education Society."

There was ample support in the testimony for this finding of the Commission.

The Federal Trade Commission Act (*supra*) gives the Commission power to "prevent persons, partnerships or corporations, . . . from using unfair methods of competition in Commerce."

This Court has held that

"a command to the Corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance . . . they, no less than the corporation itself, are guilty of disobedience and may be punished for contempt." *Wilson v. United States,* 221 U. S. 361, 376.

Respondents Stanford, Ward and Greener, who are in charge and control of the affairs of respondent corporations, would be bound by a cease and desist order rendered against the corporations. Since circumstances, disclosed by the Commission's findings and the testimony, are such that further efforts of these individual respondents to evade orders of the Commission might be anticipated, it was proper for the Commission to include them in its cease and desist order.

The record in this case discloses closely held corporations owned, dominated and managed by these three individual respondents. In this management these three respondents acted with practically the same freedom as though no corporation had existed. So far as corporate action was concerned, these three were the actors. Under the circumstances of this proceeding, the Commission was justified in reaching the conclusion that it was necessary to include respondents Stanford, Ward and Greener in each part of its order if it was to be fully effective in preventing the unfair competitive practices which the Commission had found to exist. The court below was in error in excluding these respondents from the operation of the Commission's order.

[*Decree reversed and Commission's order upheld.*]

The decree below will be reversed except as to modification of clause ten of the Commission's order, and the cause is remanded with instructions to proceed in conformity with this opinion.

Reversed.

[¶ 55,171] Aluminum Company of America v. The United States of America.

Supreme Court of the United States. December 6, 1937.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

The decree of the lower court, denying an injunction against an anti-trust suit in New York, is affirmed on the grounds that the findings are adequately supported and the conclusion reached is proper. The injunction was sought on the grounds that the New York anti-trust suit was barred by a similar anti-trust suit previously maintained in Pennsylvania, resulting in a consent decree. The court held that the suits were not substantially identical.

Mr. Justice McReynolds delivered the opinion of the Court.

[*Facts*]

This appeal brings up a final decree of the District Court, Western District of Pennsylvania, three judges sitting, which vacated a preliminary injunction and refused to restrain law officers of the United States from conducting a proceeding against appellant in another district.

June 9, 1912, in the present cause—"Pennsylvania Suit"—when appellant was the only defendant, a consent decree cancelled certain restrictive provisions of designated contracts and forbade future violations of the anti-trust laws by it, its officers, agents and representatives. With certain modifications (1922) presently unimportant this decree remains in force.

April 23, 1937, the United States through their law officers, defendants here, instituted a proceeding in the Southern District of New York—"New York Suit"—wherein the appellant, its officers, agents, stockholders and others (sixty-three in all), were named as defendants. All of these were charged with violating the anti-trust laws and appropriate relief through injunctions, dissolution of appellant, rearrangement of its properties, etc., was asked.

April 29, 1937, in the "Pennsylvania Suit"

appellant asked and the District Court entered an ex parte order directing the law officers concerned with the New York suit to appear as defendants. It then filed the petition now before us wherein it prayed for an injunction restraining these officers from proceeding further in New York against it, its wholly owned subsidiaries, officers and directors.

The petition charged that prosecution of the later suit would subject appellant to the peril of concurrent decrees on the same subject matter by two courts; also that there was the possibility of conflicting decrees and unseemly conflict. The prayer for relief rested essentially upon the assertion that the suit embraced subject matters and issues substantially identical with those previously presented and adjudicated by the consent decree of 1912.

The law officers appeared specially and answered; the Attorney General filed an expediting certificate under the Act of February 11, 1903, as amended, 15 U. S. C. A. 28, 29; a court of three judges assembled, heard evidence, made findings of fact and denied relief. Errors were assigned; this appeal followed.

[*Identity of suits*]

Plainly, and there is no suggestion to the contrary, appellant cannot succeed unless the Pennsylvania and New York suits are substantially identical in subject matter and issues. It says that comparison of the petitions in the two causes reveals this fact. Also that comparison of the petition in the later suit with the prohibitions of the 1912 consent decree shows the alleged identity, since each charging paragraph of the petition sets up violations of the anti-trust laws inhibited by the decree.

On the other hand, counsel for the United States submit that the two suits differ in substantial respects — defendants, charges and relief prayed.

The court below found: "The subject matter, parties, issues and relief sought in the New York suit differ substantially from those in the 1912 suit. The New York suit does not attack the affirmative provisions of the 1912 decree or seek to reverse any action taken by the District Court for the Western District of Pennsylvania in the suit of 1912. The New York suit does not subject Aluminum Company to the peril of two conflicting decrees. Aluminum Company will not suffer irreparable injury by being compelled to defend the suit in the Southern District of New York. . . ." It concluded that the two suits were dissimilar in respect of parties defendant, subject matter, issues and relief sought, and that no basis for an injunction had been shown.

[*Decree of lower court affirmed*]

We have heard counsel, examined the record and briefs, and are unable to say that the court below erred either in respect of its findings or conclusion. The findings are adequately supported and the conclusion reached, we think, is proper. For us again to analyze the pleadings, evidence and decrees and point out the differences and necessary inferences would serve no useful purpose. This was adequately done below.

The challenged decree must be affirmed.

The Chief Justice and Mr. Justice Stone took no part in the consideration or decision of this cause.

[¶ 55,172] The People of Puerto Rico v. The Shell Co. (P. R.), Limited.

Supreme Court of the United States. December 6, 1937.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

The Puerto Rican Anti-Trust Act is upheld as not being superseded by the Sherman Act. Section 3 of the Sherman Act is interpreted as extending to Puerto Rico, coexistent with the local act.

Mr. Justice Sutherland delivered the opinion of the Court.

[*Facts*]

This is a criminal proceeding brought by petitioner against the respondents in the insular district court of San Juan, Puerto Rico. An information filed by the district attorney charged respondents with entering into a conspiracy in restraint of trade in violation of the local anti-trust act, passed by the Legislature of Puerto Rico March 14, 1907. Demurrers to the information were sustained by the district court on the ground that the Sherman Anti-trust Act of 1890, supplemented by the Clayton Act of 1914, covered the entire field embraced by the local anti-trust act, and the latter, therefore, was void. The Supreme Court of Puerto Rico accepted that view and dismissed the appeal; and its judgment was affirmed on appeal by the court below.

86 F. (2d) 577. The single question which we have to decide is whether the existence of § 3 of the Sherman Act precluded the adoption of the local act by the insular legislature.

[*Sherman and Puerto Rican Acts compared*]

The pertinent provisions of the Sherman Act and the local act are set forth in the margin.[1] Section 3 of the Sherman Act and § 1 of the local act, so far as the question here involved is concerned, are substantially identical. Section 4 of the Sherman Act confers jurisdiction in respect of violations of the act upon the several district courts of the United States. Section 3 of the local act confers jurisdiction upon the district courts of Puerto Rico in respect of violations of that act.

[*Meaning of "territory"*]

First. Section 3 of the Sherman Act extends to "any territory of the United States." But it is urged that Puerto Rico cannot be brought within the intent of this phrase, and, therefore, the section does not apply to that dependency. The point is not well made. When the Sherman Act was passed (1890) we had no insular dependencies; and, necessarily, the application of § 3 did not extend beyond our continental domain; and, undoubtedly, it was this domain which was in the immediate contemplation of Congress. Certainly, Congress at that time did not have Puerto Rico in mind. But that is not enough. It is necessary to go further and to say that if the acquisition of that insular dependency had been foreseen, Congress would have so varied its comprehensive language as to exclude it from the operation of the act. *Dartmouth College v. Woodward,* 4 Wheat. 518, 644; *Ozawa v. United States,* 260 U. S. 178, 195-196; *United States v. Thind,* 261 U. S. 204, 207-208. The only question, therefore, is whether the word "territory," as used in § 3 of the Sherman Act, properly can be applied to a dependency now bearing the relation to the United States which is borne by Puerto Rico.

In *Balzac v. Puerto Rico,* 258 U. S. 298, 304-305, it was held that, although the Sixth amendment of the Constitution with respect to the right of trial by jury applied to the territories of the United States, it did not apply to territory belonging to the United States which had not been incorporated into the Union; and that neither the Philippines nor Porto Rico was territory which had been so incorporated or had become a part of the United States, as distinguished from merely belonging to it. But it is evident, from a consideration of the pertinent acts of Congress and the decisions of this court with respect to these acts, that whether Puerto Rico comes within a given congressional act applicable in terms to a "territory," depends upon the character and aim of the act. Words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed. *Atlantic Cleaners & Dyers v. United States,* 286 U. S. 427, 433; *Helvering v. Stockholms &c. Bank,* 293 U. S. 84, 86, 87-88. Thus, although Puerto Rico is not a territory within the reach of the Sixth and Seventh Amendments and may not be a "territory" within the meaning of the word as used in some statutes, we held in *Kopel v. Bingham,* 211 U. S. 468, 474, 475, 476, that Puerto Rico was a "territory" within the meaning of § 5278 of the Revised

[1] Sherman Act (July 2, 1890, c. 647, 26 Stat. 209):

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. . . .

By § 24 (2) of the Judicial Code, 28 U. S. C. § 41 (2), the district courts of the United States are given jurisdiction—"Of all crimes and offenses cognizable under the authority of the United States."

The Puerto Rico Act of March 14, 1907 (Laws 1907, p. 328):

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade, commerce, business transactions, and lawful and free competition in a town, or among the several towns of Puerto Rico is hereby declared to be illegal. Every person who shall make any such contract or engage in any such conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both such punishments in the discretion of the court.

Section 3. The district courts of the island are hereby vested with jurisdiction to prevent, prohibit, enjoin and punish violations of this law; and it shall be the duty of the attorneys of the district courts of the island to institute proceedings of injunction or any other civil proceeding to prevent, prohibit, enjoin, and restrain such violations. . . .

Statutes, which provides for the demand and surrender of fugitive criminals by governors of territories as well as of states. The court said that it was impossible to hold that Puerto Rico was not intended to have power to reclaim fugitives from its justice, or that it was intended that it should be an asylum for fugitives from the United States. The word "territory" as used in that statute was defined as meaning "a portion of the country not included within the limits of any State, and not yet admitted as a State into the Union, but organized under the laws of Congress with a separate legislature under a territorial governor and other officers appointed by the President and Senate of the United States." And the court concluded, "It may be justly asserted that Porto Rico is a completely organized Territory, although not a Territory incorporated into the United States, and that there is no reason why Porto Rico should not be held to be such a Territory as is comprised in § 5278." See *Porto Rico v. Rosaly,* 227 U. S. 270, 274. Compare *Talbott v. Silver Bow County,* 139 U. S. 438, 444-445.

With equal force, it may be said here that there is no reason why Puerto Rico should not be held to be a "territory" within the meaning of § 3 of the Sherman Act. We pointed out in the *Atlantic Cleaners & Dyers* case, *supra,* p. 435, that in the light of the applicable history and circumstances, it was apparent that Congress meant to deal comprehensively with the subject of contracts, combinations, and conspiracies in restraint of trade, "and to that end to exercise all the power it possessed"; that while Congress in passing § 1 exercised only the power conferred by the commerce clause, in passing § 3 it exercised a general power, unlimited by that clause. We therefore concluded that the word "trade" as used in § 3 should be given a more extended meaning than the same word as used in § 1.

[*"Territory" interpreted in most comprehensive sense*]

If, as we there determined, Congress intended by the Sherman Act to exert all the power it possessed in respect of the subject matter—trade and commerce—, it is equally reasonable to conclude that Congress intended to include all territories to which its powers might extend. The same reason which requires the utmost liberality of construction in respect of the word "trade," also requires the same degree of liberality of construction in respect of the word "territory"; and we hold, accordingly, that the word "territory" was used in its most comprehensive sense, as embracing all organized territories, whether incorporated into the United States or not, including Puerto Rico.

[*Federal and local statute to same effect can coexist*]

Second. The court below held that although § 1 of the local act contained some words not to be found in § 3 of the Sherman Act, the pertinent provisions were in substance the same; that the act charged in the information as a crime under the local statute was the same as that denounced as a crime in the Sherman Act; and that in each instance the offense was a crime against the sovereignty of the United States. With that view we agree. But that court concluded that the act of Congress preempted the ground occupied by the local act and superseded it; and consequently the local district court was without jurisdiction of the offense. With that conclusion we are unable to agree.

1. Section 14 of the Foraker Act, passed April 12, 1900, c. 191, 31 Stat. 77, 80, provided that the statutory laws of the United States, not locally inapplicable, should have the same force and effect in Puerto Rico as in the United States, with certain exceptions not material here. Section 27 (p. 82) provided "That all local legislative powers hereby granted shall be vested in a legislative assembly . . ." And by § 32 (p. 83-84), it was provided that the legislative authority "shall extend to all matters of a legislative character not locally inapplicable . . ." These various provisions are continued in force by § 9, 25 and 27 of the Organic Act of March 2, 1917, c. 145, 39 Stat. 951. These provisions do not differ in substance from the various provisions relating to the powers of the organized and incorporated continental territories of the United States, in respect of which this court said in *Clinton v. Englebrecht,* 13 Wall. 434, 441, that the theory upon which these territories have been organized "has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress"; and in *Hornbuckle v. Toombs,* 18 Wall. 648, 655-656, we said: "The powers thus exercised by the Territorial legislatures are nearly as extensive as those exercised by any State legislature." See also *Cope v. Cope,* 137 U. S. 682, 684, where this court, speaking of this typical general provision contained in the Utah Organic Act, said that, with the exceptions noted in the provision itself, "the power of the Territorial legislature was apparently as plenary as that of the legislature of a State." In *Maynard v. Hill,* 125 U. S. 190, 204, the essential similarity of the various provisions in respect of the powers of territorial legislatures was pointed out, and it was said that what were "right-

ful subjects of legislation" was to be determined "by an examination of the subjects upon which legislatures had been in the practice of acting with the consent and approval of the people they represented."

The grant of legislative power in respect of local matters, contained in § 32 of the Foraker Act and continued in force by § 37 of the Organic Act of 1917, is as broad and comprehensive as language could make it. The primary question posed by the challenge to the validity of the act under consideration is whether the matter covered by the act is one "of a legislative character and not locally inapplicable." It requires no argument to demonstrate that a conspiracy in restraint of trade within the borders of Puerto Rico is clearly a local matter, and that it falls within the precise terms of the powers granted by § 32 and 37 of the respective acts in which the grant is found. The power being given without express limitation, a conclusion that the present exercise of the power is precluded by the existence of § 3 of the Sherman Act must rest upon the assumption that a congressional statute penalizing specific local behavior and a statute of Puerto Rico to the same effect cannot coexist. With due regard to the status of the territory, the character of its established government, the positive terms of the congressional grant of power, and the lack of conflict between the two acts, that assumption must be rejected.

[*Quasi-sovereignty of Puerto Rico*]

2. The aim of the Foraker Act and the Organic Act was to give Puerto Rico full power of local self-determination, with an autonomy similar to that of the states and incorporated territories. *Gromer v. Standard Dredging Co.,* 224 U. S. 362, 370; *Porto Rico v. Rosaly, supra,* p. 274. The effect was to confer upon the territory many of the attributes of *quasi*-sovereignty possessed by the states—as, for example, immunity from suit without their consent. *Porto Rico v. Rosaly, supra.* By those acts, the typical American governmental structure, consisting of the three independent departments —legislative, executive and judicial—was erected. "A body politic"—a commonwealth—was created. 31 Stat. 79, § 7, c. 191. The power of taxation, the power to enact and enforce laws, and other characteristically governmental powers were vested. And so far as local matters are concerned, as we have already shown in respect of the continental territories, legislative powers were conferred nearly, if not quite, as extensive as those exercised by the state legislatures.

This comprehensive grant of legislative power made by Congress plainly recognizes the great desirability of devolving upon the local government the responsibility of searching out local offenses and prosecuting them in the local tribunals. The insular Supreme Court in this case declared in emphatic terms the wisdom of such local control in respect of the matter dealt with by the act in question. Although striking down, with evident reluctance, the act as invalid, that court said: "The right of the Insular Legislature and officers to prosecute and punish such monopolies as may be set up within our jurisdiction is really inestimable. It was so understood by our Legislature when it took upon itself to legislate on the subject. This is a wholesome and necessary legislation that should be enforced through the insular courts. It must be admitted that The People of Puerto Rico has a special interest in prosecuting before the courts those citizens who violate its own laws. No matter how interested the National Government may be in prosecuting such offenses, instances might occur where the latter would pass unnoticed by the federal officers, or where, for some reason or other, such officers might not display the same activity and interest that it is to expected from the local officials."

[*Power of local legislation not limited*]

3. In the light of the foregoing considerations, including the sweeping character of the congressional grant of power contained in the Foraker Act and the Organic Act of 1917 the general purpose of Congress to confer power upon the government of Puerto Rico to legislate in respect of all local matters is made manifest. In this connection it is significant that the only express limitation upon the power is that, in certain of its aspects, it shall be exercised consistently with the provisions of the respective acts. See § 37, 57 of the Organic Act, and § 32 of the Foraker Act. Nothing is expressed in these acts or, so far as we are advised, in any other federal act which suggests a congressional intent to limit the exercise of the power of local legislation to those subjects in respect of which there is an absence of explicit legislation by Congress; and we find nothing in the nature of the power or in the consequences likely to ensue from the duplicate exercise of it which requires an implication to that effect.

[*Conflict between statutes*]

Our attention is called to certain differences of language in the two acts; and it is urged that these differences create a "risk" of conflict of interpretation between the local courts and the federal district courts. The fear of conflicting decisions is more fanciful than real, since we agree with the court below that there is in fact no sub-

stantial conflict between the pertinent provisions of the two statutes. But in the unikely event that, in spite of this conclusion, a conflict of decisions shall arise, the power of the federal appellate courts to resolve that conflict is clear. Secs. 128 (a) and 240, Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936; 28 U. S. C. § 225, 347.

It likewise is clear that the legislative duplication gives rise to no danger of a second prosecution and conviction, or of double punishment for the same offense. The risk of double jeopardy[2] does not exist. Both the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty. See *Balzac v. Porto Rico, supra,* p. 312. Prosecution under one of the laws in the appropriate court, necessarily, will bar a prosecution under the other law in another court. *Grafton v. United States,* 206 U. S. 333. In that case, Grafton, a soldier in the army, had been acquitted by a general court martial convened in the Philippine Islands of a crime not capital, alleged to have been committed in violation of the 62d Article of War. Subsequently, a criminal information in the name of the United States was filed in a Philippine court of first instance, charging him with the same offense committed in violation of a local law. This court held that the acquittal of the accused by the court martial precluded his being again tried for the same offense in the civil courts, for the reason that he would thus be put twice in jeopardy of punishment. The 62d Article of War[3] was a federal statute. Revised Statutes, § 1342. The general court martial was a federal tribunal. The Philippine act was a local law; and the court of first instance was a local court. But both of the laws and both of the courts owed their existence to the same supreme authority. The situation presented there was, in all essentials, the same as that presented here. The decision of the court in that case rested upon the ground that the accused, having been acquitted by the federal tribunal, could not be subjected to prosecution in another court, civil or military, of the same sovereignty. We held that although the same act might constitute distinct offenses against a state and against the United States, for both of which the accused might be prosecuted, that rule had no application to acts committed in the Philippine Islands. We said (p. 354-355), "The Government of a State does not derive its powers from the United States, while the Government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States. The jurisdiction and authority of the United States over that territory and its inhabitants, for all legitimate purposes of government, is paramount. So that the cases holding that the same acts committed in a State of the Union may constitute an offense against the United States and also a distinct offense against the State, do not apply here, where the two tribunals that tried the accused exert all their powers under and by authority of the same government—that of the United States." . .

An attempt is made to distinguish the *Grafton* case on the ground that but one statute was there involved—namely, the statute of the Philippine Islands—and that both the general court martial and the Philippine court undertook to enforce that statute. Obviously, that view is incorrect. The court-martial proceeding was not to enforce the Philippine legislation, but to enforce the 62d Article of War; and that article was none the less a federal law, distinct from the local law, because it might be necessary to refer to the local law to determine whether the act charged against the soldier was embraced by the term "crimes" in the 62d Article. This is well illustrated by § 289 of the Criminal Code (18 U. S. C. § 468), which, in respect of offenses committed upon places subject to the exclusive jurisdiction of the United States within the limits of a state or organized territory or district, makes applicable the laws of such state, territory or district in respect of such offenses. Prosecutions under that section, however, are not to enforce the laws of the state, territory or district, but to enforce the federal law, the details of which, instead of being recited, are adopted by reference. See *United States v. Press Publishing Co.,* 219 U. S. 1.

[*State Supreme Court rulings*]

4. The decisions of the supreme courts of four states, rendered when the states were newly-created from former territories, are, except in one particular, of which we shall speak later, in harmony with the views we have expressed. Those decisions, though not conclusive, are entitled to great weight,

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[2] The Fifth Amendment to the Constitution provides, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Section 2 (the Bill of Rights) of the Puerto Rico Organic Act of 1917, 39 Stat. 951, provides that "no person for the same offense shall be twice put in jeopardy of punishment."

[3] "All crimes not capital . . . which officers and soldiers may be guilty of . . . are to be taken cognizance of by a general . . . court-[martial], . . . and punished at the discretion of such court."

because they dealt with territorial powers in operation at a time so shortly before the rendition of the decisions that the judges who rendered them well may be credited with such knowledge of the purpose of these powers and their history and application, as to make these judges peculiarly competent to decide questions relating thereto.

The Supreme Court of Wyoming, in a very full and carefully drawn opinion, reached the conclusion that a statute of that territory defining and punishing the crime of bigamy was valid and enforceable, notwithstanding the fact that an act of Congress defined and prescribed punishment for the same crime when committed in any of the territories. *In re Murphy,* 5 Wyo. 297. Following its discussion in respect of the relations between the national and territorial governments, and the extensive powers which had been conferred upon the latter, that court (p. 315) concluded: ". . . the crime of bigamy as defined and punishable by act of congress, is a crime against the sovereignty of the United States. The act of congress embraces no express limitation upon the right of the territory to also punish the same act as an offense against it and its local laws, nor upon the local legislature to enact a law defining and providing a punishment therefor as an offense against the territorial sovereignty. As there are in practical and legal effect two governments, although the one emanates from the other, we are unable to perceive why the legislature of the territory under the general grant of power with which it was invested, may not have enacted a valid law assuming to punish as a territorial offense the crime of bigamy. It does not conflict with the United States statute. It could not and did not assume to destroy the force or effect of the congressional provision. It could not have assumed to offer immunity to those desiring to contract polygamous marriages. By silence, it could only have refused to punish it as a territorial crime. To avoid this possibility congress undertook to punish it as a crime against the Federal government." That decision was followed by the Supreme Court of Utah in *State v. Norman,* 16 Utah 457.

The Wyoming and the Utah courts thought that prosecution and punishment could be had under both statutes, and attempted to justify that view by invoking the rule applicable to state and federal statutes denouncing the same criminal acts. This, of course, in the light of our later decision in the *Grafton* case, is now seen to be erroneous; but the error does not affect the accuracy of the reasoning and conclusion of these courts upon the main point—that the local statute was a valid exercise of territorial power, notwithstanding the identical legislation by Congress.

In *Territory v. Guyott,* 9 Mont. 46, a territorial statute making it a felony to sell, barter or give intoxicating liquor to an Indian, was sustained against the contention that the authority of the territory to pass the statute had been foreclosed by § 2139 U. S. Rev. Stat., which defines and punishes the same offense.

Territory v. Long Bell Lumber Co., 22 Okla. 890, involved the validity of the antitrust act passed by the former territorial legislature. Suits were brought against the defendants, charging violations of the territorial act, which were also violations of the Sherman Act. The court sustained the validity of the territorial act, holding that it was not repugnant to or in conflict with the federal act. In doing so, it followed the reasoning of, and relied upon, the Wyoming, Montana and Utah decisions, above cited.

The Supreme Court of the Territory of Arizona, in *Territory v. Alexander,* 11 Ariz. 172, had before it for consideration a bigamy statute like that involved in the Wyoming case, and erroneously held it to be invalid. In reaching that conclusion, it expressly rejected the Wyoming, Utah and Montana decisions upon the authority of *Davis v. Beason,* 133 U. S. 333, a case which we shall presently consider.

[*Contrary language explained*]

5. There is some general language in *El Paso & N. E. Ry. Co. v. Gutierrez,* 215 U. S. 87, and *Davis v. Beason, supra,* which, considered apart from the question which was involved and apart from the opinions in their entirety, seems to support the decision of the court below in the present case. The opinion of the court below and the argument of respondents here rest in the main upon these cases. An examination of them, however, will show that they have been misunderstood. The *Gutierrez* case involved the validity of a statute of the Territory of New Mexico, which provided that no action for injuries inflicting death caused by any person or corporation in the territory should be maintained unless the person claiming damages should, within 90 days after the infliction of the injuries complained of and 30 days before commencing suit, serve upon the defendant an affidavit covering certain specified particulars. The statute also required that suit must be brought within a year and in a specified district court of the territory. The statute is set forth in full in the margin of the opinion of this court in *Atchison, T. & S. F. Ry. v. Sowers,* 213 U. S. 55, 59-63. An action was brought in Texas by Enedina Gutierrez against the railway company

to recover damages for the death of her intestate. The accident causing the death happened in New Mexico, and the railway company set up the New Mexico statute by way of special plea and answer. A writ of error brought here for review the judgment of the Supreme Court of Texas holding that the case was controlled by the Federal Employers' Liability Act, 34 Stat. 232, and refusing to give effect to the New Mexico statute—a statute which was plainly an attempted restriction upon the right of action conferred in unlimited terms by the Federal Employers' Liability Act, and, therefore, in direct conflict with that act. In deciding the question, this court said that there could be no doubt that the act of Congress "would necessarily supersede the territorial law regulating the same subject." This is broad language; but it must be construed in the light of the question presented, which was whether a territorial act, *in plain conflict with* the federal act, was valid. In that situation, the applicable rule is that formulated by Chief Justice Marshall in *Cohens v. Virginia,* 6 Wheat. 264, 399, where, speaking for this court, he said: "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision." See, also, *Humphrey's Executor v. United States,* 295 U. S. 602, 627, and cases cited.

In the course of the opinion rendered by this court in *Davis v. Beason, supra* (p. 348), it was said: "The cases in which the legislation of Congress will supersede the legislation of a State or Territory, without specific provisions to that effect, are those in which the same matter is the subject of legislation by both. There the action of Congress may well be considered as covering the entire ground." This generalization was not necessary to the decision of the case, and, taken literally, cannot stand, because, as in the *Gutierrez* case, it omits the element of actual conflict between the two acts of legislation. The decision itself sustained the validity of a statute penalizing any person who teaches, advises, counsels or encourages the practice of bigamy or polygamy, notwithstanding there was a general act of Congress which had for its object the suppression of bigamy and polygamy in the territories. And the court said in its opinion (page 341), that bigamy and polygamy are "crimes by the laws of the United States, and they are crimes by the laws of Idaho"; and further (page 348), that the act of Congress was a general law applicable to all territories and "does not purport to restrict the legislation of the Territories over kindred offenses or over the means for their ascertainment and prevention." Each of the two observations which we have last quoted, may have gone beyond the necessities of the case and may fall within the rule announced by Chief Justice Marshall in the *Cohens* case. In any event, however, they indicate that the general statement first quoted is not to be given the sweeping effect which a categorical reading of the words might first suggest.

Only a word need be said about *Domenech v. National City Bank,* 294 U. S. 199, which the court below thought lent support to its judgment. That case involved the validity of a tax sought to be imposed by Puerto Rico upon a branch of a national bank organized under the laws of the United States. We held that § 5219 of the Revised Statutes was in force in Puerto Rico and that that section forbade the tax. The grant to the territory of the general power to tax did not constitute consent on the part of Congress that a tax not authorized by § 5219 could be laid; and it is upon that ground that our decision rests. The conflict between the tax and the federal law we regarded as plain.

[*Jurisdiction of courts*]

6. Finally, it is contended that, if the local anti-trust act and the Sherman Act both stand, a conflict of jurisdiction between the federal courts and the local courts may result. But clearly there is slight, if any, ground for the apprehension. The local act simply confers jurisdiction upon the local courts to enforce that act. No attempt, of course, is made to confer jurisdiction upon those courts to enforce the Sherman Act, or upon the federal courts to enforce the local act. It is hard to see why a conflict as to which law shall be enforced and which jurisdiction shall be invoked should ever arise, since the officers charged with the administration and enforcement of both acts are, in the last analysis, under the control of the same sovereignty and, it well may be assumed, will work in harmony.

[*Puerto Rican Anti-Trust Act upheld*]

We conclude that the anti-trust act of Puerto Rico is valid and enforceable; and, accordingly the judgement below is
Reversed.

[¶ 55,173] **Paramount Pictures, Inc., v. United Motion Picture Theatre Owners of Eastern Pennsylvania, Southern New Jersey and Delaware, Inc., Lewen Pizor, et al.**

United States Circuit Court of Appeals, for the Third Circuit. Filed December 14, 1937.

Appeal from the District Court of the United States, for the Eastern District of Pennsylvania.

A combination by motion picture exhibitors to boycott and to persuade others to boycott films of a certain producer is held to be in restraint of trade in violation of Section 1 of the Sherman Anti-Trust Act. "The methods which the defendants proposed and used to effectuate their objects constitute a secondary boycott, for they are coercive and enlist the cooperation of others than themselves." "Combinations or conspiracies constituting a secondary boycott . . . in restraint of trade among the states, are illegal and may be enjoined even though the restraint is produced by means of peaceful persuasion."

Before BUFFINGTON, DAVIS and BIGGS, Circuit Judges.

Opinion

BUFFINGTON, J.—This is an appeal from a decree of the District Court dismissing the appellant's bill of complaint for lack of jurisdiction.

[*Restraint of trade charged*]

The appellant, a manufacturer and distributor of motion picture films, is a corporation of New York. The appellees are corporations and individuals who own and operate moving picture houses in Eastern Pennsylvania, Southern New Jersey and Delaware. The appellant filed a bill of complaint against the appellees for an injunction charging them with having formed an illegal combination and conspiracy in restraint of trade or commerce among the several states in violation of section 1 of the Sherman Anti-Trust Act, which provides that:

Section 1 of the Sherman Act.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 16 of the Clayton Act provides that:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws."

Admittedly, what the appellees set out originally to do was a violation of the Sherman Act. As appears by the untraversed bill and by affidavits, they combined and conspired: (1) to prevent by coercive means the making of contracts for future distribution of the films produced by the appellant in interstate commerce until it offered better prices and terms; (2) to prevent the exhibiting of the producer's films and their transportation in interstate commerce to fulfill existing contracts until the appellant complied with the demands of the conspirators.

[*Boycott of Paramount pictures*]

In order to carry out their purpose, the appellees planned to boycott all Paramount pictures as long as might be necessary to compel it to offer better terms for its license agreements for 1937-1938.

On June 25, 1937, one of the appellees, United Motion Picture Theatre Owners of Eastern Pennsylvania, Southern New Jersey and Delaware, Inc., hereinafter called "United," called a meeting at Philadelphia at which it voted to boycott the Paramount Company or to bring about a so-called "strike" against the use of its films. A "War Board" was appointed and a "War Chest" authorized. Eastern Pennsylvania, Southern New Jersey and Delaware were divided into zones and a zone captain was appointed in each zone whose duty it was to ascertain who in his zone was violating the boycott and report the same to the "strike" headquarters.

The boycott in the territory of the three states mentioned was part of a proposed nation-wide boycott against the Paramount Company. A meeting was held on June 29, 1937, at Washington, D. C., which three individual defendants representing "United" attended. Representatives of exhibitor associations from many parts of the United States were at the meeting. The chairman read a speech charging the Paramount Company with "unfair, indecent and unethical business practices."

He then discussed the question of punishment and said: "There is only one

way in which Paramount can be punished —viz. through its pocketbook, * * *." "If the owners of four thousand theatres, who bought 1936-37 Paramount program, should decide not to buy 1937-38 program * * * it would cause Paramount a loss in revenue of between eight and ten million dollars. Thus, a 'sit-down strike' by four thousand theatres with respect to the 1937-38 Paramount program would deprive that company of its anticipated profits for the current year * * *." "But the real value of such concerted action on the part of the number of exhibitors would be the effect it would have upon the other major distributors."

He then asked: "Have you, the owners of four thousand theatres, the courage—the guts—to take the action—a 'sit-down strike' against Paramount * * *?"

The meeting then "was of the unanimous opinion that this campaign against Paramount shall be declared a 'Buyers' Strike,' or a 'Sit-Down Strike' of exhibitors against Paramount." Thereupon the exhibitors throughout the country were called upon to carry out the plan "as adopted by the present Conference."

The plan in part consisted of the refusal of all exhibitors throughout the United States to show Paramount pictures or to enter into 1937-38 contracts with Paramount during the period of the "strike" unless Paramount's terms were modified.

Mr. J. P. Wood of Columbus, Ohio, was then elected "as the clearing agency of this National Campaign, to whom all exhibitor organizations are to send full data as to the steps they adopt and the procedure which they take during the progress of this 'Strike.'"

On July 2, 1937, George P. Aarons, one of the defendants, and secretary of "United," who is a lawyer and who it appears was an active agent, sent out a letter to every exhibitor, sales manager and officer of producing companies and to the trade papers in Eastern Pennsylvania, New Jersey and Delaware, in which, after denouncing Paramount and calling a mass meeting of exhibitors at the Broadwood Hotel on July 8, 1937, among other things, said "Your organization has declared a strike against Paramount's 37-38 terms and urges you to delay buying or negotiating until we have obtained a revision of these terms * * * Your organization has voted to lawfully picket any theatre in the zone that buys Paramount pictures, features, shorts and newsreels, on and after August 1st * * * This strike is a part of the national strike! Don't fail us!" This letter, and much other material, if not all, that "United" put out were sent to other exhibitor organizations "all over the United States" and "also to Canada."

During July 1937 Aarons continued to send out pamphlets, post cards and letters not only to exhibitors and exhibitor organizations in New Jersey, Pennsylvania and Delaware—who were the plaintiff's only possible buyers of its product—but all over the entire United States and "to certain public officials, members of Congress, members of legislatures, to members of the judiciary," persuading exhibitors not to deal with the Paramount Company and threatening them if they did so. Such statements as the following were sent out:

"Any exhibitor who signs a contract in violation of the buying strike should be picketed, as well as any one who, without proper dispensation of the War Board, does not join in the August date strike."

"The U M P T O (United Motion Picture Theatre Owners) organization says be a man not a mouse. Fight this along the lines of campaign adopted by the elected War Board. Stick to your guns! Hold yourself in readiness for the date strike, the mass protest (if you want to stay in business) when advised by your organization."

"ALL EXHIBITORS VIOLATING THE STRIKE WILL BE PICKETED."

"ATTENDANCE AT THIS MEETING (August 2, 1937) IS COMPULSORY."

"On August 2nd, the elaborate picketing campaign goes into effect.

"This will include:

"1. PICKETING FROM THE SKY for the first time in the history of aviation.

"2. CRUISING TRUCKS both in Philadelphia and throughout the territory.

"3. CIRCULARIZING ALL TOWNS where exhibitors refuse to cooperate.

"4. TRAILERS ON 300 SCREENS.

"5. ADS IN THE NEWSPAPERS.

"6. CONTACTING of local labor unions.

"7. PICKETS IN FRONT OF THEATRES.

"8. **RADIO BROADCASTS.**

"A list of men who fail to cooperate in Paramount strike will be posted outside STRIKE HEADQUARTERS—301 N. 13th Street. YOU MUST NOT permit these misguided exhibitors, few in number, to threaten success of this protest against Paramount's insolent demands for gratis interest in your theatre, and their stubborn refusal to deliver pictures sold you * * * WE CANNOT TOLERATE STRIKE BREAKERS."

"The Independent exhibitors are on strike against theatres playing Paramount pictures because these theatres are UNFAIR to organized independent theatres. Ask Driver for free literature."

Post cards were sent out on the sides

of which was the picture of a truck to be used in picketing. Across one end of the card in front of the truck was the following: "U. M. P. T. O. E. Pa., S. N. J. and Del. 301 N. 13th St., Phila. Pa.

"This is the truck which will picket each theatre violating August Date Strike.

"Play no Paramount Pictures, Features, Shorts, News Reels Until Strike Is Settled! Geo. P. Aarons, Secretary."

On the side of the truck was a large poster or bill board containing among other things an inscription reading in part as follows:

"An appeal to the public conscience. Support our STRIKE against PARAMOUNT PICTURES," etc.

It is also to be noted as the then present object of the combination, the purpose to stop the interstate commerce of the plaintiff, that the Washington conference's unanimous declaration was:

"That all exhibitors throughout the United States refuse to play any Paramount pictures during the month of August, 1937, and for such longer period as the Conference may, by its future action, decide upon."

It is also noted that in this same report, under the head "the Punishment," this sinister statement is made:

"Dorothy Thompson in one of her recent articles attributes the following statement to Leon Trotsky—'We need only a handful of men who are sufficiently disciplined, and sufficiently *ruthless to accomplish* our purpose.' (Italics ours.) It might be well if the same technique were adopted by the four thousand theatres and applied to Paramount."

[*Picketing and coercive methods modified*]

Any sound interpretation of this evidence, if carried out, admittedly brings the action proposed by it within the inhibition of the Sherman Act, but since the present counsel, employed after the bill was filed, became connected with the case and guided the conduct of the appellees, defendants have changed their attitude and modified the methods by which they now propose to bring about the object of the combination of which they are a part. Mr. Aarons, secretary of "United," in cross-examination, said that:

"* * * on advice of counsel, the organization and the so-called War Board and the officers and members of the organization have no intention whatsoever to station pickets in front of theatres who play Paramount pictures during August, or of the theatres of any exhibitor who enters into a contract with Paramount for so-called '37-'38 product, but it is the intention of the organization to use this so-called truck to which reference has been made, but not to stop in front of theatres and remain, but to carry the message that the exhibitors feel that they have been unjustly dealt with by Paramount, and carry that message in a lawful manner direct to the public."

He further said that it was the intention of the appellees

"* * * to use the truck generally in cruising throughout the city with the message on side of the truck that is indicated, and it is not the intention, nor has it ever been the intention of the organization, or any members with whom I have spoken, to threaten, intimidate or coerce by any means whatsoever any exhibitor who plays Paramount pictures or who would enter into a contract with Paramount for the '37-'38 contract."

He further said:

"We plan to use lawful means of persuasion and inducement and to carry our message to other exhibitors and to the public as to the situation of the unfairness of Paramount which we believe to be unfair, * * * and also to the terms that have been indicated under which the exhibitor can and can only enter into for the '37-'38 product."

The change in the position of the appellees was stated by the learned trial judge in his opinion in the following language:

"Whatever was at first intended to be done, all purpose is now disclaimed to do more than themselves to refrain from all dealings with the plaintiff and by a recital of their believed grievances against the plaintiff, to persuade all other exhibitors to likewise refrain.

This leads to another anticipation of the discussion, by raising the question of whether refusing to have business dealings with the plaintiff is any trespass upon the legal rights or becomes such by being expanded into a conspiracy to induce or force others to refuse to have such dealings, and the further question of the venue jurisdiction of a court of the United States to determine such a controversy. The experienced counsel for the plaintiff asserts that an affirmative answer to these questions is supplied by the Sherman Anti-Trust Act and the supplements thereto. There is thus raised the sharply defined question presented in this cause."

In other words, it is the contention of the appellees that, without violating the law, they may now by "peaceful persuasion" effect the object of the combination and conspiracy originally formed and now existing.

[*Modified methods still a restraint of trade*]

Before discussing the legal questions involved arising from these adverse contentions, we commend present counsel for bringing about a change in the attitude of the appellees. There is no question that before that time they intended to picket theatres, station trucks in front of them, and to employ all their stated coercive measures necessary to prevent them from using Paramount films in their theatres, notwithstanding what they may now say. A fair and logical interpretation of the evidence forces this conclusion. But the fact remains that in spite of the frank and commendable assurance given by counsel to the Court, coercion effective to produce the result intended may result from other than physical force and what they originally intended to do by violent means, and what they now propose doing by "persuasion," could not be done without the interference and stoppage of the free flow of interstate commerce. The original and comprehensive plan of which they were a part was intended to bring about a boycott of Paramount by all the exhibitors throughout the United States which would result in a loss to Paramount "of between eight and ten million dollars," and that aim and purpose they now still seek to effect. This could be accomplished only by stopping the movement in interstate commerce of the products of Paramount, and this the appellees well knew and now intend. This has already been the immediate result of what they did, and this has had, and must have in the future, a direct effect upon the free flow of interstate commerce. The only way that Paramount has to dispose of its products to the trade throughout the United States is by interstate transportation. In this way the combination, composed of the appellees and others, thought that Paramount would make a profit of eight to ten million dollars during the current year of 1937-38. The direct and real object of the appellees was to secure by different and better terms their contracts with Paramount, but this they could not do except by stopping the flow of Paramount's products in interstate commerce.

There is no doubt that the appellees and their associates constituted a combination or conspiracy and that the accomplishment of their aim must be done by a method which restrains and dams back trade or commerce among the several states. Such a combination is declared by section 1 of the Sherman Anti-Trust Act to be illegal, and, under the provisions of Section 16 of the Clayton Act, any person or corporation aggrieved by its action may sue in any court of the United States having jurisdiction over the parties for the injunctive relief prayed for in the plaintiff's bill, which also seeks "such other, further and general relief as the nature of the case may require and the Court may deem proper."

[*Secondary boycott*]

The methods which the defendants proposed and used to effectuate their objects constitute a secondary boycott, for they are coercive and enlist the cooperation of others than themselves. While Mr. Aarons, one of the defendants and secretary of United, now disclaims any intention "to threaten, intimidate or coerce," or "to station pickets in front of theatres," yet he still says that it is their intention to use trucks to cruise throughout the territory, Southern New Jersey, Eastern Pennsylvania, and Delaware, on the sides of which are to be such statements: "An appeal to the public conscience. Support our STRIKE against PARAMOUNT PICTURES. Paramount's demands for higher film prices means:

1. Closing of hundreds of theatres.
2. Loss of jobs for countless ushers, cashiers, doormen—others.

Do not patronize any Theatre playing Paramount Pictures," and other such prejudicial and inflammatory statements. While the defendants now deny any intention of picketing in front of theatres or of stationing their trucks there, such intention has not been disclosed to the defendants generally and there has been no denial that they intend to picket from the sky, to circularize all towns, to have trailers on 300 screens, to have ads in newspapers, to contact and enlist the help of local labor unions, to engage in radio broadcasts.

While the defendants may call this "peaceful persuasion," as the Supreme Court said in the case of the *Eastern States Lumber Association v. United States,* 234 U. S. 600, 608, "he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers" who sold direct to the consumers and thus eliminated the retailer.

The same court in commenting upon this case in the case of *Duplex Co. v. Deering,* 254 U. S. 443, 464, said that by the circulation of this list of wholesalers among the retailers the "wholesale dealers were subjected to coercion merely through the circulation among retailers, who were members of the association."

[*Activities held joint, not individual*]

Of course, an individual may restrain

interstate commerce without coming within the inhibition of the statute. The Anti-Trust Act may forbid the commission of a certain action by a combination or conspiracy, but may not interfere with the same action when done solely by an individual. Congress intended by the anti-trust acts to prevent all combinations and conspiracies, whether composed of employees, employers, producers, users or consumers, from unreasonably restraining the free flow of interstate commerce.

It is true that a single individual may be and often is powerless in dealing with an employer or producer, but if the law prevents employers, firms and corporations from combining or conspiring in restraint of trade or commerce among the several states, individuals, without having to meet artificial conditions created by combinations, may effectively deal with individual employers or producers on the merits of any transaction. It has often been said that "competition is the life of trade." Congress in passing the anti-trust acts intended to free interstate commerce from the evils produced by combinations and conspiracies of all kinds. The question for the courts, however, is not economic, but wholly legal, to wit, the true interpretation of the law as enacted by Congress.

An effort was made at the trial to make it appear that the action taken at the meetings was individual and not joint or combined. This argument is based upon the fact that at the meetings each of the appellees when called upon "individually stated that they were not going to negotiate nor buy any Paramount pictures and play any feature, shorts or news during August," and this conclusion each appellee indicated "either by making a short speech or by raising his hand or nodding his head, or some motion of that kind." But the action taken in this case was that of the combination. All the conspirators were in accord. The secretary of "United" constantly sent out literature to every exhibitor in Eastern Pennsylvania, Southern New Jersey and Delaware and elsewhere containing such statements as the following: "Your organization has voted to lawfully picket any theatre in the zone that buys Paramount at this time or plays any Paramount pictures, features, shorts or news reels, on and after August 1st * * * THIS STRIKE IS A PART OF THE NATIONAL STRIKE! DON'T FAIL US." The evidence, when fairly construed, makes it plain that the appellees had formed a combination or conspiracy and were acting together as a unit and are still so acting.

[*Peaceful persuasion*]

The Supreme Court, in construing the anti-trust act, made it clear, we think, that combinations or conspiracies constituting a secondary boycott, as we have here, in restraint of trade among the states, are illegal and may be enjoined even though the restraint is produced by means of peaceful persuasion. In *Eastern States v. United States, supra,* there was no open threat or express intimidation. Certain wholesale lumber dealers sold lumber directly to consumers and thereby eliminated retail dealers in the immediate territory where such sales were made. Thereupon certain retail dealers in New York, New Jersey, Pennsylvania, Connecticut, Massachusetts, Rhode Island, Maryland and the District of Columbia, got together and sent the following report to the retail dealers:

"You are reminded that it is because you are members of our association and have an interest in common with your fellow members in the information contained in this statement that they communicate it to you; and that they communicate it to you in strictest confidence and with the understanding that you are to receive it and treat it in the same way.

"The following are reported as having solicited, quoted or having sold direct to the consumers:

(Here follows a list of the names and addresses of the various wholesale dealers).

"Members upon learning of any instance of persons soliciting, quoting, or selling direct to consumers, should at once report the same, and in so doing should, if possible, supply the following information:

"The number and initials of car.

"The name of consumer to whom the car is consigned.

"The initials or name of shipper.

"The date of arrival of car.

"The place of delivery.

"The point of origin."

Here there was no threat, not even voiced persuasion, but only the circulation among members of the association of confidential information. The intention, of course, was to have the retailers in the future refrain from dealing with the listed wholesalers. As stated by the syllabus, the law which that declares is that "while a retail dealer may unquestionably stop dealing with a wholesaler for any reason sufficient to himself, he and other dealers may not combine and agree that none of them will deal with such wholesaler without, in case interstate commerce is involved violating the Sherman law."

So also the Supreme Court in the case of *Lawlor v. Loewe,* 235 U. S. 522, 534, commenting on the case of *Eastern States Retail Lumber Dealers' Association,* said:

"That case established that, irrespective of compulsion or even agreement to ob-

serve its intimation, the circulation of a list of 'unfair dealers,' manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers combined with a view to joint action and in anticipation of such reports, is within the prohibition of the Sherman Act if it is intended to restrain and restrains commerce among the States."

The circulation of a list may be styled "peaceful persuasion," but it is usually a potent and effective, coercive agent to effectuate a boycott. The sending out of various statements by the defendants in the case at bar was just as much a coercion as was the circulation of the list of wholesalers in the *Eastern States Retail Lumber Dealers'* case. Irrespective of compulsion or physical violence, the circulation of a list of "unfair dealers" or the dissemination of any other prejudicial or coercive information by a combination which unreasonably obstructs the free flow of interstate commerce is forbidden by the Sherman Act.

In the case of *Duplex Co. v. Deering,* 254 U. S. 443, 467, 468, the Supreme Court said: "It is settled by these decisions (*Loewe v. Lawlor,* 208 U. S. 274; *Eastern States Retail Lumber Dealers' Assoc. v. United States,* 234 U. S. 600; *Lawlor v. Loewe,* 235 U. S. 522) that such a restraint produced by *peaceable persuasion* is as much within the prohibition (of the Sherman Act) as one accomplished by force or threats of force; and is not to be justified by the fact that the participants in the combination or conspiracy may show some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute."

In *Arkansas Wholesale Grocers' Association v. Federal Trade Commission,* 18 F. (2d) 866, 872, Judge Van Valkenburgh, speaking for the Circuit Court of Appeals for the Eighth Circuit, said: "It is next insisted that the facts in evidence do not sustain the finding, that petitioners resorted merely to persuasion and that this they had a right to do provided that persuasion was peaceful and unattended by coercion or intimidation. The controlling decisions are to the contrary as applied to the facts in this case. *Eastern States Lumber Assoc. v. United States,* 234 U. S. 600; *Lawlor v. Loewe,* 235 U. S. 522, 554."

[*Violation of Sherman Act found*]

The evidence in the case at bar conclusively shows that the defendants violated the Sherman Anti-Trust Act by disseminating prejudicial, threatening and coercive literature and by appealing to the public for help in their fight. The plaintiff is entitled to injunctive relief.

[*Decree dismissing bill for injunction reversed*]

So holding, the decree of the court below is reversed and the record remanded, with directions to reinstate the bill and to proceed in due course in accordance with this opinion.

[¶ 55,174] **Federal Trade Commission v. A. McLean & Son, a Corporation, M. J. Holloway & Company, a Corporation.**

United States Circuit Court of Appeals for the Seventh Circuit. February 8, 1938.

Petitions for rules to show cause why respondents should not be adjudged in contempt.

In contempt proceedings for violation of a decree enforcing a Federal Trade Commission order involving candy lotteries, both respondent and the court are entitled to know whether the proceedings are civil or criminal in nature. By filing its petitions as ancillary to the original proceedings, the Commission indicated that it sought relief in civil proceedings, and it may not subsequently continue prosecution of the proceedings as in criminal contempt.

Before Evans and Sparks, Circuit Judges, and Lindley, District Judge.

[*Facts*]

Sparks, Circuit Judge. The Federal Trade Commission has filed a petition for a rule against McLean and Son, a corporation, and one against M. J. Holloway and Company, a corporation, to show cause why each should not be adjudged in contempt of this court for violation of a decree entered by this court July 1, 1936. That decree was entered pursuant to application of the Commission for enforcement of its order against both respondents to cease and desist from certain practices theretofore found by the Commission to constitute

unfair and forbidden methods of competition. See *Federal Trade Commission v. McLean and Son*, 84 F. (2d) 910.

[*Petition*]

The petition presented in each case was filed under the same title and number as the original proceeding, and was filed as a part of that proceeding. The prayer of each petition is as follows:

"Wherefore, Federal Trade Commission prays that said (respondent) be ordered to show cause why it should not be adjudged in contempt of this Court, in having so disobeyed said decree of this Court so made and entered on the first day of July, 1936."

[*Motions to dismiss*]

Respondents filed answers in the nature of motions, to dismiss the petitions for rule to show cause on the grounds that:

1. The object of the petitions for contempt is necessarily punitive and not compensatory, and accordingly should have been presented as an independent petition and not as supplemental proceedings in the original cause.
2. The petitions set forth only the pleader's conclusions in support of the charge, and not sufficient allegations of fact as to the subject matter alleged to violate the court's order.
3. The verification of the petitions is insufficient, not being by persons having personal knowledge of the facts, and purporting to be upon affiant's belief.
4. There was no contempt of the court's order, as indicated by certain facts set forth by respondents.

[*Civil contempt*]

In reply to respondents' motions to dismiss, petitioner, the Commission, stated that its proceeding was one for civil contempt, and that it was a part of a proceeding based upon section 5 of the Federal Trade Commission Act (15 U. S. C. A. section 45) which provides for a civil proceeding only and for a decree in the nature of an injunction; that it was not punitive; that it was wholly remedial, being prosecuted in the public interest; and that it was ancillary to the main case and in aid of the enforcement of the decree of this court. It further urged that the assessment of a fine would not indicate that the proceeding was criminal since a fine is as much an incident of civil contempt as of criminal, the difference between the two being that in civil contempt the fine must bear a relation to the injury sustained by the complaining party. In its petitions for rules to show cause, the Commission made no allegation of injury to itself and no request for fines payable to it in compensation for expense incurred as a result of respondents' alleged contempts. However, in its brief in opposition to the motions to dismiss, to show that it was entitled to such fines, it made the following statement:

"The Government, under the decree of this Court, represents the interests of the Government and of the public. The Government has borne the expense of a nation-wide investigation to ascertain the facts which constitute the company's violations of the decree herein, and it pays all salaries and other expenses incident to the prosecution of this proceeding. The public is, as a matter of law, injured by such violations. The Government is entitled to a fine which bears a reasonable relation to all these injuries. The amount may not be calculated with accuracy, but the Court may reasonably approximate it in fixing a fine in a substantial sum.

"The cash outlay required of the Government in its investigations and in the prosecution of the pending petition may not be ascertained with certainty; but it manifestly is a substantial sum.

"That violations of the decree injure the public may not be doubted or denied. Respondent's total sales are so great that such injuries to the public, when expressed in dollars, must be a substantial sum. A proceeding in civil contempt is ancillary to the case in which the decree was entered. It depends upon and is co-existent with the right to enforce such decree."

The Commission thus asserted its right, as a party injured by violation of a decree in its favor, to the remedy or relief afforded by means of civil contempt proceedings. As we studied the questions presented by the petitions and briefs filed prior to the hearing, and by the oral argument on hearing of the motions to dismiss, we concluded that the Commission was not entitled to the relief sought, by the means sought. It appeared that the question of the right of an administrative board, an agency of the Government, created principally for the purpose of regulating competition, to invoke rights customarily accorded to private litigants, had not previously been raised nor settled. Since the procedure followed was that employed in proceedings for civil contempt, according to the rules laid down in *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, and the Commission treated it as such in its petition and briefs, we concluded that the first question before us was whether the Commission was entitled to institute proceedings for civil contempt as a part of its civil proceedings against the respondents which had culminated in an order of this court to enforce the cease and desist order of the Commission. Having found that the protection of private rights was emphasized throughout the cases relating to contempt proceedings as their

principal purpose,[1] we became convinced that the Commission, an agency of the Government, representing no private interest of its own, but acting solely in the public interest, had no such standing as a private party that it could utilize procedure intended to safeguard the rights and interests of private parties. That the Commission does act in the public interest alone we think there can be no question. Section 5 of the Act creating it so provides (15 U. S. C. A. section 45). See also *Federal Trade Commission v. Klesner,* 280 U. S. 19; *Flynn and Emrich Co. v. Federal Trade Commission,* 52 F. (2d) 836.

[*Criminal contempt*]

The Commission now appears to acquiesce in the conclusion that civil contempt proceedings are not appropriate to the proceeding here involved, as indicated by a supplemental brief filed herein, seventeen days after hearing of the cause, wherein it urges its right to prosecute proceedings for criminal contempt in its own name. It now states:

"Counsel for the Commission respectfully submit that the petition herein presents an element of civil contempt, although it also presents a larger and more important element of criminal contempt—a criminal element that goes to the inherent power of this Court to vindicate its own dignity and rightful power * * * The only practical change will be that the fine will be punitive, and there may be fine or imprisonment, or both, with no limits except the sound discretion of this Court."

In support of its contention that the court should now consider its petition as one for criminal contempt, the Commission relies upon four cases, each of which was prosecuted by it in its own name: *In the Matter of Leavitt,* reported in Statutes and Decisions pertaining to the Federal Trade Commission, page 582; a second proceeding against the same party, not reported; *Federal Trade Commission v. Hoboken White Lead and Color Works,* 67 F. (2d) 551; and *Federal Trade Commission v. Pacific States Paper Trade Ass'n.,* 88 F. (2d) 1009. We note that the *Hoboken Works* case does not appear to have been prosecuted as a part of the original proceedings. No docket number is given in the published report. The question of the form of the proceedings does not appear to have been raised, and the court treated it as a proceeding for criminal contempt, and imposed a punitive fine. In the *Pacific States Association* case, it appears that a separate proceeding was had, as indicated by the fact that the original order was entered in cause No. 4217, while the fines for contempt were imposed in cause No. 8227. We consider this fact of importance for the reason that it has been generally held that the party against whom such proceedings are attempted to be had is entitled to know from the outset whether the proceedings against him are civil or criminal in their nature. The Court of Appeals for the Second Circuit discussed this in *McCann v. N. Y. Stock Exchange,* 80 F. (2d) 211, an appeal from an order fining appellant for contempt of court. In reversing the order, the court said:

"* * * Nor can we affirm it as punishment for a criminal contempt. The lower federal courts have not been very clear about the proper practice in such applications since *Gompers v. Buck's Stove and Range Co.,* 221 U. S. 418. It has been their custom to determine their character, whether civil or criminal, by resort to a number of elements, some purely formal, some substantial; such as the title of the proceeding, whether costs were demanded, whether the parties were examined, who conducted the prosecution. * * * The result of all this has been most unsatisfactory and has defeated its own purpose, which was to advise the respondent at the outset of the nature of the application * * * Criminal prosecutions, that is, those which result in a punishment, vindictive as opposed to remedial, are prosecuted either by the United States or by the court to assert its authority * * * But the judge may prefer to use the attorney of a party, who will indeed ordinarily be his only means of information when the contempt is not in his presence. There is no reason why he should not do so, and every reason why he should; but obviously the situation may in that event be equivocal, for the respondent will often find it hard to tell whether the prosecution is not a remedial move in the suit, undertaken on behalf of the client. This can be made plain if the judge enters an order *in limine,* directing the attorney to prosecute the respondent criminally on behalf of the court, and if the papers supporting the process contain a copy of this order or allege its contents correctly. We think that unless this is done the

[1] "The courts of the United States recognize that the process of contempt has two distinct aspects—one criminal, to punish disobedience; and the other remedial and civil to enforce a decree of the court, and to compensate private persons." *Kreplik v. Couch Patents Co.,* 190 Fed. 565 at 569.

"An essential element of proceedings in the nature of civil contempt is that some private interest shall appear." *State v. Verage,* 177 Wis. 295 at 317.

"The punishment is to secure to the adverse party the right which the court has awarded to him." *Bessette v. Conkey,* 194 U. S. 324.

"Substantial benefit to a private party preponderating over that to the government is the distinguishing characteristic of a civil contempt." *Holloway v. Peoples' Water Co.,* 100 Kan. 414.

See also *In re Nevitt,* 117 Fed. 448; *Merchants' Stock and Grain Co. v. Board of Trade,* 187 Fed. 398.

prosecution must be deemed to be civil and will support no other than a remedial punishment."

[*Right of respondent and Court to know nature of proceedings*]

The Commission apparently has in mind this right of the respondents to be apprised of the nature of the proceedings against them when it states: "A technical change of the case upon the docket of this Court is all the respondent might reasonably ask, and it would be of no advantage to respondent. The parties would remain the same and the subject matter and rights and liabilities of the parties would remain the same." We cannot agree with this contention. There may be a very considerable difference between the incidents resultant upon a finding of contempt in a civil proceeding from those of a criminal proceeding. The Supreme Court said, in *U. S. v. Goldman*, 277 U. S. 229, "The only substantial difference between such a proceeding for criminal contempt and a criminal prosecution is that in the one the act complained of is in violation of a decree and in the other the violation of a law * * * 'These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech * * *'"

We think that not only the respondent, but also the court is entitled to know from the original petition and briefs in support thereof just what theory the petitioner relies upon for the relief sought in his petition. By filing the petitions here involved as ancillary to the original proceedings, the Commission indicated that it sought relief in civil proceedings. Thereafter when respondents filed their motions to dismiss, it filed its brief in support of that position, claiming relief as an injured party, to be reimbursed for costs incurred as a result of the violation of the order, stating, "This is a proceeding for 'civil contempt.' * * * It is not punitive. It is wholly remedial * * * (It) is ancillary to the main case and is in aid of the enforcement of the decree of this Court made and entered therein." We are convinced that the Commission has no right now to demand permission to continue prosecution of the proceedings as in criminal contempt. Nor do the facts disclosed by the petitions for rule to show cause, and the suggestions filed in opposition thereto, show such deliberate intent to violate the order of the court that we feel impelled to prosecute a proceeding on our own motion to punish respondents for contempt of our order.

[*Petition dismissed*]

Respondents' motions to dismiss the petitions for rules to show cause why they should not be held in contempt for violations of the order of this court are granted, and the petitions are hereby dismissed.

[¶ 55,175] Federal Trade Commission v. Fairyfoot Products Company.

United States Circuit Court of Appeals, Seventh Circuit. February 11, 1938.

Petition for rule to show cause why respondent should not be adjudged in contempt.

General affirmance of a cease and desist order of the Federal Trade Commission by a Circuit Court of Appeals is not equivalent to an enforcement decree by the court embodying the prohibitions of the Commission's order, and violation of the decree does not make the respondent subject to a rule to show cause.

Before EVANS, MAJOR, and TREANOR, Circuit Judges.

TREANOR, Circuit Judge. In Cause No. 5426, entitled *Fairyfoot Products Company, a corporation, Petitioner, v. Federal Trade Commission, Respondent,* the petitioner sought a review of a "cease and desist" order of the Federal Trade Commission. This Court concluded that the "cease and desist" order was a proper one and stated its decision in the following language: "The order of the Commission is affirmed."[1]

The Federal Trade Commission now files its petition praying that a rule issue against the Fairyfoot Products Company to show cause why it should not be adjudged in contempt for an alleged violation of the aforesaid order or decree.

The Fairyfoot Products Company, the respondent in the instant proceedings, has filed its motion to dismiss the petition for a rule to show cause and in support of its motion to dismiss urges the following grounds:

"(1) It is not shown or claimed that any order or decree of this honorable court has been violated.

[1] *Fairyfoot Products Co. v. Federal Trade Commission,* (C. C. A. 7th Circuit) 80 Fed. (2d) 684.

"(2) The final order or decree entered by this court on December 23, 1935, was merely one of affirmance and not an order or decree of enforcement, and that affirmance was in accord with the opinion of this court, (*Fairyfoot Products Co. v. Federal Trade Commission*, 80 Fed. (2d) 684, at 687)."

[*Effect of Court orders*]

It is elementary that a court is without power to adjudge one to be in contempt for violation of a court order or decree unless the alleged contemnor has violated a judicial decree, or order, which by its coercive force, acting directly upon the person, lawfully restrains the alleged contemnor from doing the acts complained of.

Under the terms of the Federal Trade Commission Act the Circuit Court of Appeals possesses a twofold function. At the request of one against whom the "cease and desist" order has been directed it has the power to review the proceedings of the Commission to determine whether the order should be affirmed, modified, or set aside. The effect of affirmance is to adjudicate the validity of the order of the Commission and to decree its effectiveness in the sense that disobedience of it by the one against whom it is directed would constitute an unlawful act. But it does not follow that the unlawful act of disobedience can be made the basis of a contempt proceeding in this Court, even though the order of affirmance of this Court, in a sense, gives legal vitality to the order of the Federal Trade Commission. For the lawfulness of the order of the Commission derives ultimately from the Act of Congress and not from this Court's adjudication of its lawfulness.

Also by the terms of the Federal Trade Commission Act the Circuit Court of Appeals has the power to enforce valid orders of the Commission. In respect to this power of enforcement the act does not purport to grant any new power to the Circuit Court of Appeals, but assumes the existence of the equity power of coercion and obviously contemplates the use of this power. Consequently, federal courts have concluded that the decree of enforcement "should be along the lines adopted by courts of equity generally in hearing suits for injunction."[2]

The language of authorization to the Commission to apply for enforcement of its order does not prescribe or authorize any particular type of enforcement procedure, and apparently it was the intention of Congress that the Circuit Court of Appeals should utilize the usual practice adopted by courts of equity in hearing suits for injunction and formulating decrees therein.

Different Circuit Courts of Appeals have had to decide what method of procedure should be followed after the Federal Trade Commission has entered an order with which it alleges the respondent is not complying; and when the respondent has had no opportunity to present evidence that it is not violating the order, and when no proof has been taken before the Commission on that question.

In *Federal Trade Commission v. Standard Education Society*,[3] the following facts appeared: The Federal Trade Commission after duly entering an order "to cease and desist" filed its petition in the Circuit Court of Appeals, Seventh Circuit, for an order of enforcement of the previously entered order. In the petition there was an allegation that the respondent had failed and neglected to obey the "cease and desist" order. The respondent answered with a denial that it had failed and neglected to obey the order and the petitioner moved to strike out all of the answer relating to such denial. It was the opinion of this Court that it could not act upon the merits of the application for the enforcement of the Commission's order until it should be established as a fact that the respondent had failed or neglected "to obey such order of the Commission."[4] Consequently, the motion to strike out was overruled for the reason that the answer of denial of failure and neglect to obey the Commission's order made a proper issue of fact. Yet it is clear from the provisions of Section 5 of the Federal Trade Commission Act that the question of "failure or neglect to obey the order of the Commission" will not be an issue in a proceeding in this Court based upon a petition by an aggrieved party to set aside an order to "cease and desist." In fact in the original proceedings in cause No. 5426 this Court entered an order of affirmance of the Commission's order although there was no suggestion of

[2] *L. B. Silver Co. v. Federal Trade Commission* (C. C. A. 6) 292 Fed. 752; *Butterick Co. et al. v. Federal Trade Commission*, 4 Fed. (2d) 910 (certiorari denied 267 U. S. 602).

[3] 14 Fed. (2d) 947 (C. C. A. 7); See also *Federal Trade Commission v. Balme* (C. C. A. 2) 23 Fed. (2d) 615. *Federal Trade Commission v. Baltimore Paint & Color Works* (C. C. A. 4) 41 Fed. (2d) 474.

[4] "Enforcement of orders. If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order * * *" Federal Trade Commission Act, Sec. 5; 15 U. S. C. A. Sec. 45, paragraph 5.

any violation of the "cease and desist" order, and when it appeared that the petitioner in fact had desisted from the objectionable practices long prior to the issuance of the "cease and desist" order.

The necessary conclusion from the decisions of this Circuit, and we believe from a proper construction of Section 5, is that a general order of affirmance is not equivalent to a decree of enforcement; and that a decree of enforcement should be of the general nature and form of a decree of injunction, definitely fixing the duties of the party against whom the "cease and desist" order has been issued.

Nothing that has been said in this opinion is intended to question, or restrict, the wide discretion of the Circuit Court of Appeals to determine in one proceeding the various questions which Section 5 authorizes the aggrieved party and the Commission to present to the Circuit Court of Appeals.

In *Q. R. S. Music Co. v. Federal Trade Commission*,[5] the petitioner asked this Court to set aside an order of the Federal Trade Commission. The Federal Trade Commission asked for an order of enforcement. This Court disposed of all the issues presented and made the following order: "Petitioner's petition is denied. The application of respondent for an enforcement order is granted. The clerk will enter an order identical with the one entered by the commission." The legal effect of denial of petitioner's petition was to affirm the order of the Commission. This Court did not consider such affirmance the equivalent of an enforcement decree, but, on the contrary, felt that it was necessary not only to formally grant the application for an enforcement order, but to specifically direct the clerk to enter an original order of this Court identical with the one entered by the Commission.

We conclude that the entry of general affirmance by this Court in Cause No. 5426 was not in legal effect an enforcement decree of this Court embodying the prohibitions of the "cease and desist" order of the Commission and enjoining the petitioner from violating the injunctive order of this Court.

[*Petition for rule denied*]

The motion of the respondent herein, Fairyfoot Products Company, to dismiss the petition of the Federal Trade Commission for rule to show cause is sustained, and the petition is dismissed.

[¶ 55,176] E. A. Lynch, as Trustee in Bankruptcy for Jackson Bell Co., Ltd., v. The Magnavox Company, et al.

United States Circuit Court of Appeals, Ninth Circuit. Filed February 7, 1938.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

An agreement to pool patent rights and extend cross licenses to the parties to the agreement is an attempt to create a monopoly by means of conspiracy, and the agreement, being intended to impose unreasonable restraint, is unlawful under the Sherman Anti-Trust Act even though the means used are in themselves lawful.

Mathews, C. J., dissenting, held that the allegations in the complaint were insufficient to show an unlawful conspiracy.

Before GARRECHT, MATHEWS and HANEY, Circuit Judges.

[*Counsel*]

John H. Klenke of Los Angeles, Cal., for appellant.
Charles A. Beardsley and M. W. Dobrzensky, both of Oakland, Cal., for appellees.

[*Facts*]

HANEY, Circuit Judge.—Appellant brought an action to recover treble damages from appellees for the latter's alleged violations of the Sherman Act. Appellees demurred to the second amended "Bill of Complaint," which demurrer was sustained, and after appellant elected not to amend, judgment of dismissal was entered. This appeal followed.

It appears from the record that prior to the filing of the complaint in question, a demurrer to a first amended complaint had been sustained, and leave granted to appellant to amend within twenty days. Thereafter a "Second Amended Bill of

[5] 12 Fed. (2d) 730 (C. C. A. 7).

Complaint," hereinafter called the complaint, was filed.

Appellant, as trustee in bankruptcy of Jackson Bell Co., Ltd., a California corporation, hereinafter called the bankrupt, filed the complaint against eight defendants. The defendants were: The Magnavox Company, an Arizona corporation, having its principal place of business in Fort Wayne, Indiana, hereinafter referred to as Magnavox; one O'Connor, who was president of Magnavox; Jensen Radio Manufacturing Company, a Nevada corporation, having its principal place of business in Chicago, Illinois, hereinafter referred to as Jensen; one Jensen, who was president of the corporation just mentioned; Utah Radio Products Company, an Illinois corporation, having its principal place of business in Chicago, Illinois, hereinafter referred to as Utah; one Caswell, who was president of Utah; Lektophone Corporation, a Delaware corporation, having its principal office in New York City, hereinafter referred to as Lektophone; and one Winship, who was Secretary of Lektophone. Appellees Magnavox and Jensen were the only defendants who appeared in the action. Appellant in his brief states that they were the only defendants who were served with process.

[*Allegations of conspiracy*]

With respect to the formation of the plan, scheme or conspiracy, the complaint alleges on information and belief

"* * * that in, about or between the months of May and September, 1932, the said date being at this time unknown to plaintiff, but known to defendants, the defendants herein, jointly and severally, each with the other, and one with the other, entered into and consummated a plan, scheme or conspiracy * * * That pursuant to said plan, scheme or conspiracy and in order to effect the purposes thereof, the defendants herein, and each of them, did jointly and severally, enter into a plan, scheme or combination, in restraint of trade * * *"

A later paragraph in the complaint begins as follows:

"Plaintiff is informed and believes and therefore alleges, that in, about or during the months of May and June, 1932, and at or about the time the said combination and pooling of patent and patent rights was agreed upon * * *"

With respect to the purposes of the plan, scheme or conspiracy, the following allegations are pertinent:

"* * * to effect, or attempt to effect a monopoly, in the manufacture, sale and distribution of radio loud speakers in inter-state commerce throughout the United States of America, as well as elsewhere and to attempt to control and increase the price thereof, and particularly with radio receiving set manufacturers located throughout and in the several states of the United States of America * * *"

The complaint also alleged that Magnavox, Jensen and Utah manufactured loud speakers, and shipped them from the factories located in Chicago, Illinois and Fort Wayne, Indiana to their agents and representatives in Los Angeles; that orders for such loud speakers were either filled from the stock in Los Angeles or were shipped directly to the purchasers from the factories mentioned. It was also alleged that bankrupt shipped its products by various common carriers, to buyers located "throughout and in the several states of the United States and in foreign countries."

[*Operation of the conspiracy*]

The plan, scheme or conspiracy was to be carried out, it is alleged, in the following manner: (1) Utah, Jensen, Magnavox and Lektophone, each possessed patent or patent rights, pooled them and extended cross-licenses to each other; (2) "under threat of patent litigation of all asserted patent rights of all of the parties to the pool and combination, to force radio receiving set manufacturers to discontinue the purchase of radio loud speakers from any one other than the members of the said pool, or radio loud speaker manufacturers having a sub-license, under the patents of the pool, and to thereby increase, maintain and control the price that radio receiving set manufacturers would be compelled to pay for radio loud speakers necessarily used in the manufacture and sale of their radio receiving sets, and purchased by them, in interstate commerce, from said other manufacturers of loud speakers"; (3) "under threat of patent litigation of all asserted patent rights of all of the parties to the pool and combination, to force legitimate manufacturers of loud speakers not members of the said pool, or licensed thereunder, to discontinue the manufacture and sale thereof in interstate commerce."

The last mentioned detail was elaborated upon and alleged differently, to be: under threat of patent litigation to force loud speaker manufacturers (other than defendants) to "acquire a license under the alleged patents of the pool on exorbitant, unreasonable and extortionate terms, and thereby increase the ultimate cost of radio loud speakers to the users and consumers thereof throughout the United States of America, and particularly radio receiving set manufacturers using the same in interstate commerce, and so increase the selling price of such speakers to consumers above the selling price of defendants' loud speakers and thereby cause competitive or other

loud speakers manufacturers to be unable to sell their products in interstate commerce in competition with defendants and be thereby compelled to retire from business."

Other details of the plan, scheme or conspiracy were alleged to be: loud speaker manufacturers, who did not obtain sublicenses from defendants, which could be acquired only "at excessive and unreasonable license fees, to the pecuniary benefit, advantage and gain of the defendants," were to be forced by a "ruinous commercial campaign" which "was not to be waged by direct action against the manufacturers of radio loud speakers for alleged infringement by them of asserted patent or patent rights, but by a campaign of intimidation and harassment of the customers and users of the products of such independent, non-member, non-license[d] loud speaker manufacturers."

The campaign was to be waged in the following manner: (a) by a member of the pool who would institute in a specified geographical area, an infringement suit against the "leading, or 'key' accounts, customers and retail outlets of radio receiving set manufacturers using, incorporating or embodying in their radio receiving sets" loud speakers manufactured by manufacturers, other than defendants, specifying therein the "trade name or names" of the alleged infringing device; (b) by another member of the combination, who would, simultaneously or immediately thereafter, institute infringement suits "against the same or different customers in the same or different localities"; (c) by pursuing "the same tactics in another geographical territory in which a sufficient number of large or 'key' accounts of such manufacturers resided, or had their place of business"; (d) by "waging a campaign of intimidation and harassment by word of mouth, or in writing" to the retail outlets, calling attention to the expense, inconvenience and annoyance other customers were being or would be subjected to because of the infringement suits, and threatening to sue such retail outlets for infringement, designating the trade name of the alleged infringing loud speaker used.

There are allegations concerning execution of the plan, scheme or conspiracy. It is alleged that between May 1, 1932 and September 1, 1932, the combination was consummated, the defendants granting cross-licenses to each other; that Lektophone and Utah between October 10, 1932 and October 25, 1932, filed in the United States District Court for the Southern District of New York sixteen suits and filed in the United States District Court for the Eastern District of New York thirteen suits, against retail outlets for radio sets which used loud speakers made by manufacturers other than defendants, alleging infringement of Farrand patent, No. 1,855,168; that between October 13, 1932 and October 20, 1932, Magnavox filed twenty-six or more similar suits against the same retail outlets in the same districts, alleging infringement of Metcalf patent No. 1,881,324.

Other acts done in execution of the plan, scheme or conspiracy were alleged to be: that Lektophone, on September 2, 1932, mailed or caused to be mailed "to the Pacific Coast trade generally" letters threatening institution of infringement suits; that Utah on September 13, 1932, both Lektophone and Utah, on November 10, 1932, Jensen on September 13, 1932, and Magnavox on September 13, 1932, on October 12, 1932, on November 16, 1932 and on November 29, 1932, mailed or caused to be mailed letters "to the Pacific Coast trade generally, who had" theretofore "received * * * letters mailed, or caused to be mailed by defendant, Lektophone" containing threats of institution of infringement suits. It is further alleged that Magnavox, between November 10, 1932 and November 29, 1932, and Lektophone and Utah, on November 10, 1932, wrote and mailed letters "specifically addressed to each and all of the largest, most desirable 'key' accounts, sellers, buyers and users of the radio receiving sets manufactured, sold and distributed by the" bankrupt, "which said accounts were located in a specific geographic area comprising the cities of Los Angeles, San Francisco and Oakland, California"; that said letters stated that the loud speakers used by the bankrupt infringed patents, hereinbefore mentioned; that the use and sale of the products manufactured by bankrupt must be discontinued; and that the "key" accounts and retailers must account for damages.

[*The results of the plan*]

The direct result of the execution of the plan, scheme or conspiracy was alleged to be that the "retail radio dealers, customers and merchants" of bankrupt "immediately cancelled, or caused to be cancelled, or reduced in number and amounts, orders for radio receiving sets which had theretofore been placed with" the bankrupt, "and refused to continue to buy from" the bankrupt "its products, unless equipped with the radio loud speakers manufactured and sold by the defendants"; that by reason thereof bankrupt's business was destroyed, and bankrupt was compelled to go into equity receivership, on December 2, 1932, and was adjudged a bankrupt on February 13, 1933.

It was further alleged that the infringement suits filed, and the letters written and

mailed by defendants "were not made, done, suffered to be done or committed in good faith, or in an honest belief by defendants as to the validity of" the Farrand and Metcalf patents but were overt acts committed by defendants "to effect the purposes of the said plan, scheme and conspiracy"; that said patents were invalid because of previous patents and printed publications. There is also an allegation as follows:

"* * * That the said, The Rola Company, was, and still is one of the leading loud speaker manufacturers, and was and still is an active competitor of the defendants herein, in the manufacture, sale and distribution of radio loud speakers to the wholesale as well as retail trade."

The complaint demanded judgment for damages in the sum of $1,000,000.00, and for attorney's fees in the sum of $100,000.00. A demurrer filed by appellees was sustained on July 7, 1936. Appellant declined to plead further, and on November 16, 1936, a judgment of dismissal was entered. This appeal followed.

In *Hicks v. Bekins Moving & Storage Co.* (CCA 9), 87 F. (2d) 583, 586, this court said that "to show a violation of the Sherman Anti-Trust Act, mere statements of legal conclusions are not sufficient * * *"

[*Elements of conspiracy under the Act*]

Section 1 of the act (15 USCA § 1) provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor * * *"

Section 2 of the act (15 USCA § 2) provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *"

This action was brought under section 4 of the act of October 15, 1914 (15 USCA § 15), which provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The existing confusion as to the distinction between § 1 and 2 of the act, and what the elements under each section are, would seem to invite and justify more specific statements from the Supreme Court with respect thereto. Broadly speaking the complaint is sufficient if it pleads a violation of the act by appellees and an injury to bankrupt's business or property by reason thereof. The injury is pleaded and no question is raised in regard to it. Many contentions are made respecting the question whether or not a violation of the act by appellees is pleaded.

Although appellant contends that a violation of § 1 is pleaded, it is evident that no monopoly as a result of the conspiracy is pleaded, for there is nothing alleged to show substantial dominance or exclusion, or in other words a realized monopoly, which is necessary under that section. *United States v. United States Steel Corporation,* 251 U. S. 417, 444.

We believe no offense is pleaded within the words of § 2, that "Every person who shall monopolize * * *" The word "monopolize" as there used, apparently means the acquisition of power to fix prices, limit production or deteriorate quality. *Standard Oil Co. v. United States,* 221 U. S. 1, 52, 53, 61. It has been suggested that the phrase quoted, means monopolizing "by any means other than by contracts or combinations or conspiracies * * *" Thornton, Combinations In Restraint of Trade 375, § 183. Inasmuch as the language used in *Standard Oil Co. v. United States, supra,* 61, is broad enough to cover any act, a monopolization by conspiracy apparently would be prohibited by both § 1 and § 2. In either case, monopolization must be had, and no allegations here show that fact.

For a like reason, no offense has been pleaded within the phrase "Every person who shall * * * combine or conspire with any person or persons, to monopolize * * *"

Is there an offense pleaded within the phrase "Every person who shall * * * attempt to monopolize * * * any part of the trade or commerce among the several States, or with foreign nations * * *"? In *Standard Oil Co. v. United States, supra,* 61, it is said that "the words 'to monopolize' and 'monopolize' as used in the section reach every act bringing about the prohibited results." We believe, therefore, that an attempt to monopolize may be made by means of a conspiracy as well as by any other act, and that the allegations here in question were intended to plead an attempt to monopolize by means of a conspiracy.

Appellees contend that there are no allegations of the formation of a plan, scheme or conspiracy other than conclusions, and that subsequent allegations showing the purpose do not allege formation but rest on the assumption that one was in fact formed. In *Marino v. United States* (CCA 9), 91 F. (2d) 691, 693 (cert.

den., January 3, 1938, *Gullo v. United States*), it was said that a conspiracy is "a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means." See cases there cited and *Truax v. Corrigan*, 257 U. S. 312, 327.

[*Sufficiency of the allegations*]

Assuming, without deciding, that an allegation of the formation of a conspiracy is necessary, we think the allegations, here involved, are sufficient. In *United States v. Kissel*, 218 U. S. 601, 608, it is said: "* * * A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself * * *" This language means that a conspiracy is formed by an agreement. See also: *Eastern States Lumber Ass'n v. United States*, 234 U. S. 600, 612. Here there are allegations that defendants "entered into * * * a plan, scheme or conspiracy." Standing alone, the allegations probably are, as appellees contend, conclusions. It should be alleged that defendants entered into an agreement, or agreed between themselves as to details alleged. However, we believe the later allegation referring to the same time previously alleged, and including the words: "about the time the said combination and pooling of patent and patent rights was *agreed* upon * * *" sufficiently explains the prior allegations, and shows that defendants reached an agreement. Similar allegations may be found in: *Loewe v. Lawlor*, 208 U. S. 274, 288; *Ballard Oil Terminal Corp. v. Mexican Petroleum Corp.* (CCA 1), 28 F. (2d) 91, 98; *People's Tobacco Co. v. American Tobacco Co.* (CCA 5), 170 Fed. 396, 397; *Dowd v. United Mine Workers* (CCA 8), 235 Fed. 1, 12 (cert. den. 242 U. S. 653). Compare: *Mitchell Woodbury Corp. v. Albert Pick Barth Co.* (CCA 1), 41 F. (2d) 148, 150; *Glenn Coal Co. v. Dickinson Fuel Co.* (CCA 4), 72 F. (2d) 885, 888; *Tilden v. Quaker Oats Co.* (CCA 7), 1 F. (2d) 160.

Was the agreement made "to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means"? It is here, we believe, that appellees misapprehend what is pleaded. Two lines of argument are urged by them.

The first line of argument seems to imply that the purpose alleged was to pool patents, make cross-license agreements, threaten and bring infringement suits, etc. It is said that each act agreed upon is a lawful one. *Standard Oil Co. v. United States*, 283 U. S. 163; *Virtue v. Creamery Package Co.*, 227 U. S. 8.

[*Conspiracy effected though means are lawful*]

We may assume that each of those acts would be lawful, and still a conspiracy might be shown. If the agreement has an unlawful purpose, it is a conspiracy, notwithstanding that the means used to carry it out were lawful. Thus in *Swift & Company v. United States*, 196 U. S. 375, 396, it is said:

"* * * It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful * * * The statute gives this proceeding against combinations in restraint of commerce among the States and against attempts to monopolize the same. Intent is almost essential to such a combination and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen * * * But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result * * *"

In *United States v. Reading Co.*, 226 U. S. 324, 357, it is said:

"It is not essential that these contracts considered singly be unlawful as in restraint of trade. Even acts absolutely lawful may be steps in a criminal plot * * * But a series of such contracts, if the result of a concerted plan or plot between the defendants to thereby secure control of the sale of the independent coal in the market of other States, and thereby suppress competition in prices between their own output and that of the independent operators, would come plainly within the terms of the statute, and as parts of the scheme or plot would be unlawful * * *"

And in *United States v. Patten*, 226 U. S. 525, 544, it is said:

"* * * It hardly needs statement that the character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole * * *"

Therefore, here, it is insufficient to contend that there is no violation of the act because the means agreed upon were lawful. If the purpose was unlawful there is a violation.

As a corollary to the first line of argument, it is also contended that the actual use of the various means related was lawful. The argument is pertinent only if there was no unlawful purpose. Appellees rely strongly on *Standard Oil Co. v. United States*, 283 U. S. 163. There a patent pool and cross-licensing agreement was exe-

cuted. There was no conspiracy to monopolize, other than that which might arise from the agreement itself. That agreement had neither an express or implied purpose to monopolize all the gasoline manufactured, was not used to that end, and there were no acts from which the unlawful purpose could be inferred. It was there said that "Any agreement between competitors may be illegal, if part of a larger plan to control interstate markets," and that the "limited monopolies granted to patent owners do not exempt them from the prohibitions of the Sherman Act and supplementary legislation." (p. 169) It was also said (p. 175):

> "* * * But an agreement for cross-licensing and division of royalties violates the Act only when used to effect a monopoly, or to fix prices, or to impose otherwise an unreasonable restraint upon interstate commerce * * *"

In other words, if the purpose of a plan is to effect a monopoly, or to fix prices, or to impose otherwise an unreasonable restraint, then the act is violated by use of any means to that end, including a cross-licensing agreement.

Thus, the arguments, relating to the means agreed upon and used as being lawful means, are wide of the mark, unless there is a total failure to allege an unlawful purpose; and it is here evident that there was such an unlawful purpose alleged. It was alleged that the purpose of the conspiracy was

> "to effect, or attempt to effect a monopoly in the manufacture, sale and distribution of radio loud speakers in interstate commerce throughout the United States of America, as well as elsewhere and to attempt to control and increase the price thereof, and particularly with radio receiving set manufacturers located throughout and in the several states * * *"

Thus, since there was an unlawful purpose, the fact, that the means contemplated and used were in themselves lawful, does not acquit appellees.

[*Allegation of interstate operations*]

It is next contended that the allegations are insufficient to show that interstate or foreign commerce, as distinguished from intrastate commerce, was involved. The commerce involved must be interstate or international. *United States v. Joint Traffic Association,* 171 U. S. 505, 568; *Anderson v. United States,* 171 U. S. 604, 615; *United States v. Patten,* 226 U. S. 525, 542; *Blumenstock Bros. v. Curtis Pub. Co.,* 252 U. S. 436, 441. The contention is that only conclusions have been pleaded by alleging "interstate commerce." The complaint is subject to that objection in a great number of instances. It is alleged that the purpose of appellees was to attempt to acquire a monopoly, which necessarily would involve the business of appellees, which was alleged to be

> "manufacturing, assembling, selling and distributing electrical apparatus * * * that [they] * * * manufactured or assembled * * * in their various factories and principal places of business located as aforesaid, and thereupon sold the same * * * to various and sundry other persons * * * located in and throughout the several states * * *"

In *Addyston Pipe and Steel Co. v. United States,* 175 U. S. 211, 246, it is said:

> "* * * Where the contract is for the sale of the article and for its delivery in another State, the transaction is one of interstate commerce, although the vendor may have also agreed to manufacture it in order to fulfil his contract of sale * * *"

The allegations therefore are sufficient to show that interstate commerce is involved. The fact that appellees may have shipped the articles to their agents in other states does not put an end to the interstate character of the transactions. *Binderup v. Pathe Exchange,* 263 U. S. 291, 309.

It is next contended that interstate commerce was not directly affected, and this contention may be summarily dismissed on the authority of the following statements in *Coronado Co. v. United Mine Workers,* 268 U. S. 295, 310:

> "The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act * * *"

See also: *Addyston Pipe & Steel Co. v. United States, supra,* 241, 242; *Loewe v. Lawlor,* 208 U. S. 274, where interstate transportation of plaintiff's goods was prevented.

It is also contended that no unreasonable restraint is shown. See: *Standard Oil Co. v. United States,* 221 U. S. 1, 60, 62; *United States v. American Tobacco Co.,* 221 U. S. 106, 179; *United States v. St. Louis Terminal,* 224 U. S. 383, 394; *Nash v. United States,* 229 U. S. 373, 376; *Eastern States Lumber Ass'n v. United States,* 234 U. S. 600, 610; *Maple Flooring Ass'n v. United States,* 268 U. S. 392, 396; *Appalachian Coals, Inc. v. United States,* 288 U. S. 344, 359; *Sugar Institute v. United States,* 297 U. S. 553, 597. Appellees seem to make some distinction between an unreasonable restraint and the principle that the public rights must be violated before an offense is committed. These are merely different ways of saying the same thing.

The contention is, we believe, unsound, for an agreement to fix prices is in itself an undue and unreasonable restraint. *United States v. Trenton Potteries,* 273 U. S. 392, 396, 401. Undoubtedly we may say the same for monopoly.

The allegations concerning the validity of appellees' patents are attacked on the ground that the patents cannot be collaterally attacked. We believe those allegations to be unnecessary, and they are therefore treated as surplusage.

Reversed.

[*Dissent*]

MATHEWS, Circuit Judge (dissenting): Appellees demurred to appellant's second amended complaint (hereafter called the complaint) on four grounds: (1) That it does not state facts sufficient to constitute a cause of action, (2) that it is ambiguous, (3) that it is unintelligible, and (4) that it is uncertain. The District Court sustained the demurrer, with leave to amend the complaint, but appellant elected not to amend. Judgment was accordingly entered dismissing the action. This appeal followed.

The complaint states:

"That this is an action at law for damages brought under the provisions of Section 7 of the Act of Congress approved July 2nd, 1890, commonly known as the Sherman Act, and for all the relief therein provided, because of the violations by the defendants [appellees], and each of them, of the provisions of sections 1 and 2 of the said Sherman Act."

Section 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. A. § 1, provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished. * * *"

Section 2 of the Sherman Act, 15 U. S. C. A. § 2, provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished. * * *"

Section 7 of the Sherman Act * provides:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any [district] court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The complaint does not allege that appellees made any contract or engaged in any combination or conspiracy in restraint of trade or commerce among the several States or with foreign nations, or that they monopolized, attempted to monopolize, or combined or conspired to monopolize, any part of such trade or commerce. The nearest approach to such an allegation is in paragraph XII of the complaint, which reads as follows:

"Plaintiff is informed and believes and therefore alleges that * * * the defendants * * * entered into and consummated a plan, scheme or conspiracy * * * to effect, or attempt to effect a monopoly in the manufacture, sale and distribution of radio loud speakers in interstate commerce * * * That pursuant to said plan, scheme or conspiracy and in order to effect the purposes thereof, the defendants * * * did jointly and severally, enter into a plan, scheme or combination, in restraint of trade * * *"

Thus, it will be noted, the complaint alleges that defendants entered into (1) a plan, scheme or conspiracy and (2) a plan, scheme or combination. Whether the alleged plan, scheme or conspiracy was, in fact, a conspiracy, the complaint does not say, nor does it say whether the alleged plan, scheme or combination was, in fact, a combination. Each may have been merely a plan or scheme. The Sherman Act deals, not with plans or schemes, but with combinations and conspiracies. The complaint in this case does not charge either a combination or a conspiracy.

Even assuming that the alleged plan, scheme or conspiracy was, in fact, a conspiracy, and that the alleged plan, scheme or combination was, in fact, a combination, it still does not appear that such combination or conspiracy violated the Sherman Act. As described in the complaint, the alleged plan, scheme or conspiracy was one "to effect, or to attempt to effect a monopoly in the manufacture, sale and distribution of radio loud speakers in interstate commerce." The Sherman Act says nothing about conspiracies to "effect" or to attempt to "effect" monopolies. It says nothing about monopolies in the manufacture, sale or distribution of goods. It does condemn conspiracies in restraint of trade or commerce among the several States and with foreign nations, and conspiracies to monopolize such trade or commerce, but no such conspiracy is alleged in this case.

As described in the complaint, the alleged plan, scheme or combination was one "in

* See, also, § 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C.A. § 15.

restraint of trade," but there is no allegation that it was in restraint of trade among the several States or with foreign nations. The trade which it restrained may have been wholly intrastate. Such restraints are not forbidden by the Sherman Act.

The complaint alleges, in substance, that after entering into the above mentioned plan, scheme or conspiracy, defendants did certain acts in furtherance thereof. These acts consisted chiefly of instituting and prosecuting, and threatening to institute and prosecute, patent infringement suits. It is not claimed that any of these acts was, in or of itself, a violation of the Sherman Act. The claim that these acts were unlawful is predicated upon the assumption that the plan, scheme or conspiracy described in the complaint was a violation of the Sherman Act. That assumption being baseless, appellant's claim is untenable.

Since the complaint, as I read it, shows no violation of the Sherman Act, I hold that it fails to state a cause of action.

I am also of the opinion that the complaint is ambiguous and uncertain in the particulars specified in appellees' demurrer. This is as good a ground of demurrer as the failure to state a cause of action. California Code of Civil Procedure, § 430; *Goddard v. Metropolitan Trust Co.* (C. C. A. 9), 82 F. (2d) 902.

The judgment should be affirmed.

[¶ 55,177] Kentucky Utilities Co. v. Commonwealth of Kentucky.

Court of Appeals of Kentucky. Decided March 1, 1938. Modified June 24, 1938.

Competitive price-cutting, engaged in prior to the effective date of the Kentucky Unfair Practices Act, is not admissible as evidence to show a disposition to violate the statute in a trial for an alleged violation.

Price reductions, made in good faith to meet a competitive price, are not violations of the Kentucky Unfair Practices Act.

Held unnecessary to pass upon the constitutionality of the Kentucky Unfair Practices Act.

[*Indictment*]

Judge RATLIFF.—The grand jury of Barren county returned an indictment against appellant, charging it with the violation of the "Unfair Trade Practices Act," Chapter 109 of the 1936 Acts of the General Assembly of Kentucky, now incorporated in Carroll's Kentucky Statutes, Baldwin's 1936 Revision, as section 4748h-1 to 4748h-14, both inclusive, the Act became effective May 15, 1936.

It appears that the indictment was drawn under section 1 of the Act, now section 4748h-1, Kentucky Statutes, which insofar as pertinent, reads:

"It shall be unlawful for any person, firm or corporation, doing business in the State of Kentucky and engaged in the production, manufacture, distribution or sale of any commodity, or product, or service or output of a service trade, of general use or consumption, or the product or service of any public utility, with the intent to destroy the competition of any regular established dealer in such commodity; product or service, * * * to discriminate between different sections, communities, or cities or portions thereof * * * by selling or furnishing such commodity, product or service at a lower rate in one section, community or city * * * than in another after making allowances for difference, if any, in the grade or quality, * * *. This act shall not be construed to prohibit the meeting in good faith of a competitive rate, or to prevent a reasonable classification of service by public utilities for the purpose of establishing rates."

[*Alleged price discrimination*]

In the accusatory part of the indictment it is charged that the defendant unlawfully and willfully discriminated in the retail price of a commodity of general use, to-wit: ice between different cities of the state of Kentucky for the purpose of destroying competition; and, in the descriptive part it is charged that on the — day of September, 1936, and within twelve months before the finding of the indictment, the defendant did unlawfully and willfully sell ice to Travis Taylor in Glasgow, Kentucky, at a price less than the defendant company sold ice at the same time in the cities of Springfield, Lancaster, Stanford and Lebanon, Kentucky, to the same customer, with the intention and for the purpose of destroying the competition of the Citizens Ice and Fuel Company, which was engaged in selling ice in Glasgow, Kentucky, and then a regularly established dealer in the sale of ice in Barren County, Kentucky.

[*Circuit Court's holding*]

Upon a trial of the case the jury found appellant guilty and fixed its fine at $700.00 and from the judgment entered upon that

verdict appellant has prosecuted this appeal.

[*Grounds for appeal*]

In appellant's brief four alleged errors or grounds of reversal are relied on: (1) The court erred in admitting incompetent evidence; (2) if it be assumed that all evidence admitted was competent still it is insufficient to sustain a conviction; (3) the Act is unconstitutional; and (4) the indictment was defective. We will discuss the points in the order named.

[*Admissibility of evidence challenged*]

(1-2) At the beginning of the trial counsel for appellant moved the court to direct the Commonwealth and its counsel not to introduce evidence of any act or transaction of the defendant company or its competitor, Citizens Ice and Fuel Company, prior to May 15, 1936, the effective date of the Act, under which the defendant was indicted. Counsel for the Commonwealth objected to the motion and stated that if the evidence was confined to acts and transactions occurring after May 15, 1936, the Commonwealth could not make out a case, and the court sustained the objection of counsel for the Commonwealth and overruled the motion of the defendant to which the defendant excepted. The court then directed counsel to confine the evidence introduced to acts and transactions occurring on and after January 1, 1936, to which the defendant excepted.

Travis Taylor, the first witness called for the Commonwealth, testified that in September, 1936, he bought ice from the appellant company in the towns of Lebanon, Springfield, Lancaster, Stanford and Glasgow; that at Glasgow, he paid 30¢ per hundred weight; at Lebanon, 60¢ per hundred; at Springfield, 40¢ per hundred; at Stanford and Lancaster each at 50¢ per hundred. He said that these purchases of ice at the various places and prices occurred on the same day, September 18, 1936. But the witness did not state when such prices were established or put into effect or whether any change in prices was made after May 15, 1936.

Vincent Jones, manager of the Citizens Ice Company, was permitted to testify concerning prices fixed by the then NRA code, in the summer of 1933 and 1934, and that on October 16, 1933, the effective date of the NRA code, the price of ice ranged from 80¢ per hundred to 60¢ per hundred by cash, and 65¢ per hundred by coupon price. He further testified at length and in detail concerning various prices at which defendant company and the Citizens Ice Company sold ice in the years 1933 to 1935 inclusive, showing the different changes made in the prices at various times.

Paul Holman, an employee of the local newspaper in Glasgow, was permitted to testify concerning an advertisement by the appellant company in the newspaper in July, 1934, setting out various prices of ice which seemed to be a reduction in the prices theretofore charged by the company. The witness was permitted to read to the jury the prices charged for ice by the appellant company as set out in the advertisement. Also, Leland Miller, a former employee of the appellant company, was permitted to testify concerning prices charged for ice in the summer of 1935, and to statements made to him by Mr. Phelps, manager of appellant company, to the effect that it did sell ice at 30¢ per cut and if necessary would go lower, or words to that effect.

At the close of the evidence for the Commonwealth defendant moved the court to exclude from the jury all the evidence of the witnesses who testified in reference to the prices of ice under the NRA code, which motion the court overruled. Defendant also moved the court to direct the jury to return a verdict for the defendant, which motion was also overruled with exceptions.

The court then upon its own motion admonished the jury, in substance, that the court permitted certain testimony to go to the jury with reference to the acts done by the defendant prior to May 15, 1936, and that the court permitted that evidence for the purpose of evidencing an intention or an indication on the part of the defendant in 1936, to commit those acts, if it did so indicate such intention; and further admonished the jury that it could not find the defendant guilty for any act of any kind that defendant did prior to May 15, 1936.

It is thus seen that while the jury was admonished that it could not find defendant guilty of any act or acts committed by it prior to May 15, 1936, yet it was authorized to take into consideration any and all acts committed by defendant prior to the effective date of the Act in determining whether or not it committed an unlawful act subsequent to the effective date of the Act and before the finding of the indictment.

[*Price-cutting prior to Act not in violation of law*]

The argument for appellee is that the acts committed by defendant previous to May 15, 1936, were competent under the rule that on the trial of a criminal case evidence of other crimes is competent for the purpose of establishing (1) identity; (2) motive; (3) intent; (4) guilty knowledge; (5) a plan, system or scheme to perpetrated crime; (6) to cover up previous crime or the evidence of a crime for which the accused is at the time being tried; and (7) a crime, the proof of which is so interwoven as to be inseparable from the crime for which he is being tried, that the evidence of the two acts cannot be separated.

See *Sneed v. Commonwealth,* 236 Ky. 838, 34 S. W. (2d) 724.

We do not think the present case comes within the category of the rule above stated. It must not be overlooked that the acts of the defendant previous to May 15, 1936, were not in violation of any law. The evidence discloses that previous to May, 1936, appellant company and its competitor, Citizens Ice Company, both engaged in competitive price cutting, but they violated no law and were legally free to sell their products at any price they may desire. The rule enunciated in the *Sneed* case, *supra,* and many other like and similar cases, relates to the commission of crime or other acts prohibited by law, the commission of which are admissible under proper cricumstances to show an inclination or disposition of the person accused to violate the law or commit the particular offense for which he is on trial, but has no application to acts not prohibited by law at the time committed.

[*Competitive price reductions in good faith lawful*]

There is but little, if any, evidence tending to show that appellant company made any change in its prices after May 15, 1936, except in September of that year it reduced its commercial coupon rates from 30¢ per hundred to 25¢ per hundred which apparently was made necessary because the Citizens Ice Company had been selling ice during the summer of 1936 to commercial customers at the rate of 25¢ per hundred. Appellant company had never sold ice at wholesale below 20¢ per hundred and the Citizens Ice Company had sold ice at wholesale as low as 16⅔¢ per hundred. Under the provisions of the Act appellant company had the right to reduce its rates, if it did so in good faith to meet a competitive bid or price of its competitor. There is no evidence conducing to show that appellant company did not act in good faith, and it claims it did, when it reduced its rates to meet the bid of its competitor. It is further shown by the evidence and it is undenied, that during the summer of 1936, the Citizens Ice Company reduced its prices and sold to some customers at 25¢ per hundred, or 5¢ less than the price charged by appellant company, and a number of former customers of appellant company ceased to purchase ice from it and purchased from the Citizens Ice Company because of the reduced rate.

[*Sufficiency of evidence not determined*]

It is doubtful that there is any evidence tending to show that the reductions in price made by appellant company were not in good faith to meet the competitive price of the Citizens Ice Company. But inasmuch as the case will have to be reversed because of the incompetent evidence admitted relating to the acts of appellant before the effective date of the Act, we express no opinion as to the sufficiency of the evidence to take the case to the jury, once the incompetent evidence is eliminated.

[*Question of constitutionality*[1]]

[*Propriety of indictment*]

(4) The defect in the indictment is that it fails to negative the conditions which by

[1] Included in the original decision of March 4, but deleted by a modification of June 24, was the following discussion as to constitutionality:

"(3) It is next insisted for appellant that the Act is unconstitutional and counsel cite and rely on the case of *Commonwealth v. Malone,* 141 Ky. 441, 132 S. W. 1033; and *Fairmont Creamery Company v. Minnesota,* 274 U. S. 1, 71 L. Ed. 893, 52 A. L. R. 163. The *Malone* case relates to the pooling of tobacco crops as provided by section 3941a Kentucky Statutes. It was held that a mere buyer of tobacco raised by others is excluded from the benefits of the pooling statute, and this being true a person cannot legally enter into or be bound by the pooling contract authorized by the Statute. We do not think that case is authority for appellant's position that the statute under consideration in the present case is unconstitutional.

"In the *Fairmont Creamery* case, *supra,* it was held by the Supreme Court of the United States that the statute involved in that case violated the Fourteenth Amendment to the Constitution of the United States upon the ground that it interfered with the freedom of contract guaranteed under the Fourteenth Amendment, hence an infringement upon private rights. We see no logical connection between the subject matter and questions involved in that case and the case at bar. The Act here involved, in its final analysis, is intended to serve the same purpose as the Federal Anti-Trust Statute, which is intended to prevent monopolies for the purpose of destroying competition, and thereby make it possible to impose upon the consuming public exorbitant prices of commodities. The purpose of the statute involved in the case at bar is to prevent a strong competitor from resorting to unfair tactics, not in good faith to meet a competitive price, for the purpose of destroying its competitor and thus eliminate competition within its range of business, and make it possible to impose upon the consuming public exorbitant prices for its commodities. The courts will not hold a statute unconstitutional where it is merely in doubt. The invalidity of the statute must clearly and satisfactorily appear and in case of mere doubt the doubt will be resolved in favor of the constitutionality of the statute. It is our conclusion, therefore, that the statute is constitutional."

the terms of the statute are made exceptions to the violation of the Act, viz.; that the act, "shall not be construed to prohibit the meeting in good faith a competitive rate." The indictment should have pleaded the negative. See *Smith v. Commonwealth,* 196 Ky. 188, 244 S. W. 407; 31 C. J. p. 822, Sec. 411; 31 C. J. p. 720, Section 269, and notes thereunder.

The negative or exception contained in the statute under consideration appears in the same section under which the indictment is drawn. By the weight of authority the rule is that when an exception appears in the same section of a statute which defines the offense it is necessary that the indictment plead the exception. However, if the exception is separate from the description of the offense, it is not an ingredient thereof and need not be pleaded.

The exception contained in the statute should have been negatived in the indictment and the failure to do so rendered it demurrerable, and the court erred in failing to sustain the demurrer thereto.

These conclusions render it unnecessary to discuss or pass upon the constitutionality of the Act.

For reasons stated the judgment is reversed [and] remanded with directions to set it aside and sustain the demurrer to the indictment.

[Counsel]

Attorneys for appellant: Gordon, Laurent, Ogden, & Galphin, Louisville, Ky., Richard L. Garnett, Glasgow, Ky.

Attorneys for appellee: Hubert Meredith, Atty. Gen., Frankfort, Ky., A. E. Funk, Asst. Atty. Gen., Frankfort, Ky., M. O. Scott, Comth's Atty., Edmonton, Ky., Frank W. Jones, County Atty., Glasgow, Ky.

[¶ 55,178] C. E. Rust, et al. v. Maurice Griggs.

Tennessee Supreme Court. Decided March 5, 1938.

The Tennessee Unfair Sales Act, prohibiting sales at less than cost which deceive the public and destroy competition, is a constitutional exercise of the state's police power.

The deceptive advertising of sales leaders at less than the cost price, while fixing sales prices of other articles above the market, misleads purchasers and constitutes unfair competition, and will be particularly enjoined under the state Unfair Sales Act.

[*Discussion*]

GREEN, Chief Justice: This bill was filed by the complainants Rust and Lanier, partners engaged in the retail grocery business in Nashville, against defendant Griggs, engaged in a similar business in Nashville, to restrain the latter from certain business practices charged to have been within the denunciation of chapter 69 of the Acts of 1937. A demurrer was filed by defendant which challenged the construction put upon the Act by complainants, and also challenged the validity of the Act by complainants, and also challenged the validity of the Act as a whole. The chancellor overruled the demurrer and granted the injunction as prayed. The defendant, electing to stand on his demurrer, prayed and was granted an appeal to this court.

The bill set out that complainants and defendant were engaged in the same line of business in the same section of the city of Nashville. That defendant had on a day or days specified advertised and sold sugar and fruit jars at prices below cost, as that term is defined in the Act of 1937, all with the intent of misleading the public, unfairly diverting trade from complainants, and to the impairment of fair competition. The facts stated in the bill, being admitted by demurrer, will not be further detailed just here. The demurrer presenting questions as to the proper construction of the Act and as to the constitutionality of the Act as a whole, these matters may be properly first considered and the Act, sustained and construed, then applied to the facts of this case

[*Provisions of Unfair Sales Act*]

Chapter 69 of the Acts of 1937 bears this title:

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[2] The rest of the opinion was substituted June 24 for the following language, which appeared in the original decision:

"But in the present case it appears that evidence was heard concerning the acts of appellant in reducing its rates, which necessarily included the question of its good faith in so doing; and, furthermore, under the instructions given to the jury it was required to believe from the evidence that the acts of appellant were not in good faith to meet a competitive bid, before it could find it guilty. In view of the evidence and instructions of the court it is doubtful that the defect in the indictment was prejudicial.

"For reasons stated the judgment is reversed and remanded with directions to set it aside and grant appellant a new trial and for proceedings consistent with this opinion."

"An Act to promote fair competition in trade and industry, to prohibit unfair competition therein, declaring certain practices unfair and making same illegal, and providing penalties for the violation of this Act and remedies to persons damaged by any such violation."

Section 1 of the Act, in lettered subsections, defines the terms used in the Act. Some of these definitions will be particularly examined hereinafter.

We set out sections 2, 3 and 4 of the Act:

"Sec. 2. Be it further enacted, That it is hereby declared that advertising, offers to sell or sales by retailers or wholesalers at less than cost as defined in this Act, with the intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare, and are unfair competition and contrary to public policy, where the result of such advertising, offers or sales is to tend to deceive or mislead any purchaser or prospective purchaser or to substantially lessen competition or monopoly in any line of commerce. It is further declared that such advertising, offers or sales by any retailer or wholesaler with such intent or effect or result are in contravention of the policy of this Act.

"Sec. 3. Be it further enacted, That any retailer who shall, in contravention of the policy of this Act, advertise, offer to sell or sell at retail any merchandise at less than cost to the retailer as defined in this Act, shall be guilty of a misdemeanor, punishable upon the first conviction by a fine of not less than $5.00, nor more than $50.00, and upon each subsequent conviction punishable by a fine of not less than $50.00, nor more than $500.00. Any wholesaler, who shall, in contravention of the policy of this Act, advertise, offer to sell, or sell at wholesale any merchandise at less than cost to the wholesaler as defined in this Act, shall be guilty of a misdemeanor punishable as above set forth. Proof of any such advertising, offer to sell or sale by any retailer or wholesaler in contravention of the policy of this Act shall be prima facie evidence of a violation of this Act.

"Sec. 4. Be it further enacted, That in addition to the penalties provided in this Act, the state's attorney of any county or any person damaged, or who is threatened with loss or damage, by reason of a violation of this Act, shall have the right to apply for an injunction, and any court of competent jurisdiction shall have power to restrain sales in violation of this Act."

Section 5 of the Act excepts from its provisions (a) isolated transactions; (b) bona fide clearance sales; (c) sales of highly perishable merchandise; (d) damaged merchandise sold as such; (e) merchandise sold in liquidation; (f) merchandise sold for charitable purposes; (g) merchandise sold to government institutions or departments; (h) merchandise sold in meeting the legal price of a competitor; (i) sales by any officer under court orders.

[*Unfair Sales Act does not fix prices*]

In consideration of this statute we may first observe that it is not a price-fixing law. It is not therefore necessary to consider decisions of this court and the Supreme Court of the United States respecting statutes of that sort. As appears from section 2 of the statute, its object is to prevent deception of the public and to prevent practices which tend to unfairly injure competitors and thereby lessen competition or unreasonably restrain trade or create a monopoly. Section 2 declares that "advertising, offers or sales by any retailer or wholesaler with such intent or effect or result are in contravention of the policy of this Act."

Section 3 of the Act provides that a retailer who shall, "in contravention of the policy of this Act," advertise, offer to sell or sell at retail any merchandise at less than cost shall be guilty of a misdemeanor and section 4 of the Act provides for the restraint by injunction of such practices.

Sales at less than cost therefore are not denounced by the Act of 1937 unless such sales are made with the intent or effect to deceive the public, to injure creditors, or to destroy competition.

[*Unfair Sales Act constitutional*]

Legislation for the prevention of fraud and deception, especially in sales of food and other essentials of life, has always been recognized as well within the police power of the State. *State v. Mill Co.,* 123 Tenn. 399. See also *Samuelson v. State,* 116 Tenn. 470; *State v. Legora,* 162 Tenn. 122.

So legislation to foster free competition and to prevent monopolies is quite uniformly sustained. *Standard Oil Co. v. State,* 117 Tenn. 618; *State v. Witherspoon,* 115 Tenn. 138; *State v. Brewing Co.,* 104 Tenn. 715; *Bailey v. Master Plumbers,* 103 Tenn. 99.

Construed as above, the statute is freed from many of the constitutional objections urged against it.

Before considering the assignments of error in detail it will be necessary to quote (a) of section 1 of the statute, which is as follows:

[*"Cost to retailer" defined*]

"The term 'Cost to the retailer' shall mean whichever is lower of the following: (1) the purchase price of the product or commodity to the retailer at the retail outlet when invoice is dated not more than 60 days prior to the sale of such product or commodity by the retailer, or (2) the replacement cost of such product or commodity to the retailer at the time of sale in the quantity last purchased by the retailer; *less* any legitimate trade discounts but exclusive of cash discounts for prompt payment, and *plus*

a mark-up amounting to (not) less than the minimum cost of distribution by the most efficient retailer, which mark-up, in the absence of proof to the contrary, shall be six per cent (6%). In all retail sales involving more than one item or commodity, the retailer's price on individual items or commodities shall be computed on the 'cost to the retailer' as herein defined."

The first assignment of error is based on the idea that under this definition of cost to the retailer the statute does not require a mark-up on merchandise purchased more than sixty days prior to the sale by the retailer. The contention is that the mark-up is only required when "cost to the retailer" is determined by the replacement cost instead of the purchase price. It is said that the bill herein does not aver that the invoice for the sugar in question was dated more than sixty days prior to the sale of the sugar by the defendant.

[*Bases for cost to retailer*]

This assignment of error rests upon a misinterpretation of (a) of section 1. *Cost to the retailer* is "whichever is lower" purchase price within sixty days or replacement cost. "(1)" and "(2)" are separated by a comma only. They are connected clauses, both explanatory of "whichever is lower." "(2)" is followed by a semicolon and the mark-up provision following the semicolon is applicable both to "(1)" and "(2)."

The complainants demonstrate the foregoing construction by the application of somewhat esoteric rules of grammar and punctuation, and that such construction is correct is made more apparent by the application of an accepted rule of statutory interpretation, namely, "when several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Porto Rico Ry., etc. Co. v. Mor,* 253 U. S. 345.

The second assignment of error makes the point that the bill shows defendant sold the sugar for a price equal to its invoice cost with some mark-up and it is said that the statute provides that the retailer is only required to add a mark-up "less than the minimum cost of distribution by the most efficient retailer."

[*Court will effect legislature's intent*]

The statute does read as stated by defendant. It is obvious, however, that the word *not* should have preceded the words just above quoted and that *not* was inadvertently here omitted. Such omission renders the definition of the mark-up senseless and ineffective. Under such circumstance, the court will supply the word *not* to carry out the plain legislative intent. *Johnson v. Baker,* 149 Tenn. 613; *Ashby v. State,* 124 Tenn. 684.

The third assignment of error is largely based on a literal reading of the statute omitting the word *not* in the definition of mark-up. We repeat that the word *not* must be supplied. Included in this assignment of error is the proposition that an unreasonable and oppressive burden is placed upon the retailer to locate at his own risk the most efficient retailer and then from the private records of such efficient retailer to ascertain his cost of distribution.

[*Terms construed generally*]

We think the words "most efficient retailer" was not intended to designate any particular individual. The words were used in a generic sense. The cost of distribution, within the contemplation of the legislature, was the cost of distribution by the most efficient retailers. To ascertain such cost of distribution is no great task. Matters of that sort are readily available in numerous trade surveys contained in trade journals and other publications.

[*Presumptive evidence of violation*]

There is nothing unusual in the further provision of (a) of section 1 that the mark-up "in the absence of proof to the contrary, shall be six per cent (6%)." The effect of this is that proof of a mark-up of less than 6% is prima facie evidence that a sale has been made at less than the minimum cost of distribution. This is merely a rule of evidence adopted by an Act of the legislature. This court has said that "the power of the legislature to prescribe rules of evidence, and to declare what shall be evidence, is practically unrestrained, and legislation to those ends will be upheld so long as it is impartial and uniform and does not preclude a party from exhibiting his rights." *State v. Yardley,* 95 Tenn. 546, 565. The presumption thus created of course may be rebutted.

The fourth assignment of error is based on misinterpretation of (a) of section 1 heretofore quoted.

[*Clearance sales permissible*]

The fifth assignment of error makes the point that the statute deprived defendant of his property rights in violation of Article I, Section 8, of the Constitution of Tennessee, and the Fourteenth Amendment to the Federal Constitution in that

it requires the retailer who has bought merchandise on a low market more than sixty days prior to a sale to advance his prices to an amount equal to the replacement cost plus a mark-up for cost of distribution, regardless of the fact that he could sell same at a good profit without such advance in price.

Section 5 of the Act of 1937 excepts from its operation isolated transactions not in the usual course of business and also excepts bona fide clearance sales advertised as such. These exceptions would no doubt permit any merchant to rid his shelves of old stock at any price he chose without hindrance by the statute. It may be added that there is nothing before us to show that defendant bought on any low market at any time. To the contrary, the bill charges he sold fruit jars for less than they cost him and sold sugar for less than cost and cost of distribution.

[*Statute does not affect interstate commerce*]

The sixth assignment of error makes the point that the statute is a burden on interstate commerce in violation of Section 8 of Article I of the United States Constitution in that a retailer or wholesaler is denied the right to use invoice cost on goods purchased in another State on a market lower than that existing in Tennessee as a basis for his selling price, even though a fair profit could thereby be made. This argument is founded on (c) of section 1, as follows:

"The terms 'cost to the retailer' and 'cost to the wholesaler' must be bona fide costs, and sales to retailers and wholesalers at prices which cannot be justified by existing market conditions within this state shall not be used as a basis for computing costs with respect to sales by retailers and wholesalers."

[*Exceptional sales price no basis for cost*]

Market conditions in the subsection just quoted refer to conditions upon which the wholesaler and retailer in this State can purchase goods. The subsection deals with *cost to the retailer* and *cost to the wholesaler*. Marketing includes buying as well as selling. The language quoted is no attempt at regulation of the sale of goods in Tennessee by the retailer or by the wholesaler. The language quoted merely means that in computing his cost, or purchase price, the local merchant cannot use as a basis some exceptional sale price made to him, either in this State or another State, not justified by market conditions.

The seventh, eighth and ninth assignments of error seem to be founded on the idea that the statute imperatively requires a mark-up of 6% by retailers other than the most efficient retailers and thereby discriminates between inefficient and efficient retailers. We do not follow this argument. The statute sanctions a mark-up not less than the minimum cost of distribution by the most efficient retailers and, as we have observed, information as to this is accessible to the trade.

[*Statement of facts*]

Returning to the facts of this particular case, it appears from the allegations of the bill and an exhibit thereto that by large posters the defendant advertised that he would on Friday and Saturday, September 3 and 4, 1937, sell 10 lbs. of pure cane sugar for 51½¢. That he would sell Ball Mason fruit jars, quarts at 65¢ a dozen, half gallons at 90¢ a dozen.

These offers were headed in larger type by the following: "Attention Housewives!! We Offer These Canning Season Specials." At the top of this poster was the defendant's trade name and address and the words "Pay Cash; Pay Less."

In addition to the foregoing the poster advertises various other articles that the defendant will have on sale on the days mentioned. Followed by the prices at which he proposes to sell such articles. As to these other articles the bill sets out that the poster *advertises pears* in No. 2½ cans 2 for 25¢. Same articles were selling at other stores for 20¢ to 23¢. The poster advertised Polly Rich flour 24 lbs. for 99¢. The bill charges that this flour in this quantity was selling at other stores for 95¢. The poster advertised Lipton's tea ¼ lb. for 25¢. The bill charges that this tea in that quantity was sold at other stores at from 20¢ to 23¢.

It thus appears from the bill and the exhibits that while defendant was taking a loss on the sugar sold and the fruit jars sold, he was charging more than the market price for various other articles advertised for sale on these particular days. As we have noted above, a heading of the poster was "Pay Cash; Pay Less."

[*Deceptive effect of advertising*]

This advertising was plainly deceptive. The poster indicated that all the articles enumerated thereon were to be sold for cash and for less than they could be had elsewhere. As a matter of fact, according to the bill, with the exception of the two loss leaders, sugar and fruit jars, the other articles advertised were sold at market prices and some of them at prices above market prices.

[*Effect on competition*]

In addition to misleading purchasers, such advertising and such business practices as the foregoing unfairly divert trade from competitors, constitute unfair competition, and tend to put competitors out of business and unreasonably restrain trade.

[*Particular violations enjoined*]

The complainants were entitled to an injunction. We think, however, the injunction issued by the chancellor was too broad. The defendant was enjoined from advertising, offering to sell or selling merchandise in violation of the terms and provisions of the Act of 1937, and particularly at prices below cost as defined by said Act and prescribed thereby for retailers. We have adjudged that defendant violated the Act of 1937 in specific particulars. An order should be entered restraining him from further like violations of the Act. He should not, however, be enjoined in general terms from violating the Act in the future in every particular for that would as pointed out by the Supreme Court, compel defendant to conduct all his business under the jeopardy of punishment for violating a general injunction and violative of elementary principles of justice. *New York, etc., R. Co. v. Interstate Commerce Commission,* 200 U. S. 361.

So modifying the injunction, the decree of the chancellor is affirmed.

[*Decisions under similar Acts*]

NOTE: Counsel call our attention to the fact that statutes similar to chapter 69 of the Acts of 1937 have been enacted in quite a number of States. Our attention has been called to the decision of but one court considering such an enactment. In the case of *People v. Kahn* (Cal.), 60 Pac. 596, one of the California appellate courts had before it a statute of that State quite like our Act of 1937. The California court sustained the validity of the statute and construed it in substantial accord with the construction that we have given to our statute.

[¶ 55,179] Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle, et al., v. United States of America; Paramount Pictures Distributing Co., Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., et al., v. United States of America.

Supreme Court of the United States. Decided April 25, 1938.

Appeals from the District Court of the United States for the Northern District of Texas.

Where the District Court, in its determination of the validity under the Sherman Anti-Trust Act of an agreement between motion picture distributors and exhibitors fixing minimum prices for the exhibition of films subsequent to their showing in the locality at certain agreed prices, fails to make formal findings of fact and separate conclusions of law as required by the rules of equity practice, the decree is set aside and the cause remanded for determination in compliance with the rule.

[*Facts*]

Per Curiam. The Government brought this suit for an injunction against the carrying out of an alleged conspiracy, in restraint of interstate commerce, between distributors and exhibitors of motion picture films. The restraint was alleged to consist in provisions in license agreements which prevented any "feature picture" of the distributors, which had been shown "first-run" in a theater of the defendant exhibitor at an admission price of 40 cents or more, from thereafter being exhibited in the same locality at an admission price of less than 25 cents or on the same program with another feature picture.

The evidence was presented by an agreed statement of certain facts and by oral testimony on behalf of each party. The District Court entered a final decree adjudging that in making the restrictive agreements the distributors had engaged in a conspiracy with the exhibitor, Interstate Circuit, Inc., and its officers, in violation of the Anti-Trust Act and granting a permanent injunction against the enforcement of the restrictions. 20 F. Supp. 868. The case comes here on direct appeal. Acts of Feb. 11, 1903, c. 544, 32 Stat. 823; February 13, 1925, c. 229. 28 U. S. C. 345.

[*Applicable equity practice rules*]

Equity Rule 70½ provides:

"In deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under Rules 75 and 76".

[*Failure of court to comply with essential rule of practice*]

The District Court did not comply with this rule. The court made no formal findings. The court did not find the facts specially and state separately its conclusions of law as the rule required. The statements in the decree that in making the restrictive agreements the parties had engaged in an illegal conspiracy were but ultimate conclusions and did not dispense with the necessity of properly formulating the underlying findings of fact.

The opinion of the court was not a substitute for the required findings. A discussion of portions of the evidence and the court's reasoning in its opinion do not constitute the special and formal findings by which it is the duty of the court appropriately and specifically to determine all the issues which the case presents. This is an essential aid to the appellate court in reviewing an equity case (*Railroad Commission v. Maxcy,* 281 U. S. 82, and cases cited) and compliance with the rule is particularly important in an anti-trust case which comes to this Court by direct appeal from the trial court.

[*Contentions of the parties*]

The Government contends that the distributors were parties to a common plan constituting a conspiracy in restraint of commerce; that each distributor would benefit by unanimous action, whereas otherwise the restrictions would probably injure the distributors who imposed them, and that prudence dictated that "no distributor agree to impose the restrictions in the absence of agreement or understanding that his fellows would do likewise"; that the restraints were unreasonable and that they had the purpose and effect of raising and maintaining the level of admission prices; that even if the distributors acted independently and not as participants in a joint undertaking, still the restraints were unreasonable in their effect upon the exhibitor's competitors.

Appellants, asserting copyright privileges, contend that the restrictions were reasonable; that they were intended simply to protect the licensee from what would otherwise be an unreasonable interference by the distributors with the enjoyment of the granted right of exhibition; that there was no combination or conspiracy among the distributors; that it was to the independent advantage of each distributor to impose the restrictions in its own agreement and that the contention that less than substantially unanimous action would have injured the distributors in making such agreements was contrary to the evidence; and that the restrictions did not have an injurious effect.

[*No determination on merits*]

We intimate no opinion upon any of the questions raised by these rival contentions, but they point the importance of special and adequate findings in accordance with the prescribed equity practice.

[*Reversed and remanded*]

The decree of the District Court is set aside and the cause is remanded with directions to the court to state its findings of fact and conclusions of law as required by Equity Rule 70½.

It is so ordered.

Mr. Justice STONE and Mr. Justice BLACK think that the findings in the opinion and decree below, while informal, are sufficient for purposes of decision, and that the case should therefore be decided now without further proceedings below; the more so because of the public interest involved.

Mr. Justice CARDOZO took no part in the consideration and decision of this case.

[¶ 55,180] Biddle Purchasing Company, Colonial Molasses Company, Inc., Ervin A. Rice Company, General Grocer Company, Smart & Final Company, Ltd., The Eavey Company, Michigan Trading Corporation, C. G. Meaker Company, Inc., and Koll Grocery Company, Inc., Petitioners v. Federal Trade Commission, Respondent.

United States Circuit Court of Appeals for the Second Circuit. Decided May 2, 1938.

The acceptance from sellers by a purchasing company engaged in interstate commerce of brokerage fees which it transmits to buyers affords an opportunity for concealed sales price discrimination and an order of the Federal Trade Commission, prohibiting such transactions as an unfair trade practice in violation of Sec. 2(c) of the Clayton Act as amended by the Robinson-Patman Act, does not violate the Fifth Amendment.

Payment or receipt of prohibited brokerage is unlawful irrespective of injurious effect upon competition.

Affirming Federal Trade Commission Complaint No. 3032.

Before MANTON, L. HAND, and SWAN, Circuit Judges:

Petition to review and set aside an order of the Federal Trade Commission, entered against petitioners, which order directed them to cease and desist from practices found by the Commission to constitute violations of Sec. 2(c) of the Robinson-Patman Act (15 U. S. C. A. § 13[c]). Petition denied.

W. T. Kelley, Chief Counsel, Federal Trade Commission. Allen C. Phelps, Special Attorney, Federal Trade Commission. Attorneys for Respondent.

Davies, Richberg, Beebe, Busick & Richardson, Kaufman & Weitzner, Attorneys for Petitioners. Raymond N. Beebe, Adrien F. Busick, Samuel H. Kaufman, of Counsel.

Felix H. Levy, as Amicus Curiae. Felix H. Levy, J. G. L. Molloy, George B. Levy, John D. Swartz, of Counsel.

[*The alleged unfair practice*]

MANTON, Circuit Judge.

Complaint was issued by the Federal Trade Commission, charging petitioners with violating the provisions of the Clayton Act as amended by § 2(c) of the Robinson-Patman Act (15 U. S. C. A. § 13[c]). Petitioner, Biddle Purchasing Company, is in the brokerage business as herein described. Some of the petitioners are buyers while others are sellers of commodities bought and sold in interstate commerce through the Biddle Company as brokers. The sellers were charged with unlawfully paying brokerage fees to the Biddle Company for the use of buyers of the commodities in interstate commerce.

[*Order of the federal trade commission*]

The order appealed from provides that the Biddle Company, "its officers, representatives, agents and employees, in connection with the purchase or sale of commodities in interstate commerce or in the District of Columbia, do forthwith cease and desist from: (1) Receiving or accepting any fee or commission, as brokerage or as an allowance in lieu thereof, from any seller of commodities, which fee or commission is intended to be paid over to the purchaser of such commodities, or which is to be applied for the use and benefit of such purchaser; (2) Paying or granting to any purchaser of commodities any fee or commission received or accepted by said Biddle Purchasing Company, as brokerage or an allowance in lieu thereof, from the seller of such commodities."

[*Violation of Robinson-Patman Act*]

The Commission found that those of the petitioners who were sellers violated § 2(c) of the Robinson-Patman Act by paying brokerage fees to petitioner, Biddle Company, with knowledge of the fact that the fees were intended to be and were being paid over by said Biddle Company to its buyers; that the buyers were violating the statute by receiving and accepting brokerage fees paid by the sellers in connection with the purchase of commodities by said buyers, through the Biddle Company; and that the latter was violating the statute by accepting such fees and transmitting them to the buyers.

Section 2(c) of the Robinson-Patman Act provides that

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein, where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

[*Petitioner's method of operation*]

Biddle Company's business method was to obtain subscribers to its combined market information and purchasing service charging therefor from $25 to $50 per month. It provides a trade information and purchasing service for wholesalers and jobbers throughout the country. It also is engaged in selling the products of numerous manufacturers, canners and packers to the concerns for whom it supplies market information and purchasing service. Biddle Company has written contracts with the buyers. With the sellers oral contracts to dispose of their products were made under which the commissions were paid to Biddle which in turn paid them over to the buyer of the particular commodity. In about 86% of these transactions the buyers received back as commissions no more than the amount they had paid to the Biddle Company for its market information service, but in 14% the commissions exceeded that sum and this excess was paid to the buyers. Large numbers of buyers subscribe to its service. It has sold for many sellers. The Biddle Company is not controlled by or affiliated with either buyers or sellers through stock ownership, but is an independent corporation. This method of transacting business, with the remission of the selling commissions to the buyers, in effect, gives the buyer a discount on his purchase.

[*Unfair competition in anti-monopoly legislation*]

The regulation of competition results in a competitive etiquette, in standards of business conduct, in a plane of competition. Trusts were forbidden because they stifled competition and tended to create monopoly. The prohibitions of the Sherman Act set a plane of monopolistic conduct rather than a plane of competition. Anti-trust laws regulate monopolistic practices which are repugnant to decent business morality, which are injurious to competitors and to consumers, which are economically wasteful but which do not jeopardize to an appreciable degree the very existence of competition. Both types of practice must be included in the legal plane of competition; both are types of regulation which enforce each other; both are animated by a common objective notwithstanding the differences of their intermediate ends. Monopolistic purpose and intent (*Swift & Co. v. United States,* 196 U. S. 375) are illustrated by decisions as in *Standard Oil Company* case (221 U. S. 1) where the Oil Company was engaged in local price cutting and espionage, established bogus independents, and granted rebates to preferred customers and exacted rebates and preferences from railroads, all for the purpose of suppressing competition. And the American Tobacco Company (see 221 U. S. 106) employed fighting brands for the same purpose. The International Harvester Company (214 Fed. 987, appeal dismissed 248 U. S. 587; 274 U. S. 693) closed the channel of trade to competitors by tying up all the main retail outlets with exclusive dealing contracts. It is reasonably clear that most of these methods violated the Sherman Act only when they were part of a scheme to stifle competition and to obtain control of an industry.

[*Extent of resale price maintenance legislation*]

Resale price maintenance has received fuller consideration than any of the other selling devices challenged under the anti-trust laws. Agreements maintaining resale prices have been condemned as a restraint of trade. *Dr. Miles Co. v. Park & Sons Co.,* 220 U. S. 373; *Straus v. Victor Talking Machine Co.,* 243 U. S. 490. And as an unfair method of competition under the Federal Trade Commission Act see: *F.T.C. v. Beech-Nut Packing Co.,* 257 U. S. 441; *J. W. Kobi Co. v. F.T.C.,* 23 Fed. 2, 41 (C. C. A. 2). The injury, if any, resulting from price maintenance is suffered not by the competitors of the producer but by the retailer and the ultimate consumer. The courts draw the distinction between price maintenance by agreement and price maintenance by refusing to deal. *U. S. v. Colgate,* 250 U. S. 300; cf. *Frey & Sons Inc. v. Cudahy Co.,* 256 U. S. 208.

[*Effect of Clayton Act*]

Thus the rules governing the maintenance of prices must be included in any discussion of unfair competition, although the problem is somewhat different from other trade practices. But the Clayton Act singled out two practices for special treatment, price discrimination and exclusive dealing and other tying agreements. Section 2 forbids discriminations in price not based upon differences in grade, quality, quantity or cost of transportation which substantially lessen competition or tend to create a monopoly in any line of commerce. The section outlaws unfair discriminations which substantially lessen competition or lead to monopoly. It does not compel a one price sales policy. It does not forbid sales below cost in the absence of discrimination. *Porto Rican Amer. Tob. Co. v. American Tob. Co.,* 30 Fed. 2, 234 (C. C. A. 2).

[*Petitioner's grounds for review*]

The amendment in § 2(a) has for its purpose making discrimination in prices unlawful "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." It is argued that § 2(c) under which this proceeding is brought, is to be construed in the light of § 2(a) and that so construed, the payment or receipt of the brokerage is illegal only when it has such effect upon competition as is provided in § 2(a). The argument proceeds that the receipt of brokerage here would be illegal only if it restricts competition or restrains trade or injures a competitor. But no complaint is made against Biddle Company or the other petitioners for this reason. The complaint here is under the provisions of § 2(c) and not § 2(a) of the statute. The validity of the order entered is dependent entirely upon the legality of § 2(c). Section 2(c) contains no classification provision nor is there anything in it which would justify the conclusion that it would not be uniformly applied. It in no way supports the theory that the relative size of businesses coming within its purview or other differing plans of organization determine the question as to whether or not violations of the statute occur.

[*Buyer-control of brokerage concerns*]

Petitioners say that if § 2(c) is construed to prohibit the payment or receipt of brokerage irrespective of a finding of injurious effect on competition, then § 2(c) deprives petitioners of their right to make usual and ordinary contracts for the disposition of property and services without due process of law contrary to the Fifth Amendment of the Constitution. While the Biddle Company was disassociated in ownership and management from either buyers or sellers, direct and indirect control can be exercised by buyers or sellers over a broker in transactions of purchase and sale by means other than participation in the broker's ownership and management. In the purchasing transactions which the Biddle Company executes for its buyers, it is the agent and representative of the buyers and is therefore to that extent subject to their control. The fact that the buyers do not own some or all of the stock of the Biddle Company does not negative the fact that the Biddle Company is under their control when so employed.

Biddle Company's vice-president testified that its entire income is derived from the monthly service charges. "Everything we get in buying, we turn back to our clients. We are not dependent on sales. We are dependent on getting orders from people. They are important to us, because it is through the placing of their orders that we get the touch of the market that is so necessary, but we have no immediate interest as regards immediate income from that source."

[*Petitioner's brokerage contract*]

By the terms of the contract, the buyer "employs Biddle Purchasing Company of New York to purchase such material as they may order from time to time within reasonable credit limits and agrees to pay Biddle Purchasing Co. for such services $——."

Such is the contract of employment which makes the Biddle Company a purchasing agent for the buyers.

[*Brokerage fee payments to buyers prohibited*]

It is clear that the statute prohibits payment of brokerage by the seller to the buyer or his agent or representative or controlled intermediary except for services rendered. Congress intended to prohibit such payments as an unfair trade practice. The report of the House and Senate Conference Committee, submitted in referring the bill in its present form, interprets the section as having this meaning.* It is manifest that the words "except for services rendered in connection with the sale or purchase of goods" prohibits payments which were made here to the buyers.

It is argued that the Biddle Company is a true intermediary and that under the statute it can represent and collect compensation from both buyer and seller. The Commission, on the other hand, argues that the statute does not permit such an arrangement. We need not decide that question since the evidence shows that Biddle Company receives its compensation solely from the buyers. What it receives from the sellers is not retained by it but merely passed on to the buyers or credited to their account.

[*Extent of intermediary's compensation*]

Congress must have intended that payments by sellers should not be made to buyers through any one acting as agent for the buyer. Significance and effect must, if possible, be accorded to every part of the act. *United States v. Levington Co.*, 232 U. S. 399. In the last phase of the section "either to the other party" etc., the description of the persons to whom it is unlawful to pay brokerage fees, is not separable into constituent parts, and hence this clause stands in its entirety or falls altogether. It may not be said that payments to buyers are in any different category than those to agents or those who act for or under the control of the buyers. If buyers' agents or intermediaries are excepted for services rendered, so too are the buyers themselves. The intent of Congress must be recognized and applied and this may best be given effect by a construction of the phrase "except for services rendered" that will harmonize with the remainder of the section. As the House and Senate Committees said, the intermediary is entitled to nothing more than "appropriate compensation by the one in whose interest he so serves" and one who acts

* "This subsection permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other." (House Rep., 2951, 74th Congress, 2nd Sess.)

in such capacity may not receive fees from the seller when he is under contract and does in fact turn over such fees to the buyer. Cf. *Lehigh Valley R. R. v. United States,* 243 U. S. 444; *Union Pac. v. Updike Grain Co.,* 222 U. S. 215; *I. C. C. v. Peavey & Co.,* 222 U. S. 42. Indeed, the brokerage fees by the sellers to the Biddle Company could not be made in good faith as compensation for services rendered since the fees are intended for the buyers and are immediately transmitted to them.

[*No violation of due process*]

The Fifth Amendment of the Constitution does not prohibit governmental regulation for the public welfare. The guaranty of due process merely demands that the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the objects sought to be obtained. *Nebia v. New York,* 291 U. S. 502. Congress has the power to regulate commerce and this gives it power to enact "all appropriate legislation for its protection and advancement * * * to adopt measures to promote its growth and insure its safety, protect, control, and restrain." *Texas R. Co. v. Br'hood of Ry. & S. S. Clerks,* 281 U. S. 548. It may be exercised to protect interstate commerce from dangers which threaten it. *Ky. Whip & Collar Co. v. Ill. Central R. R. Co.,* 299 U. S. 334; *N. L. R. B. v. Jones & Laughlin Steel Corp.,* 301 U. S. 37. A practice which threatens to obstruct or unduly burden the freedom of interstate commerce is within the regulatory powers of Congress under the commerce clause. If Congress decides the fact of danger, it may meet it by legislation. *Stafford v. Wallace,* 258 U. S. 495.

The right of freedom or liberty of contract guaranteed by the Fifth Amendment to the Federal Constitution does not proscribe the exercise by Congress of its power to regulate commerce in derogation of that right. *Tagg Bros. & Moorhead v. United States,* 280 U. S. 420. As said in *Nebia v. New York, supra:*

> "Legislation concerning sales of goods, and incidentally affecting prices, has repeatedly been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those enacted in another, by giving trade inducements to purchasers, and by other forms of price discrimination. The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies, which have been upheld."

[*Opportunity for concealed price discrimination*]

Congress may have had in mind that one of the principal evils inherent in the payment of brokerage fees by the seller to the buyer directly or through an intermediary, is the fact that this practice makes it possible for the seller to discriminate in price without seeming to do so. If a price discount is given as a brokerage payment to a controlled intermediary, it may be and often is concealed from other customers of the seller. One of the main objectives of § 2(c) was to force price discriminations out into the open where they would be subject to the scrutiny of those interested, particularly competing buyers. See: *Trunz Pork Stores v. Wallace,* 70 Fed. 2, 688 (C. C. A. 2). The order entered is responsible to and justified by the findings of the Commission and satisfies the requirements of due process.

[*Conclusion*]

Petitioners refer to *Fairmont Creamery Co. v. Minn.* (274 U. S. 1), which recognizes the distinction between prohibition and regulation. The rule of that case is not inconsistent with the principle here announced. Section 2(c) was clearly intended to restore equality of opportunity in business by strengthening the anti-trust laws through protecting trade and commerce against unfair practices and unlawful price discrimination. The power of Congress to define this trade practice and declare it to be unfair cannot be doubted. *F. T. C. v. Keppel & Bros.,* 291 U. S. 304.

Petition denied.

[*Dissenting opinion*]

SWAN, C. J., dissenting: For reasons which may be briefly stated, I am unable to concur in the opinion of the court.

[*Character of brokerage operations*]

For an agreed monthly subscription price the Biddle Purchasing Company supplies a market informational and purchasing service to some twenty-four hundred subscribers (wholesalers and distributors). The Biddle Company keeps in touch with about five thousand producers and gets prices and other market information which it transmits to its subscribers. When a subscriber desires to make a purchase he informs Biddle Company of his need, and the price he wants to pay, and Biddle Company sends the order to one of the producers who ships and bills the goods direct to the subscriber. The seller pays Biddle Company a brokerage commission on the sale and this is credited to the subscriber in reduction of the subscription price agreed to be paid for Biddle Company's service. About fourteen per cent of the subscribers receive cash remittances after their subscriptions have been completely paid for by the crediting of commissions.

[*Fee payment above buyer's subscription price invalid*]

The Commission has found that Biddle Company does not act for the sellers but only for its subscribers. In my opinion this finding can not be sustained. Biddle Company performs a regular brokerage service for the sellers and receives the same fee as they pay other brokers for a similar service. The fact that in many instances Biddle Company selects the seller, since the subscriber frequently does not designate from whom to buy, shows clearly that Biddle Company performs a service for the seller. It performs a further service in bringing the seller's products and prices to the attention of the subscribers, even though no sale immediately results. Biddle Company also performs a service for the buyer by supplying market information in addition to the purchasing service when an order is placed. Unless the statute forbids it, there could be no objection to the Biddle Company getting the customary brokerage from the seller and also a fee from the buyer, since the parties know that it is to be compensated by both. In other words, if Biddle Company kept the commissions paid by the sellers, the statute would not forbid it. It would be within the exception "for services rendered." Section 2(c) of the Robinson-Patman Act (49 Stat. 1526), though ungrammatically phrased, expresses the intention to forbid a seller from paying a brokerage fee to a buyer or his agent unless the payee renders some service to the seller. Its object is to prevent unfair competitive conditions which are created when a buyer gets a lower price than competitors in the guise of a commission paid to the buyer or to some agent or dummy. In my opinion it was not intended to eliminate such a business as the Biddle Company does for 86 per cent of its subscribers. Their goods cost them as much as their competitors would pay for the same goods. In addition, they pay something to Biddle Company for the service it renders them. In effect the arrangement is that the Biddle Company will charge for its informational and purchasing service the difference between what it collects from sellers as brokerage on orders placed by the subscriber, and the monthly subscription price. This means that different subscribers pay different sums for the Biddle service and the less they order through the Biddle Company the more they pay for informational and purchasing service, but I see nothing in the statute forbidding that. Only when the Biddle Company pays over brokerage fees in excess of the subscriber's subscription price does the buyer get a discriminatory rebate which gives him an advantage over a competitor who does not take the Biddle service. It seems to me that the statute should be construed to forbid Biddle Company's method of doing business only with respect to the 14 per cent of its customers who really get a price reduction on the goods through the commissions paid Biddle Company by the sellers. Such a construction will save a legitimate and useful business which has existed for half a century, and one which I do not believe Congress intended to outlaw by the statute in question.

I think the order of the Commission should be vacated except in so far as it forbids the Biddle Company from paying over to a subscriber any excess of commissions above the subscription price of the service.

[¶ 55,181] Federal Trade Commission v. Goodyear Tire & Rubber Company.

Supreme Court of the United States. No. 756. October Term, 1937. Decided May 16, 1938.

On Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit.

Neither the discontinuance of discriminatory practices prohibited by a cease and desist order of the Federal Trade Commission issued prior to the Robinson-Patman amendment to the Clayton Act nor the enactment of that amendment renders the controversy moot and the function of the Circuit Court of Appeals to determine whether or not the practice violated the original Act is not affected.

[*Discrimination prohibited*]

PER CURIAM. In September, 1933, the Federal Trade Commission charged respondent, The Goodyear Tire & Rubber Company, with the violation of Section 2 of the Clayton Act (15 U. S. C. 13) in selling tires, tubes, etc. to Sears, Roebuck & Company at discriminatory prices. Respondent, invoking the first proviso in

Section 2,[1] contended that its contracts with Sears, Roebuck & Company for sales involving lower net prices than those charged to independent dealers were made because of the great difference in the quantities sold. After hearing, the Commission ruled that it did not consider a difference in price to be on account of quantity unless it was based on a difference in cost and was reasonably related to and approximately no more than that difference. In March, 1936, the Commission issued an order requiring respondent to desist from discriminations in prices as described.

[*Amendment of Clayton Act*]

Pending the hearing in the Circuit Court of Appeals of respondent's petition for review, the Congress amended Section 2 of the Clayton Act. Act of June 19, 1936, c. 592, 49 Stat. 1526. The first proviso was amended to read as follows:

"Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered:"

[*Discontinuance of the practice*]

Thereupon, respondent informed the Circuit Court of Appeals that in view of this provision respondent had ceased to manufacture tires for Sears, Roebuck & Company under the terms of its existing contract; that, to dispose of the stock on hand, the parties had made a new price arrangement designed to conform to the new law; and that within the year all transactions between respondent and Sears, Roebuck & Company ceased and obligations were terminated by mutual releases. 92 F. (2d) 677, 679.

[*Circuit court decree*]

Considering that there was no controversy between the parties as to the illegal character of respondent's practices under the amended Act, the Circuit Court of Appeals concluded that the case had become moot. In that view the court set aside the order of the Commission and remanded the case "but without direction to the Commission to dismiss the complaint and without prejudice to its filing a supplemental complaint in the original proceeding if under Section 2 of the amendatory act this may now be done" as to which the court expressed no opinion. *Id.*, p. 681.

[*Relief sought*]

Both the Commission and the respondent contended below, and contend here, that the case has not become moot. While they disagree in their reasoning, they come to the same conclusion upon this point, and both ask that the case be remanded to the Circuit Court of Appeals with directions to determine it upon the merits. We think that their conclusion is correct and that the remand should be made.

[*Prior orders not affected by amendment*]

Section 11 of the Clayton Act (15 U. S. C. 21) provides that whenever the Commission has reason to believe that any person is violating or has violated the provisions of the Act, and upon hearing so finds, the Commission shall issue an order requiring such person to cease and desist from such violations. In case of failure to obey its order, the Commission may apply to the Circuit Court of Appeals for enforcement. And anyone required to cease and desist from a violation charged may seek review in the Circuit Court of Appeals, praying that the order be set aside. The provisions of the Act of June 19, 1936, show clearly that the orders of the Commission entered before its passage are to remain in effect. Section 2 of that Act provides that nothing therein contained shall "affect rights of action arising, or litigation pending, or orders of the Federal Trade Commission issued and in effect or pending on review, based on section 2 of said Act of October 15, 1914, prior to the effective date of this amendatory Act."

[*Controversy not moot on discontinuance*]

Discontinuance of the practice which the Commission found to constitute a violation of the Act did not render the controversy moot. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 309, 310; *Southern Pacific Company v. Interstate Commerce Commission*, 219 U. S. 433, 452; *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 514-516; *National Labor Relations Board v. Pennsylvania Greyhound Lines*, decided February 28, 1938; *Guarantee Veterinary Co. v. Federal Trade Commission*, 285 Fed. 853, 859, 860; *Chamber of Commerce v. Federal Trade Commission*, 13 F. (2d) 673, 686, 687. The

[1] That proviso, in the original Act, was as follows:

"Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodities sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition;"

Commission, reciting its findings and the conclusion that respondent had violated the act, required respondent to cease and desist from the particular discriminations which the order described. That is a continuing order. Its efficacy, if valid, was not affected by the subsequent passage or the provisions of the amendatory Act. As a continuing order, the Commission may take proceedings for its enforcement if it is disobeyed. But under the statute respondent was entitled to seek review of the order and to have it set aside if found to be invalid. The question which both parties sought to have the Circuit Court of Appeals decide was whether respondent's conduct was a violation of the original statute. Upon the conclusion that it was such a violation, the Commission based its order. Neither the transactions subsequent to that order nor the passage of the amendatory Act deprived the respondent of its right to challenge the order and to have its validity determined or the Commission of its right to have its order maintained if validly made.

[*Reversal of circuit court decree*]

The decree of the Circuit Court of Appeals is reversed and the cause is remanded to that court for a determination of the merits.

It is so ordered.

Mr. Justice Stone, Mr. Justice Cardozo and Mr. Justice Reed took no part in the consideration and decision of this case.

[¶ 55,182] General Talking Pictures Corporation v. John DeMarce.

Minnesota Supreme Court. Filed May 27, 1938.

A "tying agreement" in a lease of motion picture apparatus requiring that lessee purchase repair parts from the manufacturer lessor may be necessary to effect satisfactory servicing of the lessee, and whether or not the restriction unreasonably restrains trade becomes a question of fact.

The determination of issues arising under the Federal Anti-Trust statutes, whether raised by way of attack or in defense, is a matter exclusively within the jurisdiction of the Federal courts under the statutes.

Opinion

[*History of the case*]

Holt, Justice. This is an appeal from a judgment in favor of plaintiff in an action to recover on past due promissory notes executed by defendant to plaintiff under and pursuant to a contract for the lease of certain talking motion picture projecting equipment, and for attorneys fees. The trial was to the court. There being no settled case or bill of exceptions, the only inquiry is whether the findings sustain the conclusions of law.

[*Statement of facts*]

Plaintiff, a New York corporation, is a manufacturer of sound reproducing equipment. Defendant operates a moving picture theatre in Benson, Minnesota. In October, 1930, the parties entered into a contract under which defendant, for a consideration, was licensed to use one of plaintiff's machines. As part of the transaction, defendant also executed installment notes according to which payment was to be made. Both contract and notes were prepared by plaintiff in New York, sent to and signed by defendant in Benson and returned to plaintiff in New York for execution. Thereafter the equipment was shipped and installed by plaintiff's engineers.

[*Defense contentions*]

Defendant sought to avoid liability for the following reasons, inter alia: (1) A prior rescission; (2) false and fraudulent representations inducing the contract; (3) coercion by threat of litigation; (4) illegality of the contract because in restraint of trade in violation of the Sherman Anti-Trust and Clayton Acts. He further counterclaimed, under purported authority of the Anti-Trust Laws, for treble the amount of damages alleged to have been suffered by him in his business, for the asserted violation thereof. The trial court found adversely to the defendant on all the issues and made findings of fact and conclusions of law against him. Except as to the claim involving violation of the Anti-Trust Laws, the determination of the trial court was final, and has been so considered by counsel. That issue alone presents the question to be decided on this appeal.

[*Alleged anti-trust violation*]

The following provisions of the contract are attacked as "tying agreements" restraining trade in violation of the federal laws: (Clayton Act, § 3, 15 USCA § 14).

"8. The Exhibitor shall not obtain any additional renewal, spare or assembled parts for the Equipment otherwise than through the Company

and the Company agrees to furnish and supply the same upon the terms above set forth.

"The Exhibitor shall keep, maintain and operate the Equipment together with any renewals or replacements thereof in such manner as may be from time to time prescribed by the Company and only by such persons whose efficiency is first certified by the Company, and the Exhibitor shall not remove, shift, alter, change, modify, add to, take anything from or use any other device with the Equipment, or any part thereof in the reproduction of sound, or break any seal thereon. The exhibitor may, however, take all reasonable steps consistent with the intent hereof to correct or repair the Equipment in the event of any accident or breakdown."

The appellant also cites the following paragraphs in support of his position:

"12. The title to and ownership of the Equipment and of all parts or other equipment at any time furnished hereunder, and of all drawings, prints, tools and instructions shall be and remain in the Company, all of which shall be returned to it by the Exhibitor at the expiration or sooner termination of this license.

"13. The Exhibitor shall permit the Company's agents to have access to the Theatre at all reasonable hours for the purpose of installing, examining and inspecting the equipment, and the Company will at the Exhibitor's sole cost and expense make such repairs, renewals or alterations as the Company may from time to time deem necessary."

Appellant also invites attention to the finding that plaintiff's agent made representations that if defendant bought "bootleg" equipment he would be subject to lawsuits.

[*"Tying agreement" not of necessity a restraint*]

The trial court found that during the time that the defendant operated the equipment here involved he ordered and used additional and renewal parts from concerns other than the plaintiff's, and used such parts on his equipment without objection from the plaintiff. It further found that defendant was not obliged to and did not accept the terms and conditions for the installation of the equipment because of any threat or by reason of any false and fraudulent representations and inducements made by the plaintiff to the defendant. Its most important finding on the branch of the case we are now considering was:

"That the agreement hereinbefore set forth does not have a necessary and inevitable tendency to produce material and unreasonable restraint of interstate commerce in violation of the Sherman Anti-Trust Act and the Clayton Act."

[*Interstate nature of transaction*]

1. Was the making of the contract and the installation of the equipment an interstate transaction and so subject to the Sherman and Clayton Acts? We answer that question in the affirmative. It is true that the findings show that the defendant had some preliminary negotiations with plaintiff's representative in Minneapolis but the contract had not at that time been prepared. It was subsequently made out, together with the notes by plaintiff, in New York City and mailed to the defendant and sent to Benson where he signed it "free of interference from plaintiff." The answer and the findings indicate that the contract was then returned to New York City for the signature of the plaintiff. The defendant seems to have regarded the transaction as interstate commerce because in his amended answer he pleads that the contract effected a substantial lessening of competition as between the plaintiff and competing manufacturers in violation of the Sherman Anti-Trust Law and the Clayton Act. It is true that he also charges a violation of the Minnesota restraint of competition act but the counterclaim rests solely on the federal acts and the case seems to have been tried upon the theory that the contract was subject to those acts, since the court made no findings as to whether the contract violated the Minnesota Act. The making of the contract itself was obviously an interstate transaction and the installation of the complex and intricate equipment by plaintiff's engineers was purely incidental and did not remove the transaction from the field of interstate commerce. *York v. Colley*, 247 U. S. 21, 62 L. ed. 963; *Palmer v. Aeolian Co.*, 46 Fed. 2nd 189, 190; *General Talking Picture Corporation v. Shea*, 185 Ark. 777, 49 S. W. 2nd 359; *Moline Furniture Works v. Club Holding Co.*, — Mich. —, 274 N. W. 338. Where it requires an expert with highly technical knowledge to make equipment accomplish the purpose for which it is sold and to satisfy the buyer, this court has regarded the necessity of sending such an expert into this state to accomplish the result as not taking the transaction out of the field of interstate commerce. *Boss v. Gunderson*, 18 Minn. 183, 209 N. W. 876. It appears that the parties regarded the provisions relative to the furnishing of subsequent repairs as separable and inoperative since no attempt was made to enforce those provisions and repairs were furnished by competitors without objection.

[*Restraint a question of fact*]

2. The Supreme Court of the United States has repeatedly said that the restrictions imposed by the Sherman Act set up a "standard of reasonableness." They are aimed at contracts and combinations which by reason of intent or the inherent nature of the contemplated act prejudice the pub-

lic interest by unduly restraining competition or unduly obstructing the course of trade. *Sugar Institute v. United States,* 297 U. S. 597, 553, 80 L. ed. 859, and cases therein cited. The Clayton Act (15 USCA 14) prohibits tying agreements which substantially lessen competition or tend to create a monopoly in any line of commerce. We think that a tying agreement which requires the lessee or purchaser of such equipment as here involved to purchase repair parts from the maker of the equipment is not necessarily unreasonable restraint of trade. It may quite reasonably be necessary in order to effect satisfactory service to the lessee or buyer.

"Where a practice is not inherently unlawful and unfair, and its legality depends upon its effect, the finding that it has a dangerous tendency unduly to hinder competition or create a monopoly, must be based upon its effect as demonstrated upon the experience of the competitors." *Federal Trade Commission v. Paramount Famous-Lasky Corporation,* 57 Fed. 2nd 152, 157.

We think the effect of the tying agreements here complained of was an open question of fact for the trial court's determination and that its finding adverse to the defendant is conclusive against him in the absence of a settled case which shows such finding not to be sustained by the evidence.

[*Federal jurisdiction of anti-trust issue exclusive*]

3. A further reason why this defense is not available to the defendant is want of jurisdiction in the state courts to consider this defense. § 15 Title 15 USCA provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust Laws may sue therefor in any district court of the United States * * * without respect to the amount in controversy, and shall recover threefold the damages by him sustained * * *."

Generally, if an act of Congress gives a penalty to the party aggrieved, without specifying a remedy for its enforcement, it is cognizable in state courts. *Claflin v. Houseman,* 93 U. S. 130, 23 L. ed. 833. But the above quoted provision of the Clayton Act, supplementing a similar one in the Sherman Act, has been widely construed by both state and federal courts to vest exclusive jurisdiction of issues arising under the Anti-Trust Laws in the federal courts alone. *Blumenstock Bros. v. Curtis Pub. Co.,* 252 U. S. 436, 64 L. ed. 649; *Loewe & Co. v. Lawler,* 130 Fed. 633; *Venner v. New York Central Ry. Co.,* 94 N. Y. Misc. 671, 177 App. Div. 296, 328, affirmed Court of Appeals, 123 N. E. 893, 249 U. S. 617. The compelling reason, in view of the clear language of the Act is best expressed by the court in *Loewe & Co. v. Lawler, supra:*

"Congress was dealing with a delicate problem when it gave us the Sherman Act, and it would seem to have been the thought that since a subject was one over which the federal jurisdiction was absolute, it would be well to intrust its exploitation to the federal judiciary."

Whether the issue is raised by plaintiff or a counterclaiming defendant, the result is the same. *Pennsylvania-Dixie Cement Corp. v. H. Wales Lines Co.,* 119 Conn. 603.

[*Conclusion*]

Defendant argues however that "the illegality of any contract may be urged by way of defense." We cannot agree. Whether by way of attack or defense, once raised, the issue is the same. Its determination in either case would require this court to apply federal law, the construction of which is expressly and exclusively placed with the federal courts. The "exploitation" of that "delicate problem" must be left to the jurisdiction of the tribunals designated by the government which created the defense. There is nothing in *Fox Film Corporation v. Muller,* 192 Minn. 212, 255 N. W. 845, to the contrary. In the first place, the issue herein was not there raised. Furthermore, we but construed the federal decision of *United States v. Paramount Famous-Lasky Corp.,* 34 Fed. 2nd 984, 282 U. S. 30, 75 L. ed. 145, to mean that an arbitration clause, held illegal by the court, "permeates and vitiates the whole contract." The relief here sought is in substance that provided by the Anti-Trust Laws. The fact that it is urged by way of defense alone does not change its complexion. Awarding of treble damages is based upon the prerequisite determination of the invalidity of the questioned contract. The real relief is the determination in the first instance whether or not the act is violated.

Judgment affirmed.

[¶ 55,183] Federal Trade Commission v. Charles N. Miller Company.

United States Circuit Court of Appeals, First Circuit. Decided June 10, 1938.

Petition for enforcement of an order of the Federal Trade Commission.

Modification of an order of the Federal Trade Commission to limit its prohibition of sales of candy, so packed that retail sales might be made by means of gaming devices, to sales where the packing is done with the design that retail sales be made in the prohibited manner is decreed, where the original order imposed liability without regard for intent.

Modifying cease and desist order in Federal Trade Commission Complaint No. 2826.

Before BINGHAM, WILSON and MORTON, JJ.

Opinion of the Court

PER CURIAM: This is an application for the enforcement of an order of the Federal Trade Commission of November 14, 1936, modifying its original order of August 4, 1936. The portions of the original order, so far as here material, are the two paragraphs in which the respondent was ordered to cease and desist from

"(1) Selling and distributing to jobbers and wholesale dealers for resale to retail dealers, or to retail dealers direct, candy so packed and assembled that the sales of such candy to the general public are to be made or *are designed to* be made by means of a lottery, gaming device, or gift enterprise;

"(2) Supplying to or placing in the hands of wholesale dealers and jobbers or retail dealers packages or assortments of candy which are used or *are designed to* be used, without alteration or rearrangement of the contents of such packages or assortments, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy or candy products contained in said assortment to the public;"

In the modified order they read as follows:

"(1) Selling and distributing to jobbers and wholesale dealers for resale to retail dealers, or to retail dealers direct, candy so packed and assembled that sales of such candy to the general public are to be made or *may* be made by means of a lottery, gaming device, or gift enterprise;

"(2) Supplying to or placing in the hands of wholesale dealers and jobbers or retail dealers packages or assortments of candy which are used or *may* be used, without alteration or rearrangement of the contents of such packages or assortments, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy or candy products contained in said assortment to the public:"

[*Grounds for objection*]

The respondent objects to the modified order on the ground that it renders the company subject to being held in contempt for the acts of parties over whom it would have no control.

[*Intent behind sale controlling*]

This case differs in no respect from the one before the Court of Appeals in the Seventh Circuit, in *Federal Trade Commission v. A. McLean & Son et al.*, 84 Fed. (2d) 910 (certiorari denied, 299 U. S. 590), in which the court held that an order like the modified one here in question was too broad. It was there said:

"We are convinced, however, that paragraphs (1) and (2) of the cease and desist order are too broad in that they prevent the sale and distribution to jobbers and wholesalers for resale to retailers of any candy so packed and assembled that retail sales may be made by means of a lottery, or gaming device. This clearly would prevent the sale of any candy which might afterwards be sold by the retailer by means of a lottery, gaming device or gift enterprise. Obviously, this was not the intention of Congress, and we think it was not the intention of the Commission. We have therefore stricken the word 'may' from paragraphs (1) and (2) of the orders and substituted the words 'are designed to,' and as thus modified, the orders of the Commission are affirmed, and respondents, their officers, directors, agents, representatives and employees are hereby ordered to comply therewith."

[*Conclusion*]

We approve the decision in the *McLean* case and strike the word "may" from paragraphs (1) and (2) of the modified order and in its place substitute the words "are designed to." With these modifications, the order of the Commission is affirmed and the respondent, its officers, directors, agents, representatives and employees are hereby ordered to comply therewith.

[¶ 55,184] L. & C. Mayers Co., Inc. v. Federal Trade Commission.

United States Circuit Court of Appeals, Second Circuit. Decided June 6, 1938.

Petition to review and set aside an order of the Federal Trade Commission. Federal Trade Commission seeks an enforcement order.

False representations concerning the wholesale character of the business, made in its catalogues by a jewelry company which makes sales not for resale, constitute unfair competition where they effect a diversion of trade from competitors by causing purchasers to presume that the quoted sales prices are wholesale prices.

MANTON, L. HAND, and A. N. HAND, Circuit Judges.

[*Counsel*]

Kurzman & Frank, Attorneys for Petitioner. Sidney Newborg, John C. Gall, of Counsel. W. T. Kelley, Chief Counsel, Federal Trade Commission. Edward L. Smith, James W. Nichol, Special Attorneys, Attorneys for Respondent.

Felix H. Levy, Amicas Curia on behalf of the American Natl. Retail Jewelers Asso. in support of the Commission's order.

[*The petitioner*]

MANTON, Circuit Judge. Petitioner is in the business of selling jewelry in interstate commerce and the respondent has ordered it to cease and desist, in connection with its sales and offers of sale, from representing itself in its catalogues and in other ways to be a wholesaler of jewelry.

[*Nature of catalogues*]

The evidence shows that the petitioner sent out catalogues in which many of the articles offered for sale were pictorially and descriptively represented. These were sent chiefly to industrial concerns, co-operative buying bureaus, state and local governments and purchasing clubs. On the covers of such catalogues and at various places therein, the petitioner referred to itself as "Wholesale Jewelers." The articles were set forth in the catalogues at so-called list prices from which the purchasers were allowed a discount of 53% in order to find out the cost to them of each item. The catalogues specifically stated that list prices are not to be confused with retail prices and that the former term is used in order to permit prices to be quoted on which only one discount has to be computed. The catalogues also stated that if one purchased goods at lower prices at any other wholesale jewelers, the difference would be refunded within 30 days.

[*The purchasers*]

The stipulation of facts divides the purchasers from the petitioner into seven classes. The cease and desist order includes but three of these groups, which are as follows:

(1) Sales to industrial concerns, public utilities, banks and other similar organizations of articles not for resale but for use by such organizations where the sales are not in quantity lots;

(2) Sales to industrial concerns, public utilities, banks and other similar organizations buying merchandise not for resale but for the benefit of their employees, the merchandise being shipped by respondent directly to the employee for whom the merchandise is ultimately intended or to the organization purchasing the same, the organization paying the respondent therefor with its check and obtaining reimbursement from the employees, or the employee's money orders or personal checks being forwarded to the respondent by the organization making the purchase.

(3) Sales to mutual buying clubs maintained by fraternities, colleges or universities and to the employees of industrial public utility or similar organizations of articles purchased for the purpose of obtaining benefits in price and otherwise of such buying, where the merchandise purchased by such purchasers is not resold, but is applied to their own use or to the use of members of such organizations.

The order also sets forth a fourth group which prohibits sales not in quantity lots to individuals where the goods are not to be resold. Apparently this was intended to apply to a strictly retail type of business.

[*Findings of FTC*]

The gravamen of the complaint in this proceeding is unfair competition in selling at retail. The respondent has found that the petitioner represents itself to the purchasing public as selling at wholesale prices and that these prices are higher than the usual and customary prices charged by wholesalers of jewelry to purchasers thereof; that this deceived the retail buying public and so unfairly diverted trade to the petitioners from competitors who truthfully described their status. If the petitioner was doing purely a wholesale business, as it contends, there could be no unfair competition with retailers since the purchasers would have the wholesale field from which to buy and would not need to pay petitioner's higher prices or buy at retail at all.

[*Nature of wholesale business*]

As a description of what constitutes a wholesaler, the Commission says:

"A wholesaler of jewelry is one who sells to the trade for resale and seldom, if ever, to the purchasing public, with the exception that sales to industrial concerns, public utilities, banks and other similar organizations, which purchase in quantity lots, i. e., simultaneous sales of

more than one of a given item, not for resale, but for use by such organizations, are considered as wholesale transactions. It is the character of sales to the trade that makes and distinguishes a wholesaler."

There is testimony of experts which justifies this definition of a wholesaler. This court in *Great A. & P. Tea Co. v. Cream O'Wheat* (227 Fed. 46) and *Mennen Co. v. Fed. Trade Comm.* (288 Fed. 774) has ruled in like effect.

[*Theory of case*]

The theory of the Commission's complaint is that the company sells to ultimate consumers; that in aid of such sales it uses catalogues designating itself as a wholesaler and that the purchasing public regards it as such—one selling to retailers at a price lower than the price at which the retailer sells; that consumers infer from this representation that they are buying at the prices at which retailers purchase, thereby saving an amount equal to the retailer's profit, and that the price as fixed in the catalogues are wholesale prices; but such is not the fact and the consumer purchaser is thereby deceived.

[*Representations constitute unfair competition*]

The groups to whom the petitioner is directed not to sell representing itself as a "wholesaler" are consumers. There is evidence to justify the finding that the prices at which the petitioner sold were higher than normal wholesale prices. We will not disapprove a finding based upon conflicting evidence. *F. T. C. v. Winsted Hosiery Co.*, 258 U. S. 483; *F. T. C. v. Standard Education Society*, 302 U. S. 112. Since the jewelry was sold to customers "not for resale," they are the ultimate purchasers. The evidence of experts as well as of other manufacturers and jewelers justifies the conclusion of the respondent that the petitioner was not a wholesaler. Such false and misleading representations which have a tendency and capacity to induce the purchase of petitioner's products in preference to the products of others (competitors) constitutes unfair competition within the meaning of § 5 of the Federal Trade Commission Act (38 Stat. 719; 15 U. S. C. A. 45). *F. T. C. v. Royal Milling Co.*, 288 U. S. 212; *Brown Fence & Wire Co. v. F. T. C.*, 64 Fed. 2, 934, 936 (C. C. A. 6).

[*Public interest involved*]

Petitioner contends that there is no public interest involved and therefore the order should not be approved. It is in the interest of the public to prevent the sale of commodities by the use of false and misleading statements and representations. *United States v. Winsted Hosiery Co.*, 258 U. S. 483, 494; *F. T. C. v. Balme Co.*, 23 Fed. 2, 615, 620 (C. C. A. 2). Indeed, a representation may be unlawful under § 5 although the trader makes it innocently. *F. T. C. v. Algoma Lumber Co.*, 291 U. S. 67, 81. It is not necessary that the product so misrepresented be inferior or harmful to the public; it is sufficient that the sale of the product be other than as represented. *F. T. C. v. Royal Milling Co., supra.*

[*Enforcement of FTC order*]

The order is affirmed and the order of enforcement is granted.

[¶ 55,185] Federal Trade Commission v. Standard Education Society, et al.

United States Circuit Court of Appeals, Second Circuit. Decided June 13, 1938.

The lower Court may enjoin individual respondents from engaging in unfair representations when the restraint is necessary to carry out the theory of the Supreme Court in reversing the original decision, as withdrawal of the appeal from the particular portion of the lower Court's order does not except the individual respondents from the general prohibition against unfair practices so far as the respondent corporation is concerned.

Complying with the decision of the Supreme Court of the United States, reported at ¶ 55,170. Upholding Federal Trade Commission Complaint No. 1574.

L. HAND, SWAN, and CHASE, Circuit Judges.

[*Decree intended to carry out theory of higher court*]

PER CURIAM: The respondents insist that the tenth paragraph of our order should be left unchanged, and that by enjoining the individual respondents in respect of the conduct there forbidden, we have added to the mandate of the Supreme Court. We acknowledge that verbally this may be true; the Solicitor-General withdrew the appeal from our modification of the tenth paragraph of the Commission's

order and the opinion of the Supreme Court declared that it would for this reason not be touched. However, not to enjoin the individual respondents so far as the corporation is enjoined, would falsify the whole theory of the Supreme Court, which reversed us for not including them *pari passu* with the corporation. By abandoning the appeal from the tenth paragraph all that was meant was that the conduct therein specified which we had absolved might remain absolved; not that the general appeal from our release of the individual respondents should except that part of the corporation's conduct which both the Commission and we had condemned in that paragraph. It is true that a lower court must not undertake to change by one jot the decision of the court above; but for that very reason it should try to understand it; and to adhere to a purely verbal construction which will defeat its obvious intent, is not a way to do so. For these reasons we have signed the Commission's order, and denied the respondents' motion for resettlement.

[¶ 55,186] Schenley Products Co., et al. v. Franklin Stores Co.

Court of Errors and Appeals of New Jersey. Decided May 17, 1938. 124 N. J. Eq. 100, 199 Atl. 402.

Appeal from the New Jersey Court of Chancery.

Proof of ownership of trade-marks need not be offered in an action by a distributor of trade-marked products to enjoin a retailer from selling below the prices fixed in minimum resale price contracts under the New Jersey Fair Trade Act where the distributor, although not a party to the agreements, is damaged by the knowing violation, and the trade-marks, name, and brand of the product are attached to the pleadings.

Whiskey is a "subject of commerce" within the meaning of the New Jersey Fair Trade Act and that statute and statutes which prohibit the removal of trade-marks from liquors are not in conflict and will be construed together where the United States Supreme Court, with knowledge of existing laws, has sustained the application of a similar Fair Trade Act to liquor products.

Minimum resale price contracts established under the Fair Trade Act are not invalid for want of consideration and their enforcement is not prevented by allegations of lack of mutuality and certainty.

The Chief Justice, TRENCHARD, HEHER, and PERSKIE, Justices, DEAR, WOLFSKEIL, RAFFERTY, and WALKER, Judges, concur. PARKER, CASE, BODINE, and DONGES, Justices, HETFIELD and WELLS Judges, dissent.

[Counsel]

Carey & Lane, of Jersey City (Harry Lane, of Jersey City, of counsel), for appellants.

Louis B. Englander, of Newark, for respondent.

[Statement of Case]

RAFFERTY, Judge. This is an appeal from a decree in chancery dismissing the amended and supplemental bills of complaint of appellants and awarding counsel fee, etc.

Complainants below sought, among other things, to enjoin defendant from advertising, offering for sale, or selling, certain whiskies, generally referred to as "Schenley's Products," at a price below that fixed for said products in agreements entered into between certain distributors and retailers pursuant to the provisions of chapter 58, P. L. 1935, R. S. 1937, 1:1-10, 56:4-3 to 56:4-6, N. J. St. Annual 1935, § 217-13 to 217-17. Respondent is not a party signatory to any of these agreements but, it is alleged, was advised of their existence. Nor was Schenley Products Company, a corporation, etc., a party to any agreement, but it alleges itself to be a person damaged by the acts complained of.

[Dismissal by lower court]

The learned Vice Chancellor dismissed the action because "The foundation of the action is a contract made by or on behalf of the owners of the brands" and "the failure of the pleader to disclose who is the owner of any of the brands or who is the producer of the whiskey, or in whose behalf the contract was made."

[Lower court in error]

In this it is clear that the learned Vice Chancellor fell into error. A reading of the statute discloses no such requirement as thus laid down. It provides merely that no contract shall be deemed in violation of any law of this State for the reason that the buyer agrees not to resell a commodity bearing the trade-mark, brand, or the name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others, except at the price stipulated by the vendor, or where the vendee or producer shall require, in delivery to whom he may resell such commodity, an agreement that the purchaser

will not, in turn, resell except at the price stipulated by such vendor or vendee. The act further provides that wilfully and knowingly advertising, offering for sale, or selling, any commodity at less than the price stipulated in any contract entered into pursuant thereto, whether the person so doing is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

[*The fair trade agreement*]

The amended and supplemental bills of complaint filed herein are framed within the statute and without doubt should have been retained in the court below and defendant required to plead thereto. The pleadings set forth imply an agreement between Gillhaus Beverage Company, Inc., a corporation of the State of New Jersey, a distributor, as seller, and one Lutz, a retailer, as buyer, not to resell specified trade-marked liquors except at the prices stipulated by the vendor Gillhaus, etc., and, that respondent wilfully and knowingly advertised, offered for sale, or sold, the commodity at less than the prices set down in such contract, to the damage of the parties appellant.

[*Trade-mark owner need not institute action*]

To assert that the contract must be made by or on behalf of the owner of the trade-mark or brand, or by or on behalf of the producer of the commodity bearing the trade-mark or brand, is to import into the statute that which is clearly not within its provisions and that which is unnecessary to its operation. In the case of *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 57 S. Ct. 139, 81 L. Ed. 109, 106 A. L. R. 1476, a decree of the state courts of Illinois sustaining the validity of the Fair Trade Act of that state, Smith-Hurd Stats. c. 121½, § 188 et seq., was affirmed, and the United States Supreme Court, in setting forth the facts, stated (page 141): "Appellee is a dealer in alcoholic beverages at wholesale. It buys the products here in question from the producers. The whiskies bear labels and trade-marks, and are in fair and open competition with commodities of the same general class produced by others." The limitation of the statute is that the commodity itself or the label or content of the commodity shall bear "the trade-mark, brand, or the name of the producer or owner" of the commodity. R. S. 1937, 56:4-5, N. J. St. Annual 1935, § 217-13. The pleadings filed below were within this limitation copies of the trade-mark, name, and brand of the commodity being attached to the pleadings as exhibits and the appropriate registration thereof being sufficiently alleged.

Whether the owner of the trade-mark, etc., or the producer of the commodity might successfully claim damage resulting to it because of the existence of such a contract as is here involved is not a question presently before us nor do we make any expression with respect thereto.

[*Complainants proper parties*]

Nor is the expression by Mr. Justice Bodine in the case of *Johnson & Johnson et al. v. Weissbard et al.*, reported in 121 N. J. Eq. 585, 191 A. 873, page 874, that "the intent of the act is not to prevent a resale of merchandise, but a destruction of the producer's good will * * *" to be considered as settling the legislative intent to the exclusive purpose suggested by the court below. The title of the act, challenged here as being defective because not giving notice of the effect of the legislation, etc., clearly states that distributors as well as trade-mark owners are to be protected by the legislation. The title reads, "An Act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name." This unambiguous language, within the facts of this case, does give notice of the effect of the legislation and imparts to the text of the statute an application sufficiently broad in scope to include complainants below and to justify their position as proper parties complainant.

[*Construction of statute*]

The statute, R. S. 1937, 56:4-5, N. J. St. Annual 1935, § 217-13, gives approval to contracts which provide that "the buyer will not resell * * * except at the price stipulated by the vendor." Like approval is given to contracts wherein "the vendee or producer require" that his vendee shall not resell "except at the price stipulated by such vendor or such vendee." The language thus used by the legislative body, no contrary intention appearing, will be given its ordinarily accepted meaning and will not be construed as limited to a particular class. Indeed, to state that the vendee of a commodity may require his vendee not to resell, etc., quite definitely informs that others than the owners of the brands or the producers of the commodity were within the legislative mind and were to have the advantages afforded by the statute.

[*Constitutionality of similar statute*]

It is argued that expressions by the courts that a retailer may remove the trade-mark from the commodity and thereby relieve against the statute are not applicable to liquor because liquor laws bar such removal. *Johnson & Johnson et al. v. Weissbard et al., supra.; Old Dearborn Distributing*

Co. v. Seagram-Distillers Corp., supra. The term 'commodity" is declared in the statute to mean "any subject of commerce." R. S. 1937, 56:4-3, N. J. St. Annual 1935, § 217-16. Certainly whiskey is a subject of commerce. But we see no conflict here. The statutes being *in pari materia* and not in conflict are to be construed together. It is a sufficient answer that the statutes and regulations promulgated thereunder, cited by respondent, prohibiting the removal of the trade-mark or label from whiskies and like products, antedated the decision of the United States Supreme Court in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra.* It must be presumed that the Supreme Court took judicial notice of the state of law existing at the time of the adoption of the opinion in that case, a like commodity being involved, and, notwithstanding, declared the Illinois statute, there under consideration and substantially identical with our own, as a proper and constitutional exercise of legislative power.

Lacking the question of constitutional right, we cannot here be concerned with the policy of the law as urged by respondent, this being a matter for the Legislature exclusively.

[*Legislative approval of price-fixing*]

It is contended by respondent that the contract between Gillhaus, etc., and Lutz, hereinbefore referred to, is invalid because of lack of consideration and is unenforceable in equity because of lack of mutuality and certainty. Price-fixing contracts such as the one under consideration are authorized by the statute here in question and have received judicial sanction. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra.; Johnson & Johnson et al. v. Weissbard et al., supra.*

[*Conclusion*]

We have fully considered the other matters urged in support of the decree. It is our conclusion that the pleadings filed in this cause set forth a case for equitable relief and that the decree of the courts below dismissing the action and awarding counsel fee, etc., must be reversed.

[*Decree reversed*]

The decree is reversed.

For affirmance: Justices Parker, Case, Bodine, and Donges, and Judges Hetfield, and Wells—6.

For reversal: The Chief Justice, Justices Trenchard, Heher, and Perskie, and Judges Dear, Wolfskeil, Rafferty and Walker—8.

[¶ 55,187] Steiner Sales Company v. Schwartz Sales Company.

United States Circuit Court of Appeals, Tenth Circuit. Filed May 31, 1938.

Appeal from the District Court of the United States for the District of Utah.

Provisions of a license agreement which impose restrictions upon the rights of a patent licensee do not constitute a violation of the Federal Anti-Trust statutes where they place no restrictions beyond those to which the patentee has a right under his lawful patent monopoly, under which the patentee may inhibit the use, manufacture, or sale of the patented device by other parties.

An agreement by a patent licensee, restricting his purchases of the patented device to purchases from manufacturers authorized by the patentee for the duration of the patent, is a lawful protection of the rights of the patentee and imposes no restrictions beyond those which inure to his lawful monopoly.

[*Plaintiff, a manufacturer of continuous towel cabinets, brought suit for a declaratory judgment against defendant Company, a manufacturer of a similar product, challenging the validity of patents owned by defendant and the validity of contracts between defendant patentee and its licensees, which plaintiff alleged violate Section 1 of the Sherman Act and Section 3 of the Clayton Act. By the terms of the license agreements defendant patentee leased the use of his inventions and of the improvements to the licensees for the term of the existing patent and of future patents. The use of the inventions is restricted to the licensees' own businesses, and further restrictions are imposed under which the licensees agree not to contest the validity of any patent upon the article which may be obtained by defendant patentee at any time, and to purchase the cabinets from manufacturers authorized to vend by the patentee. The trial court ruled that the contested patents were invalid and that, due to this invalidity, the licenses violated the provisions of the Clayton Act. From

[* The bracketed matter is a digest of the facts of the case, and of such portions of the opinion not within the scope of TRADE REGULATION REPORTS.]

the decision defendant patentee brings appeal.

[The court, after reversing the findings of the trial court as to the validity of certain of the patents, reconsiders the license agreements in regard to their propriety under the Anti-Trust statutes.]

[*Rights of patentee under Clayton Act*]

Section 3 of the Clayton Act does not impinge upon the lawful monopoly granted to a patentee, namely, the exclusive right to manufacture, use and vend the patented device. It does not prohibit him from inhibiting the manufacture, use or sale or restricting the manufacture, use or sale of the patented device by others.

[*Substantial lessening of competition prohibited*]

It does prohibit the patentee from making a contract which imposes limitations beyond his lawful patent monopoly on the right of his lessee or purchaser to use or deal in goods, wares, merchandise, supplies, or other commodities of a competitior where so to do will substantially lessen competition or tend to create a monopoly.[11]

In *General Talking Pictures Corp. v. Western Elec. Co.*, — U. S. —, decided May 2, 1938, the court said:

"Unquestionably, the owner of a patent may grant licenses to manufacture, use or sell upon conditions not inconsistent with the scope of the monopoly."

In *Bement v. National Harrow Company*, 186 U. S. 70, 92, referring to the Sherman Act, the court said:

"But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor."

In *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 48, the court held that a license agreement which transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it and was designed to and accomplished a restraint of trade condemned by the Sherman Act was invalid.

[*Question as to validity of license agreement*]

Does the license agreement here involved impose restraints on the licensee beyond the lawful monopoly of the patents, or restraints that are not reasonably necessary to protect Steiner's rights under the patents?

[*Operation of estoppel on licensee*]

A licensee while exercising under the protection of the patent the rights con-

[10] *General Talking Pictures Corp. v. Western Elec. Co.*, — U. S. —, decided May 2, 1938.

[11] In *International Machines Corporation v. United States*, 298 U. S. 131, a lease contract under which the lessee of a patented tabulating machine agreed that the lease should terminate in case any cards not manufactured by the lessor should be used in the leased machine was held to violate Section 3, supra. There the restriction was not upon the use of the patented device itself, but a restriction upon the materials to be employed in the utilization of such device.

In *United Shoe Machinery Corporation v. United States*, 258 U. S. 451, a lease of patented shoe machines was involved. It contained certain restrictive clauses as follows: (1) that the leased machinery should not be used upon shoes or parts thereof upon which other operations had been performed with machines other than the lessor's; (2) that if the lessee should fail to use exclusively certain machines made by the lessor the lessor should have the right to cancel the lease; (3) that the lessee should purchase supplies exclusively from the lessor; and (4) that the lessee should use the machines leased only on shoes which had had certain other operations performed on them by the lessor's machines. The clauses were held to violate Section 3, supra. Here again the patentee sought to extend his rights, beyond the lawful monopoly of his patent. He restricted not merely the manufacture, use or sale of the patented device, but the purchase and use of other devices and the purchase of supplies to be used in the operation of the patented device.

In *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502, the patent involved covered that part of the mechanism of motion picture exhibiting machines, which feeds a film through the machine. The Motion Picture Company entered into a license agreement giving a company the right to manufacture and sell machines embodying the invention described and claimed in the patent and in other patents. The license agreement contained a covenant on the part of the licensee that every machine sold by it, except for export, should be sold under "the restriction and condition that such exhibiting or projecting machines shall be used solely for exhibiting or projecting motion pictures containing the inventions" of a certain reissue patent "leased by a licensee of the licensor." The license agreement was held to violate Section 3, supra. After referring to those provisions of the patent statute found in 35 USCA §§ 31, 40, the court said:

"Plainly, this language of the statute and the established rules * * * restrict the patent granted on a machine, * * * to the mechanism described in the patent as necessary to produce the described results. It is not concerned with and has nothing to do with the materials with which or on which the machine operates. The grant is of the exclusive right to use the mechanism to produce the result with any appropriate material, and the materials with which the machine is operated are no part of the patented machine or of the combination which produces the patented result. The difference is clear and vital between the exclusive right to use the machine which the law gives to the inventor and the right to use it exclusively with prescribed materials."

ferred by his license is estopped to deny the validity of the patent.[12]

.[*Limited restrictions imposed by license*]

Under the license agreement here in question the licensee obtains the privilege to use any or all of the devices covered by all of the Steiner patents, present and future. There is no proof that the licensee was required to take a license covering all of the Steiner patents. Furthermore, he is not required to purchase any particular device or any number of devices.

It should be noted that the restraints in the licensee agreement are expressly limited to towel cabinets which embody the inventions of the patents and that are *"sold, loaned or leased to the licensee."* (Italics ours.)

The first sentence of paragraph 4 (a) goes no further than the estoppel which the law itself imposes upon a licensee. If the licensee accepts the privilege of the license and acquires a cabinet covered by the Steiner patents he agrees not to contest the validity of the patents embodied therein. He is not inhibited either by law or the terms of the contract from challenging the scope of the patent claims. See *Westinghouse E. & M. Co. v. Formica Insulation Co.*, 266 U. S. 342, 351.

[*Validity of estoppel after expiration of license not determined*]

The last sentence of paragraph 4 (a) undertakes to extend the estoppel beyond the life of the license agreement. It has been uniformly held that a licensee may lawfully agree not to contest the validity of a patent at any time during its term.[13] However, so far as the evidence here discloses, all of the licensees who have acquired towel cabinets embodying the inventions of the Steiner patents and brought themselves within the inhibition of paragraph 4 (a) are continuing to exercise the rights and privileges granted by the license agreement. Hence, we regard the question of the validity of a license provision prohibiting the licensee from contesting the validity of a patent embraced in the license even after he has repudiated the license and is no longer exercising rights or receiving benefits thereunder, as not presented on this record and we express no opinion on that question. Moreover, we are of the opinion that the last sentence of paragraph 4 (a) applies only to licensees who have purchased, borrowed or leased pursuant to the license, towel cabinets embodying the inventions of the Steiner patents. So construed it merely prohibits a licensee, who has acquired a patented cabinet pursuant to the license and still retains it, from enjoying greater rights or privileges while the license is suspended for breach or after it has been lawfully terminated, than while the license remained in full force and effect. Suspension for breach or lawful termination of the license should not enlarge the rights of the licensee while he retains devices he has acquired pursuant to the license. Where a contract is fairly susceptible of two constructions, one of which will render it lawful and the other unlawful, the former will be adopted.[14]

[*License distinguishable from invalid agreements*]

In *United States v. Standard Oil Company*, D. C. Ill., 33 F. 2d 617, the license agreements tied the hands and sealed the lips of the only parties who would ordinarily contest the validity of the patents. That is not true here. Schwartz is here contesting their validity. Steiner has an infringement suit now pending against the Darman Company and Steiner has notified the Simplex Company of alleged infringement. The license agreement in *Buffalo Specialty Co. v. Gougar*, 26 Colo. App. 523, 144 P. 325, went further than the contract in the instant case. The contract there inhibited the licensee not only from contesting the validity but also the scope of the patent claims. Nor is the license agree-

[12] Robinson on Patents, Vol. 2, § 820;
Baker Oil Tools v. Burch, 10 Cir., 71 F. 2d 31, 35;
National Clay Products Co. v. Heath Unit Tile Co., 8 Cir., 40 F. 2d 617, 618;
Pressed Steel Car Co. v. Union Pacific R. Co., 2 Cir., 270 F. 518, 524;
Indiana Mfg. Co. v. Nichols & Shepard Co., C. C. Mich., 190 F. 579, 584;
Regina Music Box Co. v. Newell, C. C. N. Y., 131 F. 606;
United States v. Harvey Steel Co., 196 U. S. 310.

[13] *Eskimo Pie Corp. v. National Ice Cream Co.*, 6 Cir., 26 F. (2d) 901, 902;
United Lens Corp. v. Doray Lamp Co., 7 Cir., 93 F. 2d 969, 973;
Philadelphia Creamery S. Co. v. Davis & Rankin Bldg. & Mfg. Co., C. C. Ill., 77 F. 879, 882;
Dunham v. Bent, C. C. Mass., 72 F. 60;
Consolidated Rubber Tire Co. v. Finley Rubber Tire Co., C. C. Ga., 116 F. 629, 638;
Hall v. Penley Bros. Co., D. C. Me., 8 F. Supp. 524.

[14] *Fairbanks, Morse & Co. v. City of Wagoner*, 10 Cir., 81 F. 2d 209, 218;
E. I. Dupont De Nemours & Co. v. Claiborne-Reno Co., 8 Cir., 64 F. 2d 224, 228;
Intermountain Bldg. & Loan Ass'n v. Gallegos, 9 Cir., 78 F. 2d 972, 981;
Hobbs v. McLean, 117 U. S. 567, 576;
Great Northern Ry. Co. v. Delmar Company, 283 U. S. 686, 691.

ment here involved like the one before the court in *Pope Mfg. Co. v. Gormully,* 144 U. S. 224, in that the contract there provided that the licensee should not set up any defense whatever to any suit and that judgment might be entered against him without notice.

[*Effect of restriction on purchasing by licensee*]

Paragraph 4 (d) requires the licensee to purchase the patented cabinets and patented improvements only from a manufacturer authorized by the licensor. It is clear that Steiner and its licensees have always construed this provision to refer only to Steiner's patented cabinets and patented improvements, and by its express language it is limited to Steiner's *patented* devices. It does not include other devices or supplies to be used in connection with Steiner's devices. A licensee is free to purchase any other towel cabinet and to purchase his toweling and other supplies from whomsoever he chooses.

[*Device of original patent not operative on improvements*]

True, paragraph 4 (d) covers both the patented cabinet and patented improvements therein. But an improvement is not a mere accessory to be used in connection with the cabinet. It is not a material or supply upon which the device of the original patent operates. It involves a change in or addition to the original device which becomes an integral part thereof and enables it to produce its appropriate result in a more perfect or economical way.[15] The licensee is free to use the cabinets with or without the patented improvements. But if he desires to use an improvement he must purchase it from Steiner's manufacturer.

[*Patentee may condition right of purchase*]

Furthermore, a patentee may condition the right of his licensee to purchase the patented devices. The exclusive right to vend is a part of the patent monopoly. If the patentee grants separate licenses, each covering a single patented device, clearly he may by the terms of each license agreement provide that the device may be purchased only from himself or his authorized manufacturer. Can it be said he could not so restrict the purchase of the devices if he includes both devices in a single license agreement?

[*Restriction a protection for patentee's right*]

Moreover, since the licensee, if he purchases or otherwise acquires a device covered by a patent included in the license is estopped to contest the validity of the patent and the license grants the right to use and not the right to manufacture or purchase except from Steiner or its authorized manufacturer, the licensee could not purchase from others a device covered by a patent embraced in the license without infringing the patent. Therefore, paragraph 4 (d) is merely an agreement not to infringe—an agreement to observe a duty which the law itself enjoins. An agreement by a licensee not to infringe the patent covered by the license is valid.[16]

[*Valid construction of license favored*]

Were paragraph 4 (d) construed to embrace Steiner devices after the patents thereon had expired it would constitute an unlawful tying agreement in violation of Section 3, supra. Even if its language permits of that construction, which we doubt, it is susceptible of a construction limiting it to the patented devices and the latter construction which will render it lawful should be adopted. That it is being construed by the parties as limited to patented devices is evidenced by the fact that when a patent expires Steiner notifies the licensee of the expiration and advises the licensee that he is free to use the cabinet without payment of royalties.

Paragraph 6 merely suspends the rights of the licensee for breach. It restricts him from using during the suspension of the license the devices embodying the Steiner patents which he has acquired pursuant to the license agreement.

[*Restrictions within patentee's rights*]

We conclude that the license agreement does not impose restrictions beyond the lawful monopoly of the patents or that are

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[15] Robinson on Patents, at Sec. 210, defines improvement as follows: "An improvement is an addition to or alteration in some existing means, which increases its efficiency without destroying its identity. It includes two necessary ideas: First, the idea of a complete and practically operative art or instrument, either natural or artificial, as the original to be improved; and second, the idea of some change in such art or instrument, not affecting its essential character, but enabling it to produce its appropriate results in a more perfect or a more economical manner. When such a change involves the exercise of the inventive faculties it is a true invention and is known as an improvement."

See, also, *Trott v. Cullen,* 10 Cir., 86 F. 2d 141, 148.

[16] *United Lens Corp. v. Doray Lamp Co.,* 7 Cir., 93 F. 2d 969, 973; *Daniels v. Brown Shoe Co., Inc.,* 1 Cir., 77 F. 2d 899, 902.

not reasonably necessary to protect the rights of Steiner under its lawful patent monopoly.

[*Deleterious effect on competition not established*]

Furthermore, we entertain grave doubts that the record in this case justifies the finding that these license agreements have tended to lessen competition, or that they have resulted in loss or damage to Schwartz, facts which it was incumbent upon Schwartz to establish. *Standard Oil Company v. United States,* 283 U. S. 163; *Union Pacific R. Co. v. Frank,* 8 Cir., 226 F. 906.

[*Decree reversed*]

The decree is reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

[¶ 55,188] Seaboard Terminals Corporation and Seaboard Midland Petroleum Corporation v. Standard Oil Company of New Jersey, Socony-Vacuum Oil Company, Incorporated, and The American Oil Company.

United States District Court, Southern District of New York. Decided June 30, 1938.

A cause of action for treble damages under the Clayton Act arises in the state in which the effect of the wrongful conduct is experienced, and the bar imposed by the statute of limitations of that state will prevent maintenance of an action in a foreign state against parties who transact business within the state in which the cause arose, where the statute of limitations of that state is declared applicable by the law of the forum.

The purchase and transportation of products from and into a state does constitute transaction of business therein within the meaning of the Clayton Act, under which a continuous course of dealing is required.

[*Counsel*]

O'Connor & Farber, (Henry K. Urion and Stephen V. Ryan, Jr., of counsel) for plaintiffs.

Davis Polk Wardwell Gardiner & Reed, (John W. Davis, Edwin F. Blair, Judson C. McLester, Jr., and D. Nelson Adams, of counsel) for defendant Standard Oil Company of New Jersey.

Louis Mead Treadwell, (Stafford Smith and Henry B. Potter, of counsel) for Socony-Vacuum Oil Company, Inc.

Kellogg, Emery & Inness-Brown, (David Paine, J. Branch Darby and Harold Kronig, of counsel) for defendant American Oil Company.

[*Nature of proceedings*]

PATTERSON, D. J.: The action is one at law for treble damages under section 4 of the Clayton Act, to the effect that any person injured in business or property by reason of anything forbidden in the antitrust laws may recover threefold the damages sustained. The defendants have made motions under Rule 107 of the New York Rules of Civil Practice to dismiss the action on the ground that it is barred by the statute of limitations.

[*Allegations of conspiracy*]

The action was commenced on June 29, 1936. The amended complaint shows that the plaintiffs are Maryland corporations, Seaboard Terminals Corporation owning all the stock of Seaboard Midland Corporation; that the defendant Standard Oil Company is a Delaware corporation, defendant Socony-Vacuum Oil Company a New York corporation and defendant American Oil Company a Maryland corporation; that Seaboard Terminals in 1924 acquired a long lease on waterfront property in Baltimore on which it built storage tanks, pipe lines and terminal facilities for storing, handling and transshipping gasoline and other petroleum products, and it engaged in the business of furnishing such facilities to concerns dealing in such products; that Seaboard Midland in 1924 engaged in the business of buying gasoline and other petroleum products, chiefly in cargo lots, and selling the same at wholesale to dealers, chiefly in tank car lots, using the facilities of Seaboard Terminals, and that Seaboard Midland was engaged in interstate commerce in that it purchased gasoline in California and other states, took delivery in cargo lots, and sold and delivered in tank cars from the Seaboard Terminals plant in Maryland to customers in various states. It is alleged that the defendants, who were also engaged in buying, transporting and selling gasoline in interstate commerce from and to various states including Maryland, conspired to restrain interstate commerce in violation of the Sherman Act and to destroy the business of Seaboard Terminals and the business of Seaboard Midland; that in pursuance of the conspiracy the defendants, beginning in 1925, arbitrarily fixed prices, cut off Seaboard Midland from sources of supply and did other oppressive acts, with the

result that Seaboard Midland was forced out of business in March 1933 and Seaboard Terminals was obliged to sell its properties at a loss in May 1933; that later one of the defendants and a subsidiary of another made claims against Seaboard Midland for moneys alleged to be due them and commenced suits in Maryland against it in August and September 1933. Damages of $4,800,000 for Seaboard Midland and $168,000 for Seaboard Terminals are demanded.

[*State statute of limitations*]

The defendants show in their moving papers, as bearing on the statute of limitations, that the Maryland statute is to the effect that actions on the case must be commenced within three years from accrual (Code of Public General Laws, article 57, section 1). It is also shown that two of the defendants, American Oil Company and Standard Oil Company of New Jersey, for many years have been doing business in Maryland and have been subject to suit there, American Oil Company being a Maryland corporation and Standard Oil of New Jersey having an office and agents there.

[*Applicability of foreign statute of limitations*]

The period of limitation for civil actions under the antitrust statutes, not being specified by Congress, is to be found in the law of the forum. *Chattanooga Foundry and Pipe Works v. Atlanta,* 203 U. S. 390. When we examine the law of the forum, New York, we find that an action to recover on a liability created by statute must be commenced within six years after the cause of action accrued, Civil Practice Act, section 48; but by section 13 of the Civil Practice Act it is provided that where a cause of action arises outside of the state, an action may not be commenced in the state to enforce such cause of action "after the expiration of the time limited by the laws of a state or country where the cause of action arose for bringing an action upon such cause of action." From the amended complaint it is evident that the causes of action asserted in it arose in Maryland, the state where both plaintiffs were incorporated, had their principal places of business, and conducted their businesses. As to each plaintiff the thing said to have been harmed by the defendants' unlawful acts was the business or property, and the business or property was situated in Maryland. The causes of action thus arose in Maryland. *Beale, Conflict of Laws,* section 377.2. It follows that if the causes of action were barred by limitations in Maryland, they were barred here also. See *Bluefields S. S. Co. v. United Fruit Co.,* 243 Fed. 1 (C. C. A. 3).

[*Foreign statute of limitations a bar*]

The law of Maryland fixes three years from accrual of the cause of action as the period in which an action on the case may be commenced. The amended complaint shows that the last tortious act complained of occurred no later than March 1933, more than three years prior to commencement of action. The plaintiffs do not contend that the mere bringing of suits against Seaboard Midland in late 1933 postponed accrual of the causes of action asserted in the amended complaint. The action therefore was barred as to the two defendants which were present in Maryland and plainly subject to suit there.

[*State law applicable to domestic corporation*]

As to the remaining defendant, Socony-Vacuum Oil Company, the situation is different. That company was not a Maryland corporation, and it does not appear from the defendants' papers that the plaintiffs could have commenced action against it in Maryland. There is a Maryland statute to the effect that time shall not run in favor of a defendant absent from the state when the cause of action arises, Code of Public General Laws, article 57, section 5. New York, in adopting the law of Maryland for limitations on actions of this type, adopts not only the period of limitation but also the provisions of Maryland that toll the running of the period. *Hanna v. Stedman,* 230 N. Y. 326; *Irving National Bank v. Law,* 10 Fed. 2nd, 721 (C. C. A. 2). Action against that defendant not having been barred in Maryland, there is nothing in section 13 of the Civil Practice Act that bars action against it here. The normal time fixed in the New York statutes for commencement of the action, six years, had not run when the action was instituted.

[*No "transaction of business" within statute*]

The defendant Socony-Vacuum Oil Company, though not shown to have been subject to suit generally in Maryland, maintains that it was subject to an action there for treble damages under the Clayton Act. By section 12 of the Clayton Act, suit may be brought in the district where the defendant is an inhabitant or in any district "wherein it may be found or transacts business." By *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U. S. 359, the words "transact business" warrant maintenance of a suit against a foreign corporation which is continuously engaged in selling and

shipping goods to dealers within the district, soliciting orders there through salesmen, and promoting demand for its goods through demonstrators who visit dealers there. The only activity of this defendant in Maryland shown on these papers, however, is the statement in the amended complaint that it has bought, sold, transported and caused to be transported gasoline and other petroleum products from and to Maryland, Pennsylvania and other states. In my opinion this falls short of alleging that it "transacted business" in Maryland to a sufficient extent to be subject to civil action there under the Clayton Act.

[*Action for damages under Clayton Act arises in state*]

The plaintiffs' arguments against the running of limitations in favor of any defendant have not been overlooked. It is urged that a cause of action for treble damages under the national antitrust acts does not arise in any particular state. The fact is, however, that the cause of action does arise in the place or places where the impact of the defendants' conduct is felt by the plaintiffs, and if the law of the forum refers to the law of such place or places for the applicable limitations on actions, the law of that place or places becomes controlling. It is alternatively urged that the plaintiffs' businesses were not confined to Maryland but extended over several states, the amended complaint showing that Seaboard Midland, if not Seaboard Terminals, was engaged in interstate commerce, and that consequently the statutes of limitations of other states as well as of Maryland must be consulted. But the amended complaint shows that the principal business of each plaintiff was in Maryland and that the alleged injuries were inflicted there. The plaintiffs' grievance is not based on specific injuries but on general injury to their respective businesses. The plaintiffs' affidavits bearing on business done in other states may not be considered, the sole question being whether the causes of action contained in the amended complaint are barred.

[*Conclusion*]

The motions to dismiss for limitations will be granted as to the defendants Standard Oil Company of New Jersey and American Oil Company and denied as to the defendant Socony-Vacuum Oil Company.

[¶ 55,189] Bear Mill Manufacturing Company, Inc., v. Federal Trade Commission.

United States Circuit Court of Appeals, Second Circuit. Decided July 5, 1938.

Petition by Bear Mill Manufacturing Company, Inc., to review an order of the Federal Trade Commission directing petitioner to cease and desist from the use of the words "mill" and "manufacturing" in its corporate name or in any other manner until and unless it actually owns and operates, or directly and absolutely controls the mill or factory wherein such products are made. Cross-petition by the Federal Trade Commission for the affirmance and enforcement of the Commission's order. Order modified.

Abandonment of an established corporate name constitutes too drastic a remedy for the correction of misrepresentations which have misled purchasers to believe the company was engaged in manufacturing operations and thereby caused a diversion of business from competitors, where the misrepresentation may be remedied by the addition of words descriptive of the company's business.

Before MANTON, SWAN and AUGUSTUS N. HAND, Circuit Judges.

Affirming as modified Federal Trade Commission Order No. 2578.

[*Counsel*]

Curtis, Mallet-Prevost, Colt & Mosle, Attorneys for Petitioner Bear Mill Manufacturing Company, Inc.; Dudley B. Bonsal, Clarence U. Carruth, Jr., and Kenneth N. LaVine, Counsel.

W. T. Kelley, Chief Counsel for Respondent Federal Trade Commission; Martin A. Morrison, Assistant Chief Counsel; James W. Nichol, Special Attorney.

[*Character of petitioner's business*]

AUGUSTUS N. HAND, Circuit Judge: The petitioner, Bear Mill Manufacturing Company, Inc., was incorporated in 1907 under the laws of the State of New York. For many years before, a partnership, of which it was the successor, bore the same name. Neither it, nor its predecessor, was strictly a manufacturer, nor did either own or operate a mill or factory. They purchased unfinished cotton or rayon goods, had them sent to another concern which they did not own, control or operate, for finishing, bleaching, dyeing, or printing and then sold them to be made up into garments. The petitioner is technically known as a "con-

verter," that is, a person that buys unfinished goods from the mills, has them finished by a processor and sells the finished products.

[*Alleged misleading impression of manufacturing operations*]

The Commission filed a complaint against Bear Mill Manufacturing Company, Inc., alleging that it was using its name containing the words "mill" and "manufacturing" on its letterheads, invoices and other stationery and folders for samples and was selling its product under the representation that it was a manufacturer, when it was not a manufacturer and did not own, control, or operate any mill or factory. The complaint also alleged that certain retail merchants believe that by dealing directly with a mill owner or manufacturer they can buy goods at a lower price and on more favorable terms than they can obtain them from others who are not manufacturers, and can thus eliminate the profits of middlemen. The complaint further alleged that the use of the words "mill" and "manufacturing" by Bear Mill Manufacturing Company, Inc., tends to mislead purchasers and prospective purchasers and to divert trade from concerns that actually manufacture similar goods and thus results in unfair trade.

[*"Manufacturing" an inducement to purchasers*]

There was testimony that certain persons in the trade believe buying from a manufacturer rather than from a converter or jobber an advantage both in eliminating the profit of the middleman and in obtaining the newest and best designs. While many of the witnesses said that they could often secure advantageous bargains from converters and jobbers and that price, quality and service would determine their purchases irrespective of whether they were made from a manufacturer or converter, nevertheless some of them testified that they regarded dealing with the manufacturer as desirable and that the descriptive words might lead customers, who did not know that Bear Mill Manufacturing Company was a converter, to suppose that it was a manufacturer.

[*Extent of damage not controlling*]

The proof indicated that the retail trade of the company was trivial and that its customers generally knew that it was not itself manufacturing and that those who did not know usually did not care. Indeed, the line between manufacturing itself and supervising the finishing of the product as to color, style and workmanship where, as here, the orders are given to an independent contractor is so tenuous that, upon the record, we regard the damage, if any, to customers or competitors as highly speculative. Yet accuracy of representations implicit in a trade-name indicating whether a concern is a manufacturer, converter or jobber is in general important and it cannot be denied that a misleading name may lead to injurious misapprehensions on the part of customers, actual or prospective, and damage to competitors. We think that the Commission is authorized to guard the public against such dangers. Indeed, it exists to promote fair rules of trade and in so doing to curb practices that involve a likelihood of injury to the public, even if in a particular case the acts complained of are, as here, innocent in purpose and may thus far have done little harm.

[*Findings of the Commission*]

Upon the foregoing record the Federal Trade Commission made findings that a substantial portion of the fabric buying public has a preference for dealing direct with a manufacturer of the fabrics being purchased; that such purchasers believe they obtain better prices, superior quality and other advantages in so dealing, rather than with a broker or middleman; that many of petitioner's competitors who sell and distribute cotton and rayon in interstate commerce do not manufacture the products sold by them and do not in any way represent that they are the manufacturers of such products; and that there are also among petitioner's competitors manufacturers of cotton and rayon fabrics sold in interstate commerce who employ the terms "mill" and "manufacturing," or other terms of similar import and meaning, in their corporate names and advertising. The Commission made the further findings that petitioner's practice of representing itself as a manufacturer through the use of the terms "mill" and "manufacturing" has the tendency to mislead a substantial portion of the purchasing public into the erroneous belief that petitioner actually owns and operates or directly controls a mill wherein the products which it sells are manufactured and, that as a result, the buying public has purchased a substantial volume of petitioner's products and trade has been unfairly diverted from competitors who truthfully represent the character of their goods. There can be no doubt that a finding should stand that the erroneously descriptive words in the corporate title and stationery have the tendency to mislead prospective purchasers and the public. Although we may think the likelihood of misleading the class of customers with which the petitioner generally deals is slight, the words have a tendency to mislead cus-

tomers not entirely familiar with the fact that Bear Mill Manufacturing Company, Inc. is not the manufacturer of the goods they are buying. Just how far the buying public has purchased petitioner's goods and there has been a diversion of trade to it because of the representation that it is a manufacturer cannot be known but, in view of the testimony that some of the purchasing public believes that trade with the manufacturer affords advantages in price and style, we think the finding that the descriptive words have had the effect of diverting some trade and have tended to injure customers to some extent was justified.

[*Findings supported by evidence*]

While a reading of the record fails to convince us that the prejudice, so far as it may have existed or may continue to exist, is of serious importance, yet we cannot say that the findings are not supported by substantial evidence or that the order to cease and desist from the use of the words "mill" and "manufacturing" which the Commission issued in consequence of the findings was without foundation. *F. T. C. v. Pure Silk Hosiery Mills,* 3 F. (2d) 105, (CCA. 7).

[*Abandonment of firm name too drastic*]

The injury to the petitioner by the requirement of the order of the Commission that it should abandon a well known corporate and trade-name of many years standing and of evidently excellent repute, seems to us a far too drastic method of remedying a slight and, we believe, unconscious infraction of proper trade practice when the inaccuracy can be cured by requiring the petitioner to append to and use in connection with its corporate name, stationery, folders, labels, cartons and any advertising the words "Converters, Not Manufacturers of Textiles." *Fed. Trade Comm. v. Royal Milling Co.,* 288 U. S. 212; *Fed. Trade Comm. v. Mid West Mills, Inc.,* 90 F. (2d) 723. We accordingly hold that these words descriptive of the nature of the petitioner's business should be added to the corporate title on all stationery, folders, labels, cartons and advertising without the necessity of amending the certificate of incorporation.

[*Conclusion*]

The order of the Commission is so modified and, as thus modified, may be enforced after thirty days which are allowed petitioner in order that it may change its stationery, folders, labels, cartons and any advertising so as to conform to the views we have expressed.

[*Order enforced as modified*]

Order modified. Motion to enforce the order as so modified granted.

[¶ 55,190] The Sheffield Silver Company, Inc., v. Federal Trade Commission.

United States Circuit Court of Appeals, Second Circuit. Decided July 18, 1938.

Appeal from the Federal Trade Commission.

Where the evidence does not support findings that unfair methods of competition are employed in the use of the word "Sheffield" in a corporate name, in connection with the sale of silver, enforcement of an order of the Federal Trade Commission is denied.

Reversing Federal Trade Commission Order No. 2638.

Before MANTON, SWAN and HAND, Circuit Judges.

Petition by The Sheffield Silver Company, Inc., to vacate an order of the Federal Trade Commission directing the petitioner to cease and desist from certain conduct; and cross-petition by the Commission for an order of enforcement. Order vacated.

[*Counsel*]

Jay Leo Rothschild, Attorney for petitioner; Walter S. Beck, of Counsel.

Walter T. Kelley, Chief Counsel, Martin A. Morrison, Assistant Chief Counsel, and James W. Nichol, Special Attorney, for the respondent.

[*Nature of proceeding*]

SWAN, Circuit Judge: This case is before us upon a petition and cross petition brought under section 5 of the Federal Trade Commission Act, 15 U. S. C. A. § 45. The order which the petitioner seeks to have vacated and the Commission seeks to have affirmed, directs the petitioner to cease and desist from "using the word 'Sheffield' in its corporate name or in any other manner, so as to represent or imply that said [petitioner's] electroplated hollow-ware products are 'Sheffield' or are made

by the Sheffield process." The principal issue is whether the evidence justifies the Commission's finding of unfair competition.

[*Findings of the commission*]

At the hearing before the trial examiner it was stipulated that the word "Sheffield," as applied to or as descriptive of any silverware, means to the trade a ware made according to a process known as the "Sheffield process" or the "copper rolled process," which is a process whereby silver is welded or fused upon copper according to a process originating in or around Sheffield, England, in approximately 1742; that no Sheffield ware is now manufactured; and such Sheffield silver as may be upon the market today is regarded as an antique or museum piece, and is so sold and carries such a value. The petitioner is a corporation which was organized under the laws of New York in 1908. It manufactures by an electroplating process silver-plated hollow ware which it sells in interstate commerce at wholesale to retail dealers; it makes no sales direct to the consuming public. It is in competition with other manufacturers who also use the electroplating process. The conduct complained of by the Commission is the use by the petitioner of its corporate name upon its letter heads and invoices, upon labels affixed to cartons in which its goods are shipped in commerce, and upon photographs of its products carried by its salesmen. The Commission has found that the name "Sheffield" has become identified in the public mind with a high quality of silverware manufactured by the Sheffield process, and has a sales value when applied to silver-plated ware; and that the petitioner's use as aforesaid of its corporate name has the tendency and capacity to deceive the purchasing public and to induce purchasers to buy its products in the mistaken belief that they are made by the Sheffield process, thereby unfairly diverting trade to the petitioner from its competitors. There is also a finding that the acts of the petitioner serve to place in the hands of unscrupulous retail dealers a means of misleading the purchasing public into the belief that the petitioner's products are manufactured in accordance with the Sheffield process. The Commission has concluded that the petitioner's practices prejudice its competitors and the public, and constitute unfair methods of competition in violation of the Act.

[*No evidence of purchases under misapprehension*]

The record is barren of evidence that any one has ever purchased the petitioner's product under the erroneous belief that it was antique Sheffield ware, or modern ware manufactured by the old Sheffield process. Neither the word "Sheffield" nor the petitioner's corporate name appears on its goods; they bear symbols, customarily used on electroplated ware, to indicate electroplating either on a nickel-silver or copper base. The letterheads and invoices give the petitioner's address, either Brooklyn, N. Y., or Jersey City, N. J., and state that it manufactures "silver plated hollowware." The retail dealers to whom the petitioner and its competitors sell are sophisticated merchants. Several witnesses testified, and there was no contradiction, that there was no danger of mistaking the petitioner's electroplated ware for anything other than it was. We can see no basis for a finding that the name "Sheffield" has a sales value when applied to electroplated silver ware. Nor was there testimony that the petitioner's corporate name gives it any advantage over its competitors. The petitioner enjoys a valuable good will, according to the testimony of its officers, but this no doubt has resulted from the quality or price of its wares. The only attempt to prove that the petitioner's name gives to unscrupulous dealers a means of defrauding the ultimate consumer consisted in the introduction of one advertisement by a retailer in Atlanta, Ga. It was stipulated that this was not published at the direction or instance of the petitioner nor with its knowledge. This advertised "Sale 500 Sample Pieces Sheffield Silverware by Sheffield Company ½ Price 2.50 to 18.00 values for 1.25 to 9.00." There is no testimony that any reader of this advertisement understood that it referred to authentic Sheffield ware. Any one who had the slightest knowledge of Sheffield ware would realize that 500 "sample pieces" at the prices advertised could not be genuine old Sheffield. If in fact the retailer was attempting to palm off modern electroplated ware for antique Sheffield, his sins should be visited upon his own head rather than imputed to an innocent manufacturer of the goods who never authorized nor approved the fraud. In our opinion the record does not support the findings upon which rests the conclusion of unfair methods of competition by the petitioner. Its good will resulting from 30 years of business without complaint by any one, should not be destroyed upon a single instance of unauthorized advertising such as this.

[*Deception an unlikely result*]

None of the authorities upon which the Commission relies involves similar facts. In *Federal Trade Comm. v. Winsted Co.*, 258 U. S. 483, labels were attached to the goods which indicated to the consuming public

and sometimes to the retail trade that they were pure wool fabrics, contrary to the fact. No false labelling has been done by the petitioner in the case at bar. In *Federal Trade Comm. v. Milling Co.*, 288 U. S. 212, the respondents used corporate names containing words, such as "milling company," which are commonly understood by dealers and the purchasing public to indicate concerns which grind wheat into flour. In the case at bar no one has been deceived by the petitioner's corporate name into the belief that its wares are manufactured by the old Sheffield process. While actual deception need not be shown if the necessary effect of a person's acts is to make deception likely, there is nothing in the present record to support an inference that deception is likely. The parties have stipulated that such Sheffield silver as may be upon the market today is regarded as an antique or museum piece and is sold at a corresponding value. Persons who buy antique museum pieces will not mistake for authentic Sheffield the petitioner's low-priced wares, which bear symbols indicating they are electroplated, merely because the manufacturer calls itself The Sheffield Silver Company.

[*Pleadings remain unaltered on appeal*]

The Commission has sought to sustain its order by the argument that it is justified by the pleadings without regard to the evidence, because the company's denials of the allegations of the complaint were general instead of special as required by Rule V(a) of the Rules adopted by the Commission. The contention is without merit. Assuming without decision that the denials did not comply with the Rule, they were assumed by the Commission to raise issues to be tried before an Examiner, who was appointed to take evidence and before whom both parties introduced extensive testimony. Under such circumstances the complainant should not be allowed to change his theory on appeal. The pleadings will be treated as the parties elected to treat them below. See *Kansas & A. V. Ry. Co. v. Dye*, 70 F. 24, 26 (CCA-8); *Montgomery v. Pacific Elec. Ry. Co.*, 293 F. 680, 684 (CCA-9).

[*Order vacated*]

The order is vacated.

[¶ 55,191] Wholesale Tobacco Dealers Bureau of Southern California, Incorporated, a California non-profit corporation, v. National Candy and Tobacco Co., a California corporation.*

Supreme Court of California. Received August 3, 1938.

The validity of the California Unfair Practices Act, prohibiting discrimination and sales below cost, is not affected by direct or indirect price-fixing inherent in its operation and, where the need for regulation of unfair competition is demonstrated and the method of regulation reasonably accomplishes the purpose, the Act is upheld as a constitutional exercise of the state's police power within the discretion of the legislature.

WASTE, C.J.; CURTIS, LANGDON, SEAWELL, HOUSER, and SHENK, J.J. concur.

[*Nature of proceedings*]

Defendant appeals from a judgment enjoining it: (1) from selling, or offering or advertising for sale its products at less than invoice or replacement cost, whichever is lower, plus its cost of doing business; (2) from discriminating as to price between different sections, communities or cities by selling its products to customers at a lower rate in one section, community or city than in another, after making proper allowance for grade, quality, quantity and costs of transportation; and (3) from secretly paying or allowing rebates, refunds, commissions or unearned discounts, whether in the form of money or otherwise, to certain customers, not extended to all purchasers purchasing upon like terms and conditions, whether used to cover up sales below cost and discrimination between localities, or otherwise. It is admitted that appellant committed all of the acts enjoined, and that the commission of said acts was in express violation of

* In view of the length of the opinion, certain deletions have been made, as indicated by dots and asterisks.

the provisions of the Unfair Practices Act as amended in 1935 (Stats. of 1935, p. 1546; Deering, Codes, Laws and Constitutional Amendments, 1935 Supp., p. 2063, Act 8781). The sole question presented on this appeal has to do with the constitutionality of certain sections of the 1935 amendments as applied to the facts of this case. It is appellants contention that the challenged amendments are unconstitutional in that they violate Art. I, § 1, 11, 14 and 21, and Art. XII, § 22 and 23 of the California Constitution and § 1 of the Fourteenth Amendment to the federal Constitution. It is also contended that section 3 of the act, in so far as it defines the cost of doing business, is void for the reason that it is uncertain and unintelligible.

[*Prohibition of sales below cost or replacement cost attacked*]

The judgment, in so far as it enjoins appellant from discriminating as to price between different sections, and from giving secret rebates, is not challenged. Appellant centers its entire attack on that portion of the judgment enjoining it from selling its products below cost or replacement cost (whichever is lower) plus the cost of doing business as defined in the act.

[*Question of constitutionality*]

The trial court held the statute constitutional, and, upon the admission of appellant that it had committed the challenged acts, entered its judgment accordingly. Another department of the superior court of Los Angeles County has held the statute unconstitutional in *Balzer v. Caler*, L.A. 15859, now on appeal to this court. (See *Post.*)

It should also be mentioned that the statute has been upheld as constitutional by the appellate department of the superior court of Los Angeles County in *People v. Kahn*, 19 Cal. App. (2d) (Supp.) 758, 60 Pac. (2d) 596. The Supreme Court of Tennessee has recently (March 7, 1938) upheld the constitutionality of the Tennessee Unfair Sales Act (Tenn. Code Ann.; Williams, Supp. 1937), which is comparable in its essential features to the act here under attack. (*Rust v. Griggs* (Tenn.), 113 S. W. (2d) 733.)

[*Complained of practices*]

The present cause was tried upon an agreed statement of facts. So far as the charge that appellant sold its products below cost as defined in the act is concerned, it appears therefrom, that the cost of doing business in the line of activity in which appellant is engaged is an established fact well known to all engaged in the industry, including appellant; that in such business the lowest possible cost of doing business is 3% above net cost; that appellant's cost of doing business is at least 3% above net cost; that respondent is an incorporated trade association composed of twenty members engaged in the wholesale tobacco industry in southern California; that appellant is a member of this association; that several of appellant's competitors, also members of respondent association, had for one of their customers the county of Los Angeles to whom they have been selling their products at net cost plus 3%; that appellant knew this fact; that in order to secure this business for itself, and to injure its competitors, appellant, on certain specified days offered to sell and subsequently sold certain of its products to the county of Los Angeles at net cost plus 1%; that in so doing appellant was fully aware that the price at which it was selling these products was below its cost price as defined in the Unfair Practices Act; that these sales were not made by appellant at a loss under any of the circumstances permitted by the act, but were made to secure this customer for itself, to injure its competitors, and for the purpose of preventing others from becoming dealers in such products in competition with appellant.

[*Purpose of Unfair Trade Practices Act*]

The Unfair Practices Act as amended in 1935 was adopted as an urgency measure. Sec. 1 prohibits merchants, manufacturers, producers and distributors, with intent to destroy competition or to prevent competition of any new dealer, from discriminating as to price between different sections, communities or cities, and likewise prohibits the giving of special rebates or the use of any other device to accomplish this result. This portion of the act, although re-enacted in 1935, has been an integral part of our law since 1913 when the original Unfair Practices Act was adopted (Stats. of 1913, p. 508). It is predicated upon a similar statute first adopted in South Dakota. The constitutionality of such provision is beyond question. (*State v. Central Lumber Co.* (S. D.), 123 N. W. 504; *Central Lumber Co. v. S. D.*, 226 U. S. 157).

[*Provisions of statute*]

Section 3 of the act is the provision against which the main attack of appellant is directed. It provides: [Not reproduced herein.]

Section 4 prohibits the seller, in establishing his cost of an article at less than present replacement cost from using the invoice cost paid by him at a forced

bankrupt, closeout sale, or other sale outside of the ordinary channels of trade, unless the article so purchased is kept separate from goods purchased in the ordinary channels of trade, and unless said article is advertised and sold as merchandise purchased at a forced, bankrupt, or close-out sale.

Section 5 permits the use of cost surveys in proving the cost of an article in any proceeding under the act.

Section 6 is the section which permits sales at less than cost under any of the following circumstances: [Not reproduced herein.]

Section 7 declares that the secret payment or allowance of rebates in any form not offered to all purchasers purchasing upon like terms and conditions "to the injury of a competitor and where such payment or allowance tends to destroy competition, is an unfair trade practice" and any person resorting to the same is guilty of a misdemeanor.

Section 8 declares that it is the duty of the attorney general, upon the third violation of the act by any corporation, to institute quo warranto proceedings for the forfeiture of the charter of any such corporation.

Section 9 provides that any contract made in violation of the act is illegal, and no recovery thereon shall be had.

Section 10 authorizes any person, corporation or trade association to maintain an action to enjoin a continuance of acts in violation of the statute, and if injured thereby to recover three times the actual damages sustained.

Section 11 makes violation of § 1 to 7 a misdemeanor, while Section 12 contains the usual severability clause.

Section 13 should be quoted. It provides: [Not reproduced herein.]

Section 14 provides that the act shall be known as the "Unfair Practices Act."

Section 15 declares the act to be an urgency measure. It provides: [Not reproduced herein.]

This act represents an attempt on the part of the legislature to regulate business as a whole by prohibiting practices which the legislature has determined constitute unfair trade practices. Its stated purpose (§ 13) is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage free, open and fair competition. So far as the present case is concerned, the practice prohibited by the statute is selling below cost. As will later appear this practice is only prohibited when performed "for the purposes of injuring competitors and destroying competition."

[*Constitutional issues involved*]

It is manifest that the statute was passed in the attempted exercise of the state's police power. That being so, the inquiry of this court is limited to determining whether the object of the statute is one for which the police power may legitimately be invoked, and, if so, whether the statute bears a reasonable and substantial relation to the object sought to be attained. These two problems involve substantially different considerations, and shall be separately discussed.

[*Purpose of statute within police power*]

That the avowed purpose of the act as stated in § 13—"to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented"—is well within the state's police power cannot be seriously doubted. It has now become firmly established that the police power of the state extends not only to the preservation of the public health, safety and morals, but also extends to the preservation and promotion of the public welfare. In recent years the state, in promoting and advancing the general welfare of its citizens, has frequently and properly used this power to promote the general prosperity of the state by the regulation of economic conditions. This apparent extension of the police power is in fact no extension at all. The police power has not expanded. Its proper exercise has always been and still is confined to regulation in the public welfare, and has always been and still is subject to the standard of reasonableness in its relation to that interest. However, changed social, political and economic conditions have enlarged the field of conduct which may properly be subjected to regulation in order that the general welfare may be adequately protected. The proper application of the power cannot be measured by past precedents—the test is, of course, present day conditions. These principles have frequently been enunciated by this court and by the Supreme Court of the United States. . . .

In *People v. Associated Oil Co.*, 211 Cal. 93, 98, 294 Pac. 717, this court stated: "But there is no longer any doubt that this general rule has been extended so as to include measures which relate to the general welfare. In the case of *Chicago B. & O. Ry. v. Illinois*, 200 U. S. 561 [4 Ann. Cas. 1175, 59 L. Ed. 596, 26 Sup. Ct. 341] the Supreme Court stated at page 592: 'We hold that the police power of a state embraces regulations designed to promote the

public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety' * * * If the question between the taking of private property and a proper exercise of the police power is fairly debatable, the statute will be upheld (citing cases). Also where a strong and preponderant opinion prevails in the state that a particular measure is greatly and immediately necessary to the public welfare, that factor has an important influence in establishing the limitations of the police power in a particular case * * *."

In *Graham v. Kingwell,* 218 Cal. 658, 659, 24 Pac. (2d) 488, this court stated: "In the exercise of its police power the state may prescribe regulations tending to promote the public health, safety, morals and welfare of the people. It may also legislate so as to increase the industries of the state, develop its resources and promote its welfare and prosperity."

* * *

With these cases, and many others that could be cited, in mind, it is obvious that the object of the present statute is within the state's police power. That the prevention of monopolies and the fostering of free, open and fair competition and the prohibition of unfair trade practices is in the public welfare is obvious, and requires no further citation of authority. In fact this is not seriously challenged by appellant. The main arguments advanced by appellant are that the act is unconstitutional in that it curtails its previously enjoyed privilege or right of fixing the price at which it is willing to sell its goods, and of selling them at such prices, and that the act unlawfully deprives it of its freedom of action; that it is unreasonable and will not accomplish the purposes intended. These contentions go to the reasonableness of the statute in its relation to its avowed object, and do not attack the validity of that object.

[*Reasonable connection with purpose challenged*]

So far as pertinent here, the present act prohibits the sale of commodities below cost as defined in the act (with certain enumerated exceptions) but, as will later appear, such sale is only prohibited when engaged in "for the purpose of injuring competitors and destroying competition." In determining the validity of this provision (the object of the statute being within the police power of the state) we are limited in our inquiry to determining whether the act is one reasonably connected with its avowed purpose. In other words, are the means adopted reasonably designed to accomplish this purpose; do they have a real and substantial relation to the objects sought to be attained?

In passing on these questions there are two fundamental principles which must be kept in mind:

[*Declared purpose not conclusive*]

In the first place, mere sincerity or honesty of purpose on the part of the legislature does not alone justify the statute. The declaration in the statute as to its purposes, does not determine whether the means provided in the statute are reasonably designed to accomplish those purposes. The courts may properly inquire into that subject.

[*Constitutionality favored*]

In the second place, in determining whether the means provided in the statute are reasonably designed to accomplish its avowed object, if that question is reasonably debatable, the determination of the legislature is conclusive. It is not for the courts, except within the limits herein set forth, to determine whether or not the policy of a statute is economically sound or beneficial. That is a matter solely for the legislature. These principles have recently been discussed at length by this court in *Max Factor & Co. v. Kunsman,* 5 Cal. (2d) 446, 55 Pac. (2d) 177, affirmed by the United States Supreme Court, 299 U. S. 198, 57 Sup. Ct. 147, a case involving the validity of the Fair Trade Act as amended in 1933 (Stats. 1933, p. 793). That statute permitted the owner of trademarked goods to fix the resale price of his commodity, and such price so fixed was made binding on all into whose hands such goods should fall as provided in the act. In that case (p. 454) it is stated: "In the first place, this court has neither the power nor the duty to determine the wisdom of any economic policy; that function rests solely with the legislature. We recognize that economic and juridical thought is, and for many years has been, divided on the economic question as to the benefits to the consuming public of free and open competition, and its necessary corollary, price cutting." After pointing out that one school of economic thought was of the opinion that from a social standpoint, free and open competition was desirable, while another school of thought believed that from a social standpoint the owner of a trademarked article should be permitted to fix the resale price of such article, and after discussing the basis of each argument, this court continued (p. 455): "By the enactment of the Fair Trade Act in 1931, as amended in 1933, the state

legislature, for reasons known to it and which we must presume were sufficient, has seen fit to attempt to change its former policy, and to adopt the second economic concept above discussed. In so far as the statute involves a mere change in the economic policy of the state, this court has no power or right to interfere. The members of the court may or may not agree with the economic philosophy of the Fair Trade Act, but it is no part of the duty of this court to determine whether the policy embodied in the statute is wise or unwise. It is primarily a legislative and not a judicial function to determine economic policy. The power of the court is limited to determining whether the subject of the legislation is within the state's power, and if so to determine whether the means adopted to accomplish the result are reasonably designed for that purpose, and have a real and substantial relation to the objects sought to be attained. These principles have frequently been stated by the United States Supreme Court. . . .

In *Old Dearborn D. Co. v. Seagram Distiller's Corp.*, 299 U. S. 183, 57 Sup. Ct. 139, in upholding the validity of the Illinois Fair Trade Act (identical in substance with the California act involved in the *Max Factor* case, *supra*) the United States Supreme Court stated:

"* * * where the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the Legislature."

See also *Pacific Coast Box and Basket Co. v. White*, 296 U. S. 176, 56 Sup. Ct. 159; *Fox v. Standard Oil Co.*, 294 U. S. 87, 55 Sup. Ct. 333; *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 33 Sup. Ct. 66; *Purity Extract & T. Co. v. Lynch*, 226 U. S. 192, 33 Sup. Ct. 44.

[*Economic theories involved*]

In discussing the question as to whether the statute is reasonably designed to accomplish its avowed purposes, the parties, and various *amici curiae* on their behalf, have written many briefs covering a wide field of discussion. On behalf of appellant it is urged that the means adopted by this statute—prohibiting sales below cost—cannot possibly prevent the creation of monopolies and will not foster free, open and fair competition. It is contended that this legislation in fact will stifle free and open competition and will foster monopolies and that it favors the large chain stores and large distributors as against the small merchant. On behalf of respondent the contrary is urged. It should be noted that *amici curiae* briefs have been filed on behalf of respondent by several of the trade associations representing the independent grocers and druggists of the state.

[*Conclusiveness of legislative determination*]

It is not the province of this court to determine where the truth of this argument lies. If the subject is fairly debatable the determination of the legislature is conclusive. That the economic wisdom of such legislation is fairly debatable cannot be gainsaid. Courts have frequently commented on the destructiveness of price cutting tactics. (. . . *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163, 55 Sup. Ct. 7; *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 57 Sup. Ct. 549; *Max Factor v. Kunsman, supra*; *Agricultural Prorate Com. v. Superior Court*, 5 Cal. (2d) 550; 55 Pac. (2d) 495.) The use of "loss leaders" for the purpose of injuring a competitor has been condemned by many economists. It has been urged that their use is injurious to the consumer in that the losses so sustained will either have to be made up by higher prices charged on other commodities, or by the enforcing of various economies, such as the lowering of wages, discharge of employees, lowering of rents, depressing the wholesale prices, etc. It has many times been urged that such practices are destructive of competition and tend to create monopolies. . . . These arguments are mentioned not because we necessarily believe that they are sound, but to demonstrate that the practice condemned by this statute, according to the views held by a large portion of the body politic, tends toward the stifling of free and open competition, the creation of monopolies, and is injurious to the consuming public. It should also be mentioned that some 14 states have passed similar legislation. This is entitled to some weight in determining whether the means provided in the statute will tend to accomplish the valid and expressed purpose of the legislature.

[*Application of statute where public interest is not involved*]

Appellant, and *amici curiae* on its behalf, urge that, except as to businesses affected with a public interest, the owner of an article has the constitutional right to sell his property at any price he may desire; that the statute is a price fixing statute; that price fixing statutes, except as to businesses affected with a public interest are *per se* unconstitutional; that the statute unlawfully interferes with its freedom of contract and unlawfully interferes with its freedom of action. Appellant relies on such cases as *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 43 Sup.

Ct. 630; *Tyson & Bro. v. Banton,* 273 U. S. 418, 47 Sup. Ct. 426; *Fairmont Creamery Co. v. Minnesota,* 274 U. S. 1, 47 Sup. Ct. 506; *Ribnik v. McBride,* 277 U. S. 350, 48 Sup. Ct. 545; *Williams v. Standard Oil Co.,* 278 U. S. 235, 49 Sup. Ct. 115; *New State Ice Co. v. Liebmann,* 285 U. S. 262, 52 Sup. Ct. 371.

[*Similar state statutes constitutional*]

We do not find it necessary to analyze the above cited cases. There is no doubt some general language in these cases which tends to sustain appellant's contentions. The point is that in more recent decisions of the United States Supreme Court these cases have been discussed and have been held not to prohibit the enactment of state statutes predicated on substantially similar concepts as the one here involved. The leading case on the subject is *Nebbia v. New York* . . . [291 U. S. 502], involving the validity of the Milk Control Law of New York, which provided for a Milk Control Board with the power to fix the minimum and maximum retail price to be charged for milk. Nebbia was prosecuted for selling milk below the price fixed by the Board. Both the New York Court of Appeals (*People v. Nebbia,* 262 N. Y. 259) and the United States Supreme Court (*supra*) upheld the statute as a valid and proper exercise of the police power. After commenting on the various factors leading to the enactment of the statute, including the disruption of the milk business caused by demoralizing competition resulting in destructive price cutting practices by retailers, the court held the business was subject to control and regulation and sustained the statute. After discussing at length the police power and its proper use in promoting the general welfare, the court pointed out (p. 524) that "these correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need." The court then commented upon many cases upholding statutes limiting the individual in the use of his property, including statutes forbidding the giving of trade inducements "and other forms of price discrimination" and statutes prohibiting monopolies and fostering free and open competition. The court then stated that Nebbia's contentions, which are exactly the same contentions made by appellant here, were unsound. . . . The court then held that the dairy industry was not a public utility, and that there was not present any suggestion of monopoly. . . .

[*Need for and reasonableness of statute controlling*]

It is quite significant that the various cases relied upon by appellant in the instant case were cited in the dissenting opinion in the *Nebbia* case. The rule of the *Nebbia* case has been since followed. (*Bordens Farm Products Co. v. Ten Eyck,* 297 U. S. 251, 56 Sup. Ct. 453.) It is true that in these cases the United States Supreme Court emphasized the emergency nature of the legislation. The emergency referred to was in fact part of the background of the statutes. In determining judicial action, however, the character of the situation sought to be remedies rather than its abruptness is the governing factor. As we interpret the *Nebbia* case and the cases from this court hereafter referred to, in passing upon the validity of such statutes the sole constitutional yardstick by which they should be measured is the necessity for and the reasonableness of the regulation. The question as to whether the statute involves direct or indirect price fixing is a false quantity.

[*Statute fixes a price floor*]

In *Old Dearborn D. Co. v. Seagram Distiller's Corp.,* 299 U. S. 183, 57 Sup. Ct. 139 the court upheld the validity of the Illinois Fair Trade Act, a statute substantially identical with the California Fair Trade Act, upheld in *Max Factor & Co. v. Kunsman, supra.* Such statutes permit the owner of trademarked articles to fix the resale price of such articles. The basic purpose of such a statute and the one here involved is the same. Both are aimed primarily at cut price retailing and the ruinous use of loss leaders. The Fair Trade Act aims to correct the evil from above by legalizing resale price maintenance, by penalizing all who sell trademarked articles in disregard of the owner's contract even though not parties to it. The present statute operates from below and is broader in scope. In its true sense it is not a price fixing statute at all. It merely fixes a level below which the producer or distributor may not sell with intent to injure a competitor. In all other respects price is the result of untrammelled discretion. This was the exact holding of the Supreme Court of Tennessee, in *Rust v. Griggs,* 113

S. W. (2d) 733, in upholding the Tennessee act comparable to the statute here involved.

This court in the *Max Factor & Co.* case, *supra,* in answering the contention that the Fair Trade Act unlawfully restricted the owner of property in selling the same at prices fixed by himself stated:

"* * * Under its police power, the state, in a proper case, has the power, acting in the interests of the general welfare, to regulate property and contract rights, and this includes, of course, the power to regulate the right of free bargaining. The fact that a state can lawfully pass a statute requiring free and open competition, such as the Cartwright Act, *supra,* which regulates the rights of a manufacturer or producer, and limits his freedom of contract, indicates this power exists.
* * *

It is true that the *Max Factor & Co.* and *Old Dearborn* cases involved only trade-marked articles but the theory of those decisions is also applicable here.

Another case to which reference should be made is *Agricultural Prorate Com. v. Superior Court,* 5 Cal. (2d) 550, 55 Pac. (2d) 495, upholding the constitutionality of the California Prorate Act. By that act the growers of certain agricultural products and a state commission, in the manner therein provided, are permitted to control the quantity of the product that shall be harvested and marketed by the industry and by the individual grower, even as against dissenters. This court upheld the statute, chiefly relying upon the *Nebbia* case, and expressly pointed out (p. 582), after citing the exact cases relied on by appellant in the instant case, that those cases have apparently been overruled. . . .

[*Freedom of contract not unlimited*]

In *West Coast Hotel Co. v. Parrish,* 300 U. S. 379, 57 Sup. Ct. 578, decided in March of 1937 the United States Supreme Court expressly overruled two of the cases relied upon by appellant—*Adkins v. Children's Hospital,* 261 U. S. 525, 43 Sup. Ct. 394 and *Morehead v. New York,* 298 U. S. 587, 56 Sup. Ct. 918. The statute there involved was one providing a minimum wage law for women. The court commented at length on the existing economic conditions intended to be remedied by the statute. It pointed out that the freedom of contract guaranteed by the constitution is one subject to proper regulation. . . .

[*Regulation of unfair trade practice valid*]

Other cases could be cited. We believe that these cases clearly establish the constitutionality of the statute here under attack. The statute must be held to be a reasonable attempt upon the part of the state to accomplish a valid object. It must be borne in mind that this statute does not regulate the selling of commodities—it is the predatory trade practice of selling below cost with intent to injure competitors which the legislature on reasonable grounds has determined is vicious and unfair that is prohibited. Such determination is clearly within the legislative power. The state may not have power to regulate all trade practices affecting competition, but it clearly has power to restrict or prohibit trade practices which upon reasonable grounds it determines are predatory, vicious, unfair and anti-social.

[*Intent an essential element*]

It is next urged by appellant that every sale below cost, except as provided in § 6, is made unlawful by § 3 regardless of intent, and that so construed the act is unconstitutional. It would certainly add to the weight of appellant's argument on the main issue if the statute omitted intent as an integral part of the act prohibited. It is one thing, from a legal standpoint, to prohibit sales below cost engaged in for the purpose of injuring competitors and destroying competition, and quite another to merely prohibit all such sales regardless of intent. It may well be that an absolute prohibition regardless of intent would be unreasonable. (See *Fairmont Creamery Co. v. Minnesota,* 274 U. S. 1, 47 Sup. Ct. 506.) However, it is our opinion that § 3, properly interpreted, requires the designated intent before selling below cost is prohibited. The language of the section, so far as pertinent to this contention is as follows: "It shall be unlawful for any person * * * to sell * * * any article at less than the cost thereof to such vendor, or give, offer to give * * * any article or product, or service or output of a service trade for the purpose of injuring competitors and destroying competition." Because of the absence of a comma after the word "trade," it is urged that the unlawful intent clause applies only to the giving away of articles and does not apply to the preceding clause dealing with selling below cost. This contention is without merit. We are of the view that the intent clause modifies and qualifies not only the words immediately preceding but also the selling below cost clause. We are led to this construction by several considerations.

In the first place, various sections of the act contain provisions clearly indicating that intent is a necessary element of the offense. (See § 1, 3, 5, 7, 13 and 15.)

In the second place the legislature amended § 3 in 1937 (Stats. of 1937, p. 2395) by inserting the comma in the proper place,

and by so changing the wording of the section as to leave no doubt that selling below cost is only prohibited when the improper intent is present. This is entitled to some weight in ascertaining the legislative intent.

In the third place, there are certain rules of construction which lead to the same conclusion. These rules were clearly stated and applied in *People v. Kahn, supra,* in construing this identical provision. . . .

[*Uniformity of statute's operation*]

It is also asserted that the statute fails to conform to Article 1, § 11 of the California constitution which requires that all laws of a general nature shall have uniform operation. This lack of uniformity is asserted to exist in that large chain and department stores, because of their large purchasing power, can buy for less than the smaller merchant, and may, therefore, under the act, sell for less. It is claimed that this not only constitutes unlawful discrimination, but necessarily defeats the claimed purpose of the act, in that such a situation fosters rather than prevents monopolies. This last contention, as has already been pointed out, deals with a reasonably debatable economic problem, and is therefore within the legislative field. The first contention has two complete answers.

[*Uniform result not required*]

In the first place, the uniformity required by such a provision as Article 1, § 11 is uniformity in operation, not uniformity of result. (*State v. Darling* (Iowa) 246 N. W. 390; *Bowers v. Glos* (Ill.) 179 N. E. 80.) If there is any theoretical "discrimination" resulting from the statute it is due to the very fact that the law is uniform in its operation, and does not classify.

In the second place, although it is true that by fixing the minimum permissible price at cost § 3 may permit one merchant to sell for less than another, as expressed by one commentator "the poison, if such it be, contains its own antidote by exempting from operation of the statute, any endeavor made in good faith to meet the legal prices of competitors" (47 *Yale Law Journal* 1201) as provided in § 6(d).

[*No consideration of hypothetical situations*]

Appellant and *amici curiae* present various hypothetical situations, and contend that as applied to these situations the statute is unconstitutional. We are not permitted to consider these hypothetical situations. In answering the identical problem in the *Max Factor & Co.* case, *supra* (p. 468) this court stated: "Respondent presents several hypothetical situations under which enforcement of the act would be inequitable or difficult, or, perhaps, even unconstitutional. It is elementary, of course, that a statute may be invalid as applied to one set of facts, yet valid as applied to another. (*Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282 [42 Sup. Ct. 106, 66 L. Ed. 239].) The situations conjured up by respondent are not here involved, and respondent is limited in his attack to the application of the statute to the factual situation now before the court. Moreover, the principal remedy granted by the statute is injunctive relief. The equity court has broad and flexible discretionary powers, and can, and undoubtedly would, deny injunctive relief where such relief would be inequitable."

The contention that because § 1 excludes the lease of motion pictures from the operation of the act, the act is discriminatory, cannot be properly raised by this appellant. (*Smiley v. Kansas,* 196 U. S. 457.)

[*Indefinite definition of operating cost not considered*]

The last contention of appellant necessary to be discussed is that the definition of "cost of doing business" found in § 3 is indefinite and uncertain. Appellant is in no position to urge this point. The parties stipulated and the trial court found that appellant sold the goods here involved at less than invoice or replacement cost, plus the appellant's cost of doing business. The parties likewise stipulated that the cost of doing business in appellant's line of activity was an established fact, well known to all in the trade, including appellant. Obviously, the provisions defining cost of doing business must have been sufficiently certain and definite to appellant at the time it stipulated to the fact. We have no way of ascertaining in this case whether the provisions relating to the cost of doing business contained in the act are too uncertain and indefinite to reasonably be applied by any merchant. Appellant and its supporting *amici curiae* urge with great vehemence that it is practically impossible for any merchant to have available the necessary facts for an accurate calculation of cost of doing business as applied to each article during the course of any current year. Respondent and its supporters urge that simple and proper accounting practices will disclose the necessary information. Under such circumstances the issue cannot and should not be determined in this proceeding. When and if the issue is properly presented against a proper factual background with appropriate eviden-

tiary material, this court can then and only then determine the reasonableness of this provision. It may well be that such evidence will disclose that the apprehensions of appellant are groundless. Moreover, the present case involves an application for an injunction. We are not now considering the criminal provisions of the act. In an equity case the trial court "has broad and flexible discretionary powers, and can, and undoubtedly would, deny injunctive relief where such relief would be inequitable." (*Max Factor & Co. v. Kunsman, supra.*) It should also be mentioned that in *Rust v. Griggs, supra,* the Tennessee Supreme Court upheld a provision in relation to cost of doing business than on its face appears to be more vague and uncertain than the one here involved.

[*Constitutionality of statute upheld*]

For the foregoing reasons it must be held that, as applied to the facts of this case, the Unfair Practices Act is constitutional, insofar as it grants to those in the position of respondent the right to injunctive relief. The statute embodies the concept that sales made at a loss to the seller, when made for the purpose of injuring or destroying competition, are predatory and anti-social in character. The economic wisdom of such a concept may be debatable, but being debatable, the legislature is empowered to choose between its acceptance or rejection. The statute, so far as the facts here involved are concerned, goes no further than reasonably necessary to effectuate that choice.

[*Conclusion*]

It is our opinion that neither the due process clause, nor any other constitutional restraint, state or federal, prohibits the legislature from acting to curb predatory merchandising practices which tend to injure or destroy fair and open competition.

[*Judgment affirmed*]

The judgment appealed from is affirmed.

[¶ 55,192] Everett L. Balzer v. Donald L. Caler.

California Supreme Court. Decided July 28, 1938.

Intent to injure competitors and to lessen competition must be proven to exist in the making of sales below cost before injunctive relief may issue under the California Unfair Practices Act

[*Counsel*]

For Appellant—Hanna & Morton; Albert Mosher; Leon B. Brown.

Amici Curiae—E. R. Hoerchner, Landels, Weigel and Crocker; Stanley A. Weigel.

For Respondent—Otto A. Gerth.

Amici Curiae—Pierson & Block; McNamara & Seymour; Chase, Barnes & Chase; Ray C. Eberhard, Orrick, Dahlquist, Neff and Herrington.

[*Nature of proceeding*]

Waste, C. J.: A hearing was granted in this cause in order to consider the constitutionality of the Unfair Practices Act as amended in 1935. (Stats. of 1935, Ch. 477, p. 1546; Deering's Codes, Laws and Constitutional Amendments, 1935 Supp., Act 8781.) Upon further deliberation, for reasons hereafter appearing, it is our opinion that the constitutionality of the statute is not involved in this proceeding.

[*Alleged unfair practices*]

This cause is a companion case to *Wholesale Tobacco Dealers Bureau v. National Candy and Tobacco Co.,* L. A. 15836, this day decided (*ante,* p. 116). The appeal is by the plaintiff from a judgment refusing to issue an injunction to prohibit the defendant from selling in his grocery stores certain staple articles for less than cost. It is claimed that such sales were in violation of the above-mentioned act. The complaint upon which the action was predicated is in four counts. The first count alleges that on specified dates defendant offered and advertised for sale in his stores certain designated articles at less than invoice or replacement cost. The third cause of action alleges that defendant on the days specified sold the articles so advertised for less than invoice or replacement cost. In neither of these counts is it alleged that the acts charged were performed for the purpose of injuring competitors and destroying competition.

The second and fourth causes of action allege the same facts as do the first and third causes of action, but add the allegation that these acts were performed "for the purpose of injuring competitors and destroying competition."

[*Defense*]

Demurrers to each count were overruled.

The defendant answered admitting the offers and sales at less than his invoice or replacement cost; but he denied that these acts were performed with the intent to injure competitors or destroy competition, alleging, in this connection, that he offered for sale and sold the goods for less than cost for the sole purposes of meeting the competition of other merchants and of advertising and stimulating his own business.

[*No intent to injure competitors*]

Upon a trial of the cause, upon admittedly competent evidence, the trial court found that although defendant admittedly sold certain articles below cost these acts were not performed for the purposes of injuring competitors and destroying competition.

[*Constitutionality not in issue*]

This last mentioned finding, based as it is upon substantial competent evidence makes it unnecessary to pass upon the constitutionality of the Unfair Practices Act as applied to the facts of this case.

It was held in the *Wholesale Tobacco Dealers Bureau v. National Candy and Tobacco Co.* case, *supra*, that under section 3 of the act sales below cost are only prohibited when engaged in with the intent to injure competitors and to lessen competition. Under this ruling, obviously, the first and third causes of action fail to state a cause of action. As to the second and fourth causes of action the finding of the trial court is supported by the evidence and cannot be disturbed on appeal.

[*Conclusion*]

Appellant contends that inasmuch as the cause involves a request for an injunction that the existing law rather than the law in force at the time of the judgment should be applied. In this connection it is pointed out that in 1937 the act was amended to clearly state that intent to injure competitors and lessen competition is a necessary element of the act prohibited, but that section 5 of the act was also amended to provide that in any action brought under the act the selling of an article below cost, together with proof of the injurious effect of such act "shall be presumptive evidence of the purpose or intent to injure competitors or destroy competition." (Stats., 1937, Ch 860, p. 2395.) Even if this section were held applicable to the instant case it would nevertheless still have to be held that the only competent admissible evidence introduced on this issue rebutted the presumption.

[*Judgment affirmed*]

For the foregoing reasons the judgment appealed from is affirmed.

[¶ 55,193] State ex rel. English v. Ruback.

Supreme Court of Nebraska. Filed October 7, 1938.

Section 3 of the Nebraska Unfair Practices Act, prohibiting the disposition of goods at less than cost price where competition would be injuriously affected, is unconstitutional by reason of the indefiniteness and uncertainty of its provisions.

The right to dispose of property in an innocent manner, at the sales price obtainable in fair barter, is guaranteed to vendors under the Constitution of the State of Nebraska.

Before Rose, C. J., Eberly, Day, Paine, Carter and Messmore, J. J., and Kroger, D. J.

[*Counsel*]

Jas. T. English, Ray McGrath, Thos. C. Quinlan (Omaha); Richard C. Hunter, Atty. Gen., Bert L. Overcash, Ass't. Atty. Gen. (Lincoln) for plaintiff, appellee.

Irvin C. Levin (Omaha) for defendant, appellant.

Allen, Requartte & Wood (Lincoln), *amici curiae.*

Peterson & Devoe (Lincoln), *amici curiae.*

Fred S. White (Omaha), *amici curiae.*

[*Statement of case*]

Eberly, J.: This is a proceeding in equity for an injunction restraining the alleged violation by defendant of section 3 of the Nebraska unfair practices act (Laws 1937, ch. 137), the defendant answered the plaintiff's petition by, first, a general denial; and, further, that such section 3 of the unfair practices act violates and transgresses "the due-process clause of the Fourteenth Amendment of the Constitution of the United States," also "the Fifth Amendment" thereto, also "section 3 of article I of the Bill of Rights of the Constitution of the state of Nebraska;" that it "tends to fix prices in businesses not clothed with a public interest;" "that it is special class

legislation affecting, injuring and discriminating against large masses in favor of the few;" and that it "creates a monopoly and an unlawful combination and is in violation of articles VIII and IX of chapter 59 of the Compiled Statutes of Nebraska for 1929."

There was a trial to the court, evidence being introduced by plaintiff alone, and at the close thereof defendant moved for a dismissal "for the reason that the state has failed to establish a cause of action against the defendant." The district court overruled this motion, and, on further consideration of the evidence, a decree was entered enjoining the violation of "section 3, of Legislative Bill 137, of the laws of Nebraska for 1937" (unfair practices act). Laws 1937, ch. 137, sec. 3. From the action of the trial court overruling his motion for a new trial, the defendant appeals.

[*Provisions of Nebraska Fair Trade Act*]

The essential portions of the unfair practices act presented for our consideration, are as follows:

"Sec. 3. It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this state to sell, offer for sale or advertise for sale any article or product, or service or output of a service trade, at less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article or product, or service or output of a service trade where the effect of such sale below cost, or the giving, offering to give, or advertise the intent to give away any article or product, or service, or the output of a service trade, *may lessen, injure, destroy, prevent, hinder or suppress the competition of competitors* of such person, partnership, firm, corporation, joint stock company, or other association engaged in business within this state." (Italics supplied.)

Section 10 of this act, in effect, provides that the violator of section 3 shall "be deemed guilty of a misdemeanor for each single violation, and, upon conviction thereof, shall be punished by a fine of not less than One Hundred Dollars ($100.00) nor more than One Thousand Dollars ($1000.00), or by imprisonment not exceeding six months or by both said fine and imprisonment, in the discretion of the court."

It will be noted that, as a part of the offense created and defined by section 1 of the unfair practices act, the words "with the intent to destroy the competition of any regular established dealer in such commodity, product or service, or to prevent the competition of any person," etc., are made an essential element of this particular statutory offense. But no similar provision forms a part of section 3 of the unfair practices act on which the instant proceeding is based.

[*Alleged violation*]

The factual situation involved in the instant case is the sales by defendant, in the usual course of business as owner of a retail grocery store in Douglas county, in two transactions, in the first whereof two pounds of M. J. B. coffee were sold at retail for 50 cents, the cost price of which to defendant had been, within 30 days prior to such sale, the sum of 51 cents; and in the second transaction, two pounds of Hills Brothers coffee were sold at retail for 53 cents, the replacement cost of which to defendant then was 51 cents; and that defendant had advertised the intended sale of such goods, and others, at cut prices in the Omaha World Herald prior to the making of such sales.

On the subject of the rights of ownership and enjoyment of personal property, the Constitution of the state of Nebraska contains the following pertinent provisions, viz.:

"All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty and the pursuit of happiness. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed." Const. art. I, sec. 1.

"There shall be no discrimination between citizens of the United States in respect to the acquisition, ownership, possession, enjoyment or descent of property. The right of aliens in respect to the acquisition, enjoyment and descent of property may be regulated by law." Const. art. I, sec. 25.

"No person shall be deprived of life, liberty, or property, without due process of law." Const. art. I, sec. 3.

On this general subject, our court has said, viz.: "This common-law right of property is secured by our Constitution. It declares that 'no person shall be deprived of life, liberty, or property, without due process of law.' The terms 'due process of law' and 'the law of the land'—one or the other of which is found in all Constitutions of the states—are said to mean the same thing; and it is quite clear that they are indifferently used in Constitutions for the same purpose. They are said to refer to a preexisting rule of conduct, and designed to exclude arbitrary power from every branch of the government. *State v. Doherty*, 60 Me. 509; *Norman v. Heist*, 5 W. & S. 171; *The State v. Simons*, 2 Spear, 767. Hence, these terms do not mean merely a legislative enactment; for, 'If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be "taken, imprisoned, disseized of his freehold, liberties and privileges; be outlawed, exiled, and destroyed; and be deprived of his property;

his liberty, and his life," without crime? Yet all this he may suffer, if an act of assembly simply denouncing these penalties on particular persons, or a particular class of persons be in itself a law of the land within the sense of the Constitution.' *Hoke v. Henderson,* 4 Dev. 1, 15." *Atchison & Nebraska R. Co. v. Baty,* 6 Neb. 37. See, also, *Ex parte Newman,* 9 Cal. 502; *Ex parte Quarg,* 149 Cal. 79, 84 Pac. 766; *Ex parte Dickey,* 144 Cal. 234, 77 Pac. 924; *In re Smith,* 193 Cal. 337, 223 Pac. 971; *People v. Pace,* 73 Cal. App. 548, 238 Pac. 1089.

[*Right to sell at any price*]

The conclusion is that the constitutional guaranties of our Bill of Rights contemplate that every person legally possesses the right of acquiring the absolute and unqualified title to every species of property recognized by law, with all rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases, and to sell it at such price as he can obtain in fair barter. *State v. Sperry & Hutchinson Co.,* 94 Neb. 785, 144 N. W. 795; *In re Deklotz,* 98 Neb. 861, 155 N. W. 240; *Hall v. State,* 100 Neb. 84, 158 N. W. 362; *Tyson & Brother v. Banton,* 273 U. S. 418; *Wolff Packing Co. v. Court of Industrial Relations,* 262 U. S. 522; *Ribnik v McBride,* 277 U. S. 350; *Williams v. Standard Oil Co.,* 278 U. S. 235; *New State Ice Co. v. Liebmann,* 285 U. S. 262; *Old Dearborn Distributing Co. v. Seagram-Distillers Corporation,* 299 U. S. 183.

[*No requirement of intent*]

The preliminary question now presented, in view of the essential nature of the transactions involved, is a mere sale of groceries, a transaction in no manner affected with a public interest. Does the language of section 3 of the unfair practices act possess the requisite definiteness to properly define a legal offense? It contains no definition of criminal intent, or of evil or criminal purpose, or of guilty knowledge. It is to be remembered that innocence must always be presumed. Under the terms of such section 3, criminality must be determined and punishment inflicted wholly without reference to the intent, purpose or actual knowledge of the seller, solely because, as a result of what is done, such act "may lessen, injure, destroy, prevent, hinder or suppress the competition of competitors."

In *Fairmont Creamery Co. v. Minnesota,* 274 U. S. 1, 10, it was stated:

"It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrong-doers also may be caught."

Likewise, in *Connally v. General Construction Co.,* 269 U. S. 385, we find the following language: "The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different construction. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

The statutory language employed by the controlling statute in defining the offense makes use of the word "may," apparently for the obvious reason of enlarging its scope and lightening the burden of proof. The word "may" includes in its definition "possibilities."

"In one of its usable senses the verb 'may' comprehends the idea of possibility, and, so used, becomes equivalent to the expression 'might possibly;' it has been defined as to be possible. It may comprehend further the idea of probability, and also the thought of what is, with more or less certainty, to be expected. Whether it carries the thought of probability, or of possibility and not probability, often depends on the context. It has been said that it comprises all the possible rather than the reasonably probable consequences, but that it is not to be taken as including every conceivable possibility, and that it must be reasonably applied, having in mind the purpose in view." 39 C. J. 1394.

"In creating an offense which was not a crime at common law, a statute must of course be sufficiently certain to show what the legislature intended to prohibit and punish, otherwise it will be void for uncertainty. Reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible; but where the legislature declares an offense in words of no determinate signification, or its language is so general and indefinite that it may embrace not only acts commonly recognized as reprehensible but also others which it is unreasonable to presume were intended to be made criminal, the statute will be declared void for uncertainty." 16 C. J. 67.

"The test to determine whether a statute defining an offense is void for uncertainty (1) is whether the language may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical dif-

ferences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts. *Czarra v. Board of Medical Supervisors*, 25 App. Cas. (D. C.) 443. (2) The dividing line between what is lawful and what is unlawful cannot be left to conjecture. *United States v. Capital Traction Co.*, 34 App. Cas. (D. C.) 592, 19 Ann. Cas. 68; *United States v. Washington R. & E. Co.*, 34 App. (D. C.) 599." 16 C. J. 68, note 10.

See, also, *Ex parte Jackson*, 45 Ark. 158; *Stoutenburgh v. Frazier*, 16 App. Cas. (D. C.) 229, 48 L. R. A. 220; *State v. Gaster*, 45 La. Ann. 636, 12 So. 739; *Augustine v. State*, 41 Tex. Cr. Rep. 59, 52 S. W. 77, 96 Am. St. Rep. 765.

[*Definition of crime indefinite*]

It is obvious that the terms of the statute under consideration are indefinite and uncertain. The elements of the crime it attempts to define and punish are not so clearly expressed that the ordinary person is apprised in advance as to what course it is lawful for him to pursue, and the intent and purpose of the sovereign is not clearly declared. Under these circumstances, and it being a rule of this court that a statute will not be declared unconstitutional unless necessary to the proper disposition of the pending case (*Howarth v. Becker*, 131 Neb. 233, 5 SCJ 771, 267 N. W. 444), the constitutional questions will not be discussed or determined.

[*Conclusion*]

It follows that the portion of the statute quoted, even when taken in connection with the context, is void and of no effect, and is insufficient to sustain a prosecution thereunder or civil proceedings based thereon. Thus, in overruling appellant's motion to dismiss the action, the trial court committed reversible error.

The judgment of the district court is, therefore, reversed and the proceeding dismissed.

REVERSED AND DISMISSED.

[¶ 55,194] William V. Hartmann v. John E. Sloan, United States Marshal for the Western District of Pennsylvania.

United States Circuit Court of Appeals, Third Circuit. Filed November 1, 1938.

On appeal from the District Court of the United States, for the Western District of Pennsylvania.

No reservation of pending appeals to the United States Circuit Courts of Appeals in *habeas corpus* proceedings to prevent removal for trial under the anti-trust statutes is had where the right of appeal is absolutely withdrawn in an amendment to the original statutory grant of jurisdiction.

[*Statement of the case*]

BIGGS, Circuit Judge. The appellant, a resident of Pittsburgh, Pennsylvania, has appealed from a judgment of the District Court of the United States for the Western District of Pennsylvania, discharging a writ of *habeas corpus* sued out by him against the appellee, the United States Marshal for the Western District of Pennsylvania, to prevent the appellant's removal to the Western District of Wisconsin for trial upon an indictment charging him and others with a conspiracy to violate the anti-trust laws of the United States. The final judgment of the court below was entered upon September 1, 1937, and by it the appellant was remanded to the custody of the appellee for removal to Wisconsin. Upon the same day an appeal from the judgment was taken to this court. Argument in the case was heard by us upon June 7, 1938. Upon August 30, 1938, the appellee filed a motion to dismiss the appeal upon the grounds indicated hereafter. Argument was had upon this motion upon October 13, 1938.

[*Jurisdiction where appeal is prior to statute denying appeal*]

The *habeas corpus* proceedings were instituted to test the validity of the warrant for the removal of the appellant to Wisconsin for trial upon the indictment referred to. It is undisputed that this warrant was issued pursuant to the provisions of R. S. 1014, May 28, 1896, c. 252, Sec. 19, 29 Stat. 184; Mar. 2, 1901, c. 814, 31 Stat. 956 (18 U. S. C. A. 591). Jurisdiction of this court for the appeal is based therefore upon the provisions of the Act of Congress of February 13, 1925, c. 229, Sec. 6, 43 Stat. 940 (28 U. S. C. A. 463). The Seventy-Fifth Congress, however, by Public Act No. 772, approved June 29, 1938, amended the provisions of subsection (a) of the Act of February 13, 1925, c. 229, Sec. 6, 43 Stat. 940 (28 U. S. C. A. 463) so that it now reads

as follows, the amended portion of the statute being that following the colon: "In a proceeding in *habeas corpus* in a district court, or before a district judge or circuit judge, the final order shall be subject to review, on appeal, by the circuit court of appeals of the circuit wherein the proceeding is had: Provided, however, That there shall be no right of appeal from such order in any *habeas corpus* proceeding to test the validity of a warrant of removal issued pursuant to the provisions of Section 1014 of the Revised Statutes or the detention pending removal proceedings . . . ". It is manifest therefore that the statute under which the appeal was taken has been amended in such wise as to withdraw the right of appeal to the Circuit Courts of Appeals from persons who seek by *habeas corpus* proceedings to test the validity of warrants of removal issued pursuant to the provisions of Section 1014 of the Revised Statutes (18 U. S. C. A. 591). The appellant concedes and indeed himself points out that the privilege of appealing from a lower court to a higher one is not an inherent right in any case but is a right conferred by statute or by express constitutional grant. He distinguishes, however, between the right of appeal to an appellate court and the right of an appellate court to adjudicate an appeal already taken and contends that under the authorities it is plain that though the right of future appeal has been done away with in cases of *habeas corpus* proceedings to test the validity of a warrant of removal as of the effective date of the amendment, none the less the jurisdiction of this court remains to adjudicate Hartmann's appeal since it was perfected prior to the amendment.

[*Precedents governing appellate jurisdiction*]

The appellant relies principally upon three decisions of the Supreme Court. We deem it desirable to discuss these briefly. In *Ex Parte McCardle,* 74 U. S. 506, McCardle, charged with the publication of libelous and incendiary articles and held for trial before a military commission by military authorities, petitioned the United States Circuit Court for a writ of *habeas corpus,* alleging that he was unlawfully restrained by military force. The military commander made a return to the petition admitting McCardle's restraint but denying that it was unlawful. McCardle appealed from the order of the circuit court to the Supreme Court of the United States. His appeal was taken pursuant to the provisions of the Act of 1867 (14 Stat. at L. 385). While the appeal was pending Congress passed the Act of March 27, 1868 (15 Stat. at L. 44) which provided that so much of the earlier Act referred to ". . . as authorized an appeal from the judgment of the circuit court to the Supreme Court of the United States, for the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is hereby repealed." The Supreme Court held that it was deprived of jurisdiction and therefore could not proceed to adjudicate the appeal.

In *Baltimore and Potomac R. R. Co. v. Grant,* 98 U. S. 398, the Supreme Court had before it a motion to dismiss a writ of error to the Supreme Court of the District of Columbia in a case involving the sum of $2,250. When the writ of error was allowed R. S. 846 and 847 provided that a final judgment of the Supreme Court of the District of Columbia might be "reexamined and reversed or affirmed" by the Supreme Court of the United States upon writ of error or appeal, but that a cause (with certain exceptions not pertinent here) might not be removed from the Supreme Court of the District of Columbia to the Supreme Court of the United States " . . . unless the matter in dispute in such cause shall be of the value of $1,000 or upward . . .". While the appeal was pending Congress passed the Act of February 25, 1879 (20 Stat. at L. 320), Section 4 of which provided that a final judgment of the Supreme Court of the District ". . . in any case where the matter in dispute . . . exceeds the value of $2,500 may be reexamined and reversed or affirmed in the Supreme Court of the United States upon writ of error or appeal . . .". The Supreme Court in the cited case held that the new act repealed the old and stated that the Act of 1879 was undoubtedly prospective in its operation and did not have the effect of vacating or annulling what had been done under the old law. The opinion of the court makes plain, however, that though the new act did not vacate or annul an appeal or a writ already taken or sued out, it none the less deprived the Supreme Court of the right to hear and determine the appeal. Mr. Justice Waite said, "The appeal or the writ remains in full force, but we dismiss the suit, because our jurisdiction is gone."

It will be seen that neither the *McCardle* case nor the *Grant* case is determinative of the question here presented since in each case the amendatory Act of Congress by its express terms withdrew the jurisdiction of the Supreme Court to adjudicate pending appeals. The appellant asserts, however, that *United States v. Heirs of Boisdoré,* 49 U. S. 113, is direct authority for his contention that an act which withdraws only the right of appeal does not affect the jurisdiction of the appellate court with respect to appeals pending at the time of its

passage. It thus becomes important to consider the facts of that case in order to determine whether they are in truth analogous to the present situation. The facts were these.

By the Act of May 26, 1824 (4 Stat. at L. 52) Congress authorized land claimants within the State of Missouri to litigate their claims in the District Court in proceedings to be conducted according to the rules of equity. It was provided that the party against whom the decree of the District Court was rendered should be entitled to an appeal to the Supreme Court of the United States within one year from the date of the judgment in the court below. Section 5 of the Act provided "that any claim . . . which shall not be brought by petition before the said courts, within two years from the passing this act, or which, after being brought before the said courts, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within three years, shall be forever barred." The last section of the Act extended its provisions to the territory of Arkansas. There was no other time limitation contained in the Act. The Act of June 17, 1844 (5 Stat. at L. 676) provided, "That so much of the expired Act of the twenty-sixth of May one thousand eight hundred and twenty-four, entitled 'An act to enable claimants to land within the State of Missouri and Territory of Arkansas, to institute proceedings to try the validity of their claims', as related to the State of Missouri, . . . be, and is hereby, revived and re-enacted, and continued in force for the term of five years, and no longer; and the provisions of that part of the aforesaid act hereby revived and re-enacted shall be, and hereby are, extended . . ." to a portion of the State of Mississippi, ". . . in the same way and with the same rights, powers, and jurisdictions, to every extent they can be rendered applicable, as if these States had been enumerated in the original act hereby revived, and the enactments expressly applied to them as to the State of Missouri."

The petition of the Heirs of Boisdore to have their rights to certain lands in the State of Mississippi adjudicated was filed in the District Court of Mississippi on February 1, 1845. The District Court entered a decree confirming the Boisdoré concession on November 12, 1847 and on that day the United States took an appeal to the Supreme Court. At the January Term in 1850 a motion was made to dismiss the appeal upon the ground that the Act of 1844 which extended to the State of Mississippi the Act of 1824 limited the duration of both acts to five years, which period having expired on June 17, 1849, the court no longer had appellate jurisdiction. This motion the court overruled. The grounds for its action clearly appear from the opinion of Chief Justice Taney. He pointed out that the Act of 1844 in referring to the Act of 1824 as having expired was inaccurate since the latter Act had not expired but was still in force. What had happened was that the limitations which that Act imposed of two years for the commencement of suits and of three years more for prosecuting them in the District Court had expired. These limitations, however, did not affect the right given by the Act to take an appeal within one year after judgment in the District Court or the jurisdiction of the Supreme Court to hear and determine the appeal. Chief Justice Taney said (p. 1013):

"And it was evidently the intention of the Act of 1844 to place the claims under Spanish and French grants in the States therein mentioned upon precisely the same footing with the claims in Missouri and the territory of Arkansas, and to give the claimants the same rights and remedies, including the right to appeal to this court. For it declares in express terms, that the Act of 1824 shall be extended to them, 'in the same way, and with the same rights, and powers, and jurisdictions to every extent they can be rendered applicable, as if these States had been enumerated in the original act thereby revived; and the enactments expressly applied to them, as to the State of Missouri.' Now, if they had been included in the original act, and the enactments applied to them as to the State of Missouri, it is admitted that the appellate jurisdiction of this court would not be limited to five years. And if it would not, it necessarily follows that it is not limited by the act when re-enacted and extended by the law of 1844. For if it were to be so limited, and the jurisdiction of this court ceased in five years, the rights and powers and jurisdictions in relation to the claimants in these States would be different from what they would have been if they had been included in the original law. Such a construction would in effect take away the jurisdiction of this court, and deprive each party of the right to appeal within twelve months in the cases decided in the last year of the five, and would make the appeal in almost every case inefficient and nugatory. Certainly, there could be no reason of policy or justice for making such a difference in the jurisdiction of this court in different classes of similar cases; nor could such have been intended."

[*Appellant's authority distinguished*]

It will thus be seen that the facts of the *Boisdoré* case are in no sense analogous to those of the case at bar. All that was decided by the *Boisdoré* case was that appellate jurisdiction conferred by an act which is subsequently extended to cases arising in other territorial jurisdictions is not withdrawn because of the inartistic language of the extending act where its intent and purpose was to confer upon courts in the territory to which the original act was ex-

tended the same jurisdiction and powers as had been conferred by the original act upon the courts in the territory to which it applied. We think it needs no further discussion to demonstrate that the *Boisdoré* case cannot be deemed to constitute authority for the appellant's position.

The appellee for his part cites *Gwin v. United States,* 184 U. S. 669. In this case a suit was brought to confirm title in a land grant under the provisions of the Act of March 3, 1851 (9 Stat. at L. 631) which provided for a review of the decisions of land commissioners by the District Court of California and for an appeal from the District Court of California to the Supreme Court of the United States. The Peraltas filed a petition to have confirmed their title to the rancho of San Antonio and after a decision had been reached in their favor in part by the district court took an appeal to the Supreme Court of the United States. The Supreme Court affirmed the decree of the court below adjudicating the rights of the parties, and in 1859 the district court entered a final decree. The act under which the decree was entered remained unchanged until July 1, 1864 when an Act (13 Stat. at L. 332) was passed which provided among other things " . . . that where a plat and survey had already been approved or corrected by one of the district courts, . . . and an appeal from the decree of approval or correction, has already been taken to the Supreme Court of the United States, the said Supreme Court shall have jurisdiction to hear and determine the apppeal. But where from such decree of approval or correction no appeal has been taken to the Supreme Court, no appeal to that court shall be allowed, but an appeal may be taken within twelve months after this act shall take effect, to the circuit court of the United States for California, and said circuit court shall proceed to fully determine the matter." Upon March 3, 1891 Congress passed the Court of Appeals Act (26 Stat. at L. 826) which provided for appeals, except in excepted cases from the district courts to the circuit courts of appeals. In 1899 the successors in title of the original claimants of the land, after a great deal of intermediate litigation, filed a petition in the district court in the original case praying execution of the final decree of 1859. A demurrer was sustained in the district court to this petition and it was dismissed. In 1900 a similar petition was filed which also was dismissed and an appeal was taken to the Supreme Court. Mr. Justice Brown, delivering the opinion of the Supreme Court, stated, "It appears perfectly clear from Section 3 that the appellate jurisdiction of the Supreme Court was taken away, except as to cases where an appeal had already been taken . . .". He went on to state, "To say that a decree rendered in 1900 may be appealed to a court whose jurisdiction to review it was taken away in 1864 is beyond belief. Even if the court of appeals act do not apply to this case, the jurisdiction of this court was clearly taken away by the act of 1864, and transferred to the circuit court of the United States for California, except as to appeals which had already been taken. If there had been no reservation of pending cases, even such cases would have fallen within the law." It will be perceived that in the cited case no appeal was pending before the Supreme Court at the time of the amending acts. The appellant takes the position that since the right of appeal to the Supreme Court was taken away by the Act of 1864, the last sentence of the opinion quoted was added *obiter,* but none the less we deem the cited case to be highly persuasive under the facts of the case at bar since by its language the Supreme Court plainly indicates that where the right of appeal has been repealed, unless there be a saving clause, the jurisdiction of the appellate court to adjudicate the appeal is obliterated along with the right of appeal.

The distinction sought to be made by the appellant between the right of appeal and the jurisdiction of the appellate court to hear it has been most ably presented. As we have seen, however, it is not supported by the authorities and we think it is too fine to be cognizable. It must be borne in mind that a party to a suit has no vested right to an appeal. *Baltimore & Potomac R. R. Co. v. Grant, supra.* The Act of June 29, 1938 with which we are here concerned expressly withdrew the right of appeal from an order of the type here appealed from. It did so by attaching a proviso to that effect to the very statute which originally conferred upon this court jurisdiction of such appeals. The withdrawal of the right of appeal is absolute and there is no reservation of pending appeals from its provisions. We think it operated likewise to withdraw our jurisdiction and we accordingly conclude that our power to proceed with the determination of the present appeal fell with the right of appeal.

In view of our conclusion that the appeal must be dismissed it is unnecessary and indeed improper at this time for us to consider the merits of the appeal. We think it proper to say however that before the Act of June 29, 1938 was passed, this court upon consideration of the merits of the appeal had reached the conclusion that the judgment of the court below must be affirmed.

[*Appeal dismissed*]

The appeal is dismissed.

[¶ 55,195] **United States of America v. Ford Motor Company, Universal Credit Corporation, et al.***

United States District Court, Northern District of Indiana. Entered November 15, 1938.

Upon consent of the parties a final decree is entered in proceedings under the Sherman Anti-Trust Act prohibiting the manufacturer from engaging in advertising which burdens competitors of respondent finance companies, and imposing restrictions upon collection methods classified as oppressive in nature.

Before SLICK, District Judge.

[*Final Decree*]

1. The United States of America filed its petition herein on November 7, 1938; each of the respondents appeared and filed its answer to such petition, and asserted the truth of its answer and its innocence of any violation of law; the petitioner and the said respondents desire to avoid the expenses of a trial of the issues therein and the loss of time occasioned thereby; no testimony having been taken, each of the respondents consented to the entry of this decree without any findings of fact, upon condition that neither such consent nor this decree shall be considered an admission or adjudication that it has violated any statute; and the United States of America by its counsel having consented to the entry of this decree and to each and every provision thereof, and having moved the court for this injunction,

Therefore, it is ordered, adjudged and decreed as follows:

[*Jurisdiction*]

2. That the court has jurisdiction of all persons and parties hereto; and for the purposes of this decree and proceedings for the enforcement thereof, and for no other purpose, that the court has jurisdiction of the subject matter hereof and the petition states a cause of action against the respondents under the Act of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies".

[*Parties*]

3. "Respondent Finance Company" as used in this decree shall include Universal Credit Corporation, Universal Credit Company (a Delaware corporation), Universal Credit Company (an Indiana corporation), Universal Credit Company, Inc., Commercial Investment Trust Corporation, and Commercial Investment Trust Incorporated and their officers, directors, agents and employees. "Manufacturer" as used in this decree shall include Ford Motor Company and its officers, directors, agents and employees.

4. The respondents, their officers, directors, agents and employees, be and they are hereby enjoined from doing the acts hereby prohibited and to do the acts hereby directed.

[*Definitions*]

5. The following terms, as used in this decree, shall have the following meanings:

(a) "Person" shall mean a person, firm, corporation or association.

(b) "Dealer" shall mean a person who holds a franchise from, or approved by, the Manufacturer, that provides for the purchase at wholesale of new automobiles made by the Manufacturer and who resells the automobiles at retail.

(c) "Wholesale financing" shall mean the advancing by a finance company, as hereinafter defined, of money or credit to or for the account of a dealer to cover, in whole or in part, the cost of new automobiles ordered by the dealer at wholesale.

(d) "Retail financing" shall mean the purchase or other acquisition of retail time sales paper from dealers by finance companies, as hereinafter defined.

(e) "Finance charge" shall mean the difference between the cash delivered price of an automobile and the price of that automobile when sold on an installment payment plan, including or not including (as the plan may provide) insurance for the retail purchaser.

(f) "Finance company" shall mean a person engaged chiefly in wholesale financing or retail financing, or both.

(g) "Retail time sales paper" shall mean any conditional sale contract, chattel mortgage, lease, note or other instrument given to evidence or secure the obligation to pay the whole or any part of the price of automobiles sold by a dealer at retail.

(h) "A finance company" or "any finance company" shall include Respondent Finance Company.

(i) "Registered finance company" shall mean a finance company which shall be registered as provided in sub-paragraph (j) of paragraph 6 of this decree including Respondent Finance Company if it be a registered finance company.

(j) "Chrysler Corporation" means Chrysler Corporation, a corporation of the State of Dela-

* A substantially identical decree was entered in the case of *United States v. Chrysler Corporation, et al.*, in the same court on the same day.

ware and its subsidiaries and successors, "General Motors Corporation" means General Motors Corporation, a corporation of the State of Delaware and its subsidiaries and successors, and "General Motors Acceptance Corporation" means General Motors Acceptance Corporation, a corporation of the State of New York and General Motors Acceptance Corporation of Indiana, Incorporated, a corporation of the State of Indiana, and their subsidiaries and successors.

[*Assistance to finance companies*]

6. The Manufacturer:

(a) Shall permit any finance company or other person to pay for any automobile shipped or otherwise delivered by the Manufacturer to any dealer, upon written specific or continuing authority of the dealer;

[*Liens upon dealers' lots*]

(b) So long as the Manufacturer shall continue to give or assign to Respondent Finance Company or any other finance company, any document of title or lien in respect of such automobiles, it shall not refuse, upon written request of any other finance company, to make available or assign to it similar documents of title or lien in respect of automobiles similarly shipped or delivered to the dealer and paid for by the finance company upon substantially similar terms and conditions;

[*Office space*]

(c) So long as the Manufacturer shall continue to furnish Respondent Finance Company or any other finance company space for maintaining an office in any place of business of the Manufacturer, it shall not refuse, upon substantially equivalent terms and conditions and upon written request of any other finance company that extends wholesale financing facilities to dealers operating under franchise of the Manufacturer, to furnish it space for maintaining an office in such place of business; provided that it shall not be a violation of this decree for the Manufacturer to furnish the same only to registered finance companies as defined in sub-paragraph (j) of this paragraph 6;

[*Furnishing dealer information*]

(d) So long as the Manufacturer shall knowingly continue to furnish to Respondent Finance Company or any other finance company the identity of or other information concerning dealers or prospective dealers, it shall not knowingly refuse to furnish corresponding information, upon substantially similar terms and conditions and upon specific or continuing request as to identity and specific but non-continuing request as to other information, to any other finance company whose territory includes the location of such dealer's or prospective dealer's place of business; provided that it shall not be a violation of this decree for the Manufacturer to furnish the same only to registered finance companies as defined in sub-paragraph (j) of this paragraph 6, or only to a finance company designated in writing to the Manufacturer by the dealer or prospective dealer; •

(e) Except as provided by sub-paragraphs (j) and (k) of this paragraph 6,

[*Competitive advantage aid prohibited*]

(i) the Manufacturer shall not establish any practice, procedure or plan for the retail or wholesale financing of automobiles for the purpose of enabling Respondent Finance Company or any other finance company or companies to enjoy a competitive advantage in obtaining the patronage of dealers through any service, facility or privilege extended by the Manufacturer pursuant to such practice, procedure or plan if such service, facility or privilege or a service, facility or privilege corresponding thereto is not made available upon its written request to any other finance company upon substantially similar terms and conditions; and

[*Indiscriminate supply of facilities*]

(ii) so long as the Manufacturer shall continue to afford any service, facility or privilege not otherwise specifically referred to in this decree to Respondent Finance Company or any other finance company or companies, it shall not refuse to afford similar or corresponding services, facilities or privileges upon substantially similar terms and conditions and upon written request to any other finance company for the purpose of giving Respondent Finance Company or any other finance company or companies a competitive advantage in obtaining the patronage of dealers; provided that it shall not be a violation of this decree for the Manufacturer to afford such service, facility or privilege only to registered finance companies as defined in sub-paragraph (j) of this paragraph 6 or only to a finance company designated in writing to the Manufacturer by the dealer or prospective dealer;

the written request shall specify in each instance the particular service, facility or privilege desired;

[*Direction of dealer patronage prohibited*]

(f) The Manufacturer shall not give or make available or deny or threaten to deny to any dealer any service or facility, or discriminate among its dealers in any other manner, for the purpose of influencing a

dealer to patronize Respondent Finance Company or any other finance company, or registered finance companies;

(g) The Manufacturer shall not enter into or further continue any contract or agreement with any dealer (1) which provides that the dealer shall patronize only Respondent Finance Company or any other finance company selected by the Manufacturer or registered finance companies or (2) which requires the dealer to observe any plan for or rate of financing the purchase and sale of automobiles designated by the Manufacturer;

(h) The Manufacturer shall not cancel or terminate any contract, franchise or agreement with any dealer, or threaten to do so, because of failure of such dealer to patronize Respondent Finance Company, or any other finance company, or because of the failure of the dealer to patronize registered finance companies;

(i) The Manufacturer shall not, except in each instance upon written request of the dealer or prospective dealer, arrange or agree with Respondent Finance Company or any other finance company that an agent of the Manufacturer and an agent of the finance company shall together be present with any dealer or prospective dealer for the purpose of influencing the dealer to patronize Respondent Finance Company or such other finance company; provided, however, that it shall not be a violation of this decree for the Manufacturer to assist any dealer or prospective dealer, because of said dealer's or prospective dealer's financial situation or requirements, by joint conference with him and a representative of a particular finance company, to obtain special facilities or services (such term not including only the financing of the shipment or delivery of automobiles to such dealer or prospective dealer and/or only the purchase or acquisition of retail time sales paper from him in the regular course of business) from the particular finance company and, in part consideration of such special facilities or services, for such dealer or prospective dealer to arrange to do business with such finance company on an exclusive basis for a reasonable period of time as may be agreed between them;

[*Registered finance companies*]

(j) As used in this decree the word "registered" as applied to a finance company means a finance company that shall have done the following things and shall have filed a statement that meets the following requirements:

1. The statement shall be signed and acknowledged by the finance company and sworn to by an officer thereof, and shall have been filed in this proceeding and a copy thereof certified by the clerk shall have been served on the Manufacturer.

2. The finance company shall not in any manner have withdrawn the statement or rendered it ineffective.

3. The court shall not have made an order to the effect that the finance company shall cease to be a registered finance company; or, if so, the finance company shall have obtained an order reinstating it as a registered finance company, or otherwise shall have become again a registered finance company.

[*Statement by finance company*]

4. The statement shall be in the following form:

"To Ford Motor Company (hereinafter called the 'Manufacturer'):

"(A) This statement is made pursuant to subparagraph (j) of paragraph 6 of a decree of the United States District Court for the Northern District of Indiana, in a cause entitled '*United States of America v.s. Ford Motor Company, et al.*,' dated November 15, 1938.

"(B) The undersigned finance company, in acquiring retail time sales paper, arising from sales of automobiles, from dealers of the Manufacturer, wherever located, will conform to the following rules:

(1) If the finance company acquires retail time sales paper from a dealer of the Manufacturer on a finance plan which includes insurance to be arranged for by the finance company, the finance company shall (unless the insurance company to which the risk is submitted declines to write the risk) arrange for such insurance as the dealer represents to the finance company is to be arranged for by it and shall mail or cause to be mailed to the buyer a policy or certificate of insurance so arranged for within twenty-five days after the finance company acquires such retail time sales paper. Such policy or certificate shall recite the character of the coverage and the amount of the insurance premium;

(2) The finance company will not require or accept assignments of wages or salaries, or garnish wages or salaries to collect deficiency judgments in respect of automobiles sold for less than $1,000 and for private and non-commercial use unless, prior to repossession, it has requested the buyer to return the automobile to it and he has not done so;

(3) The finance company will not take any deficiency judgment where the retail purchaser of an automobile, sold for private and non-commercial use, has paid at least 50% of his note or other obligation, and will not collect from any retail purchaser of an automobile, through deficiency or other judgments, any amount in excess of its actual losses and expenses upon the failure of such purchaser to pay his note or other obligation, and will pay to or credit to the account of such purchaser any surplus over the amount owing by him on his note or other obligation which the finance company or its nominee or its affiliated or sub-

sidiary company may realize on the purchaser's note or other obligation and the automobile or any other security therefor;

(4) The finance company will not assign or transfer any retail time sales paper owned or held by it to any other person, except a dealer from whom the finance company acquired the paper on a full recourse basis rather than upon a non-recourse basis or upon the dealer's agreement to repurchase the automobile if repossessed, without limiting the rights, and creating an obligation in its assignee and his successors in interest, to proceed against the retail buyer only in the manner and to the extent that the finance company is authorized to proceed hereunder;

(5) The finance company will not make a higher charge, for granting an extension or rewriting a transaction, than the approximate pro-rata equivalent of the original finance charge, or charge more than 5 per cent of the delinquent installments for reinstating a delinquent account or charge more than its out-of-pocket expense plus a reasonable amount for the time of its employes as collection or repossession expenses;

(6) The finance company will not require the dealer to take a chattel mortgage or other lien on property other than the automobile purchased, as additional security for the payment for such automobile sold for private and non-commercial use; and will not accept an assignment from the dealer of such a chattel mortgage or other lien;

(7) The finance company will not represent to any person that it is, in any way, connected or affiliated with the Manufacturer, or that it has been approved, recommended or endorsed by the Manufacturer, or in any way ascribe to the Manufacturer or its dealers responsibility for, or authorization of, its acts; but this shall not prevent the finance company from stating if that be the case that it is a registered finance company, and at any time when a plan adopted by the Manufacturer is in effect this shall not prevent the finance company from stating if that be the case that it is a registered finance company and is offering financing service in accordance with the plan;

(8) The finance company will not intentionally do anything injurious to the good will of the Manufacturer or to the reputation of its products, or to the good will of its dealers except as may result from the assertion of any legal or contractual rights;

(9) The finance company will not without the consent of the manufacturer disclose to any competitor of the Manufacturer information which it shall have received from the Manufacturer;

(10) The finance company will disclose to the purchaser whatever information is required to be disclosed by, and will otherwise comply with, any further order of the court entered pursuant to paragraph 8 of the decree hereinbefore mentioned;

(11) The finance company will not violate any other reasonable rule hereafter from time to time established by the Manufacturer, approved by the Department of Justice of the United States and incorporated herein by the further order of the United States District Court for the Northern District of Indiana, after notice by registered mail to all registered finance companies and notice in such form as the court may determine to be reasonable to other finance companies and interested parties and an opportunity for hearing to the persons so notified.

"(C) The area within which the finance company conducts its business is: [insert either 'the United States' or the names of specific states, counties or cities], and notwithstanding the designation of an area, the finance company nevertheless will comply with clause (B) in all areas in which it may now or hereafter do business with dealers of the Manufacturer.

"(D) This statement is filed on behalf of, and shall bind, the undersigned finance company and all finance companies owned or controlled by the undersigned finance company, and all finance companies which own or control the undersigned finance company or are under common ownership or control with it.

"(E) The address of the finance company's principal office is..............................

.... FINANCE COMPANY

By ....
President

Attest:

....
Secretary

State of }
County of } ss.:

On this day of , 19 , personally appeared before me, a notary public, to me known and known to me to be the person who executed the foregoing statement, and who by me being duly sworn acknowledged and deposed that he is President of said Corporation; that he executed the foregoing statement on its behalf; that he executed said statement by authority of the Board of Directors of said corporation and that the seal of said corporation was thereunto affixed by like authority.

....
Notary Public

State of }
County of } ss.:

, being duly sworn, deposes and says that he is an officer, to wit the of , the finance company which executed the foregoing statement, and that said statement is in all respects true.

....

Signed and sworn to before me this day of , 19 .

....
Notary Public"

[Appropriate changes to be made for finance companies which are not corporations.]

[*Withdrawal of statement*]

5. Any registered finance company may file with the court a notice in writing of its withdrawal of its sworn statement above mentioned, and serve upon the Manufacturer a copy of said notice, certified by the Clerk of the Court, and ninety days after

such service or at such later date as may be stated in the notice, the finance company shall cease to be a registered finance company and the Manufacturer shall notify its dealers that such finance company has ceased to be a registered finance company.

6. The Manufacturer shall notify each finance company, which makes written specific or continuing request therefor, by registered mail of every additional rule which is incorporated in the sworn statement as provided in sub-division (11) of clause (B) of sub-paragraph (j) of this paragraph 6. The notice shall set forth the provisions of the rule and the date, not less than thirty days after the date of mailing the notice, upon which the rule shall go into effect. Any registered finance company so notified may before that date file with the court notice in writing setting forth that it withdraws its sworn statement because it does not intend to be bound by said rule, and serve upon the Manufacturer a copy of said notice certified by the Clerk of the Court, and thereupon the finance company at once and without lapse of any time shall cease to be a registered finance company and the Manufacturer shall notify its dealers that said finance company has ceased to be a registered finance company.

[*Proceedings for revocation*]

7. The Petitioner, the Manufacturer or any registered finance company shall be entitled to make application to the court, for an order herein finding and adjudging that a registered finance company has failed to comply with its sworn statement, and jurisdiction of this cause is reserved for the entry of orders upon such applications as the facts and justice may require (after such notice and hearing as the court may direct) suspending or revoking the registration of any registered company or dismissing the application. If the order shall provide that such finance company shall cease to be a registered finance company indefinitely the finance company may, not less than six months thereafter, apply to the court for an order reinstating it as a registered finance company, and jurisdiction of this cause is reserved to grant or deny such application, or grant it upon such terms and conditions, if any, as the court may determine for the purpose of assuring further compliance with such finance company's sworn statement. Upon the entry of an order finding that a finance company has failed to comply with its sworn statement, as aforesaid, if the Manufacturer shall have made the application for such an order, or upon service upon the Manufacturer of a copy of said order certified by the Clerk of the Court if another party shall have made such application, the Manufacturer shall notify its dealers of the entry and the terms of such order and shall treat said company as a company that is not a registered finance company or as the order of the court may require.

8. Withdrawal of its sworn statement by a registered finance company and any order suspending or revoking the registration of any registered company or dismissing the application shall be applicable to all finance companies embraced by the sworn statement under clause (D) thereof.

9. Service of all papers hereinbefore required to be made upon the manufacturer shall be made personally upon an officer of the Manufacturer, or by registered mail to the Manufacturer, at its principal office now located in Dearborn, Michigan.

10. Service of all papers upon a finance company pursuant to this decree shall be made personally or by registered mail addressed to it at its principal office as shown in its statement.

[*Advertising by manufacturer prohibited*]

(k) The Manufacturer shall not recommend, endorse or advertise the Respondent Finance Company or any other finance company or companies to any dealer or to the public; provided, however, that nothing in this decree contained shall prevent the Manufacturer in good faith:

(1) From adopting from time to time a plan or plans of financing retail sales of new automobiles made by the Manufacturer or from time to time withdrawing or modifying the same;

(2) From recommending to its dealers the use of such plans;

(3) From advertising to the public and recommending the use of such plans.

1. The Manufacturer shall notify each finance company, which makes written specific or continuing request therefor by registered mail, of every plan and modification thereof that the Manufacturer shall adopt. The notice shall set forth the provisions of the plan or modification and the date, not less than thirty days after the date of mailing the notice, upon which the plan or modification shall go into effect.

2. Nothing in this decree shall prevent the Manufacturer from obtaining such assurances as it may desire from one or more finance companies before or after adoption of any plan or modification that it or they will make such plan or modification available for at least a specified period of time; provided, however, that the Manufacturer may not give such finance company or finance companies, as consideration for

such assurances, any consideration prohibited by this decree.

[*Modification of financing plans*]

3. The adoption or modification of any plan under this sub-paragraph (k) shall not preclude any aggrieved finance company or any other aggrieved person who considers that such plan or modification constitutes an unreasonable restraint of trade or commerce in automobiles under the Sherman Anti-trust Law from applying to this court to vacate such plan, and the court reserves jurisdiction to make an order upon such application approving or vacating such plan, upon the execution of proper bond against damages for an order of vacation subsequently reversed or vacated.

(1) The Manufacturer shall not use any information obtained from any dealer, his agents, representatives, servants and employees, either directly by examination or inspection of his books or records, or through financial, operating or other statements or reports or otherwise, nor shall it require disclosure of any such information, for the purpose of influencing such dealer to patronize Respondent Finance Company or any other finance company or group of finance companies. Nothing herein contained shall apply to the disclosure or use of any information at the dealer's written request or for the purpose of assisting the dealer, at his specific written request, to obtain wholesale or retail financing or special facilities or services from Respondent Finance Company or any other finance company designated by the dealer in such written request.

[*Restrictions upon finance companies*]

7. The Respondent Finance Company:

(a) Shall not represent in any manner to any dealer that the Manufacturer requires him to patronize Respondent Finance Company, or that his failure to do so will result in the cancellation or termination by the Manufacturer of his contract, franchise or agreement, or in the loss of any advantage, service or facility furnished by the Manufacturer, or that Respondent Finance Company can obtain from the Manufacturer any facility, service or privilege which is not available to any other finance company, except (if Respondent Finance Company is a registered finance company) such services, facilities or privileges as result from the registration of a registered finance company, under paragraph 6 of this decree;

(b) Until further order of this court pursuant to paragraph 8 hereof, shall pay to every dealer who ceases to do business with it the amount of all reserves standing to the credit of such dealer, less any off-setting indebtedness of such dealer, such payment to be made not later than thirty (30) days after liquidation of all of the retail paper acquired from such dealer, and shall comply with any provisions relating thereto contained in any further decree entered pursuant to paragraph 8 of this decree;

(c) Shall not enter into any contract, agreement or understanding with any dealer, in connection with wholesale financing for which a separate charge is not made, which requires the dealer to deal with Respondent Finance Company in respect of retail financing of automobiles not financed at wholesale by Respondent Finance Company;

(d) Shall not, except upon written request of the dealer or prospective dealer, arrange or agree with the Manufacturer that an agent of the Manufacturer and an agent of Respondent Finance Company shall together be present with any dealer or prospective dealer for the purpose of influencing the dealer or prospective dealer to patronize Respondent Finance Company; provided, however, that it shall not be a violation of this decree for Respondent Finance Company by joint conference with a dealer or prospective dealer and a representative of the Manufacturer to agree to furnish to such dealer or prospective dealer, because of his financial situation or requirements, special facilities or services (such term not including only the financing of the shipment or delivery of automobiles to such dealer or prospective dealer and/or only the purchase or acquisition of retail time sales paper from him in the regular course of business) and in part consideration of such special facilities or services to arrange for the dealer or prospective dealer to do business with Respondent Finance Company on an exclusive basis for such reasonable period of time as may be agreed between them.

[*Provision for supplemental decree*]

8. In the event that a final decree not subject to further review is entered by a court of competent jurisdiction in any proceeding hereafter instituted by the United States against General Motors Corporation and General Motors Acceptance Corporation, granting relief to the Government against said corporations upon allegations substantially identical with the allegations in Paragraph 18 of Section III of the petition herein, then and in that event the court shall have jurisdiction to enter its supplemental decree herein granting such relief, if any, against the Respondent Finance Company, or any of them, with respect to the allegations of said paragraph of the petition, as justice may then require. Such

proceeding shall be upon application of the United States and upon proper notice and opportunity for hearing to the respondents and the presentation of evidence (including evidence with respect to the other acts and practices of the Respondent Finance Company and the Manufacturer alleged in the petition and evidence of the acts and practices of other finance companies and the volume of business done by them) relevant in determining the legality under the Sherman Anti-trust Law of the acts and practices of the Respondent Finance Company alleged in Paragraph 18 of Section III of the petition and established before the court, considered in combination with any other acts and practices of the Respondent Finance Company and the Manufacturer alleged in the petition and established before the court, and relevant in determining what further decree, if any, is necessary in addition to this decree in order to require Respondent Finance Company thereafter to conduct its business in accordance with the Sherman Anti-trust Law in respect of the acts and practices alleged in said paragraph, reserving to each of the Respondent Finance Company the right to present all defenses in law or fact as to any of the matters tendered by the Government in such proceeding which would be open if this decree had not been entered, provided, however, that such supplemental decree shall be subject to review as fully as though entered as the final decree in an original non-jury action and shall be vacated upon motion of any party if not so reviewable.

9. The respondents shall not in combination or conspiracy do any act which this decree forbids or omit any act which this decree requires.

10. Upon complaint by the petitioner that any respondent has failed to comply with the provisions of the foregoing sub-paragraphs (e), (f), (i) and (l) of paragraph 6, or of sub-paragraph (d) of paragraph 7 of this decree, and the defense of such respondent that the act or acts complained of were not done for the forbidden purpose or purposes, the burden shall be upon such respondent to prove that the act complained of was done for a purpose not forbidden.

11. The Manufacturer shall mail a copy hereof to its dealers, regional and district managers and field representatives in the continental United States and Respondent Finance Company shall mail a copy hereof to its zone, regional and branch managers in the continental United States; and said Manufacturer and Respondent Finance Company respectively shall within thirty (30) days after the entry of this decree file with this court an affidavit or affidavits showing the manner in which they severally shall have complied with this provision hereof.

12. The Respondent Finance Company shall not pay to any automobile manufacturing company and the Manufacturer shall not obtain from any finance company any money or other thing of value as a bonus or commission on account of retail time sales paper acquired by the finance company from dealers of the Manufacturer. The Manufacturer shall not make any loan to or purchase the securities of Respondent Finance Company or any other finance company, and if it shall pay any money to Respondent Finance Company or any other finance company with the purpose or effect of inducing or enabling such finance company to offer to the dealers of the Manufacturer a lower finance charge than it would offer in the absence of such payment, it shall offer in writing to make, and if such offer is accepted it shall make, payment upon substantially similar basis, terms and conditions to every other finance company offering such lower finance charge; provided, however, that nothing in this paragraph contained shall be construed to prohibit the Manufacturer from acquiring notes, bonds, commercial paper, or other evidence of indebtedness of Respondent Finance Company or any other finance company in the open market.

[*Possible retention of finance company control*]

It is an express condition of this decree that notwithstanding the provisions of the preceding paragraph of this paragraph 12 and of any other provisions of this decree, if an effective final order or decree not subject to further review shall not have been entered on or before January 1, 1941, requiring General Motors Corporation permanently to divest itself of all ownership and control of General Motors Acceptance Corporation and of all interest therein, then and in that event, nothing in this decree shall preclude the Manufacturer from acquiring and retaining ownership of and/or control over or interest in any finance company, or from dealing with such finance company and with the dealers in the manner provided in this decree or in any order of modification or suspension thereof entered pursuant to paragraph 12a. The court, upon application of the respondents or any of them, will enter an order or decree to that effect at the foot of this decreee, and the right of any respondent herein to make the application and to obtain such order or decree is expressly conceded and granted.

[*Conditions under which decree is partially inoperative*]

12a. It is a further express condition of this decree that:

(1) If the proceeding now pending in this court against General Motors Corporation instituted by the filing of an indictment by the Grand Jury on May 27, 1938, No. 1039, or any further proceeding initiated by reindictment of General Motors Corporation for the same alleged acts, is finally terminated in any manner or with any result except by a judgment of conviction against General Motors Corporation and General Motors Acceptance Corporation therein, then and in that event, every provision of this decree except those contained in this sub-paragraph (1) of this paragraph 12a of this decree, shall forthwith become inoperative and be suspended, until such time as restraints and requirements in terms substantially identical with those imposed herein shall be imposed upon General Motors Corporation and General Motors Acceptance Corporation and their subsidiaries either (a) by consent decree, or (b) by final decree of a court of competent jurisdiction not subject to further review, or (c) by decree of such court which although subject to further review continues effective. The court reserves jurisdiction upon application of any party to enter orders at the foot of this decree in accordance with the provisions of this paragraph.

(2) A general verdict of guilty returned against General Motors Corporation in said proceeding, followed by the entry of judgment thereon, shall be deemed to be a determination of the illegality of any agreement, act or practice of General Motors Corporation which is held by the trial court, in its instructions to the jury, to constitute a proper basis for the return of a general verdict of guilty. A special verdict of guilty returned against General Motors Corporation in said proceeding, followed by the entry of judgment thereon, shall be deemed to constitute a determination of the illegality of any agreement, act or practice of General Motors Corporation which is the subject of such special verdict of guilty. A plea of guilty or nolo contendere by General Motors Corporation, followed by the entry of judgment of conviction thereon, shall be deemed to be a determination of the illegality of any agreement, act or practice which is the subject matter of such plea. The determination, in the manner provided in this clause, of the illegality of any agreement, act or practice of General Motors Corporation shall (for the purposes of clause (3) of this paragraph) be considered as the equivalent of a decree restraining the performance by General Motors Corporation of such agreement, act or practice, unless or until such judgment is reversed, or unless such determination is based, in whole or in part, (a) upon the ownership by General Motors Corporation of General Motors Acceptance Corporation, or (b) upon the performance by General Motors Corporation of such agreement, act or practice in combination with some other agreement, act or practice with which the respondents are not charged in the indictment heretofore filed against them by the Grand Jury on May 27, 1938, No. 1041;

[*Relief in further proceedings*]

(3) After the entry of a consent decree against General Motors Corporation, or after the entry of a litigated decree, not subject to further review, against General Motors Corporation by a court of the United States of competent jurisdiction, or after the entry of a judgment of conviction against General Motors Corporation in the proceeding hereinbefore referred to, or after January 1, 1940 (whichever date is earliest), the court upon application of any respondent from time to time will enter orders:

(i) suspending each of the restraints and requirements contained in sub-paragraphs (d) to (f) and (h) to (l), inclusive, of paragraph 6 of this decree to the extent that it is not then imposed, and until it shall be imposed, in substantially identical terms, upon General Motors Corporation and its subsidiaries, and suspending each of the restraints and requirements contained in sub-paragraphs (a), (c) and (d) of paragraph 7 of this decree to the extent that it is not imposed and until it shall be imposed in substantially identical terms, upon General Motors Acceptance Corporation and its subsidiaries, either (w) by consent decree, or (x) by final decree of a court of competent jurisdiction not subject to further review, or (y) by decree of such court which, although subject to further review, continues effective, or (z) by the equivalent of such a decree as defined in clause (2) of this paragraph; provided, however, that if the provisions of a consent or litigated decree against General Motors Corporation and its subsidiaries corresponding to sub-paragraphs (j) and (k) of paragraph 6 of this decree are different from said sub-paragraphs of this decree, then upon application of the respondents any provision or provisions of said sub-paragraphs will be modified so as to conform to the corresponding provisions of such General Motors Corporation decree;

(ii) suspending each of the restraints and requirements contained in the remain-

ing sub-paragraphs (a), (b), (c) and (g) of paragraph 6 to the extent that it is not then imposed, and until it shall be imposed, upon General Motors Corporation and its subsidiaries in any manner specified in the foregoing sub-clause (i) of clause (3), if any respondent shall show to the satisfaction of the court that General Motors Corporation or its subsidiaries is performing any agreement, act or practice prohibited to the Manufacturer by said remaining sub-paragraphs, and suspending each of the restraints and requirements contained in sub-paragraph (b) of paragraph 7 of this decree to the extent that it is not imposed, and until it shall be imposed, upon General Motors Acceptance Corporation and its subsidiaries in any said manner, if any respondent shall show to the satisfaction of the court that General Motors Acceptance Corporation is performing any agreement, act or practice prohibited to Respondent Finance Company by said sub-paragraph (b) of paragraph 7;

(iii) suspending the restraints of sub-paragraph (d) of paragraph 7 of this decree as to Respondent Finance Company, in the event that the restraints of sub-paragraph (i) of paragraph 6 of this decree are suspended as to the Manufacturer.

(4) The right of the respondents or any of them to make any application for suspension of any provision of this decree in accordance with the provisions of this paragraph and to obtain such relief is hereby expressly granted.

In the event that at any time prior to the date when General Motors Corporation has permanently divested itself of all ownership and control of and interest in General Motors Acceptance Corporation, General Motors Acceptance Corporation shall make available to dealers of General Motors Corporation in any area a finance charge, on all or any class of automobiles sold by dealers of General Motors Corporation, less than the finance charge then generally available to dealers of the Manufacturer within such area, nothing in this decree shall prevent the Manufacturer from making, and the Manufacturer may make, adjustments, allowances or payments to or with all of its dealers in such areas who agree to reduce to an amount approved by the Manufacturer (but not less than that then made available by General Motors Acceptance Corporation) the finance charges which such dealers of the Manufacturer in such area receive from any class of retail purchasers of automobiles, provided that such adjustments, allowances or payments shall not discriminate among such dealers in such area.

[*Decree not to be pleaded in bar*]

13. This decree shall not be pleaded in bar by the respondents in any action under the Anti-Trust Laws instituted by the petitioner against them or any of them in this court or in a court in any other judicial district as to matters arising after the entry of this decree; provided, however, that this paragraph shall not apply to matters which are covered by this decree or which form a part of the cause of action herein or which are a continuance or repetition of acts or practices in which the respondents now engage which form a part of the cause of action herein.

14. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to make application to the court at any time for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this decree, for the modification thereof (including, without limitation, any modification upon application of the respondents or any of them required in order to conform this decree to any Act of Congress enacted after the date of entry of this decree), for the enforcement of compliance therewith, the punishment of violations thereof, and the carrying out of the provisions of sub-paragraphs (j) and (k) of paragraph 6 hereof, and the October, 1938, Term of this court is hereby extended indefinitely for such purposes.

[*Unfair-practice by competitors*]

15. It is hereby further provided that if it shall appear to the court upon application of any respondent that, (A) in any twelve (12) months' period after the date of entry of this decree, any present or future competitor of the Manufacturer other than General Motors Corporation or Chrysler Corporation shall have sold in the United States, or any State thereof, a quantity of automobiles that shall equal or exceed 25% of the automobiles sold by the Manufacturer in the United States or said State in said period, and (B) that such competitor is doing or engaging in any of the acts, practices, procedures or things then prohibited hereunder or is failing to do or engage in any act, practice, procedure or thing required hereunder, and (C) that the doing or engaging in of said acts, practices, procedures or things, or the omission of them, as the case may be, by such competitor has resulted or threatens to result in placing the Manufacturer at a competitive disadvantage in the sale of automobiles as against such competitor, and (D) that the petitioner herein has not obtained or is not proceeding with due diligence by civil or criminal proceedings to

obtain an adjudication of the illegality of such acts, practices, procedures or things so performed or engaged in, or omitted to be performed or engaged in, as the case may be, under the Anti-Trust Laws, the court upon application of the respondents or any of them will enter its further order and decree providing that the provisions of this decree not so imposed upon or sought to be adjudicated against such competitor shall be inoperative and that they shall have no future force or effect in the United States or said State, as the case may be, and the right of the respondents to make such applications and to obtain such relief is hereby expressly granted.

It is hereby further provided that if it shall appear to the court upon application of any respondent that (A) in any twelve (12) months' period after the date of entry of this decree any present or future competitor of Respondent Finance Company other than General Motors Acceptance Corporation or Commercial Credit Company shall have financed the retail sale of a quantity of automobiles in the United States or any State thereof that shall equal or exceed 25% of the automobiles the sale of which was financed by Respondent Finance Company in the United States or said State in said period, and (B) that such competitor is doing or engaging in any of the acts, practices, procedures or things then prohibited hereunder or is failing to do or engage in any act, practice, procedure or thing required hereunder, and (C) that the doing or engaging in of said acts, practices, procedures or things, or the omission of them, as the case may be, by such competitor has resulted or threatens to result in placing the Respondent Finance Company at a competitive disadvantage in financing the sale of automobiles as against such competitor, and (D) that the petitioner herein has not obtained or is not proceeding with due diligence by civil or criminal proceedings to obtain an adjudication of the illegality of such acts, practices, procedures or things so performed or engaged in, or omitted to be performed or engaged in, as the case may be, under the Anti-Trust Laws, the court upon application of the respondents or any of them will enter its further order and decree providing that the provisions of this decree not so imposed upon or sought to be adjudicated against such competitor shall be inoperative and that they shall have no future force or effect in the United States or said State, as the case may be, and the right of the respondents to make such applications and to obtain such relief is hereby expressly granted.

16. Nothing in this decree shall limit the control by the Manufacturer of a subsidiary or limit the control by Respondent Finance Company of any subsidiary or affiliated company.

17. Whenever obligations are imposed upon the respondents by the laws or regulations of any state with which the respondents by law must comply in order to do business in such state, the court upon application of the respondents or any of them will from time to time enter orders relieving the respondents from compliance with any requirements of this decree in conflict with such laws or regulations, and the right of the respondents to make such applications and to obtain such relief is expressly granted.

[*Application to vacate*]

18. After four years after the date of the entry of this decree any respondent may apply to the court to vacate this decree or any supplemental decree entered pursuant to paragraph 8 hereof or to vacate or modify any provision thereof on the ground that the commission or omission of any of the agreements, acts or practices herein prohibited or required, under the economic or competitive conditions existing at the time of such application, does not constitute an unreasonable restraint of trade or commerce among the states in automobiles within the meaning of the Sherman Anti-trust Law as amended to the date of such application, regardless of whether or not such economic or competitive conditions are new or unforeseen. Jurisdiction of this cause is retained for the purpose of granting or denying such applications as justice may require and the October, 1938, Term of this court is hereby extended indefinitely for such purpose and the right of the respondents to make such applications and to obtain such relief is expressly granted. The provisions of this paragraph are in addition to, and not in limitation of, the provisions of any other paragraph of this decree.

[*Operation of decree*]

19. This decree shall have no effect with respect to respondents' acts and operations without the continental United States or to their acts and operations within the continental United States relating, exclusively, to acts and operations without the continental United States.

[*Effective date*]

20. This decree shall go into effect one hundred and twenty days after the date of entry hereof, except as to the provisions of paragraphs 8, 11, and 12 hereof, which said paragraphs shall take effect as therein provided.

[¶ 55,196] Fioret Sales Company, Inc., and Murray W. Morin and Irving Unterman, individually and as officers of Fioret Sales Company, Inc. v. Federal Trade Commission.

United States Circuit Court of Appeals, Second Circuit. Decided December 5, 1938.

Petition to review and set aside an order of the Federal Trade Commission.

Blending of imported perfume concentrates with domestic alcohol constitutes manufacturing within the meaning of the unfair competition laws and the sale of the manufactured product under advertisements which indicate that the product is sold in the condition in which it is imported is unfair competition, and affords a basis for a cease and desist order by the Federal Trade Commission.

Findings of fact of the Federal Trade Commission are conclusive upon courts of review where supported by substantial evidence.

Affirming Federal Trade Commission order in Complaint No. 3164.

Before MANTON, SWAN and CHASE, Circuit Judges.

[*Counsel*]

W. T. Kelley, Chief Counsel, Federal Trade Commission. Martin A. Morrison, Assistant Chief Counsel. S. Brogdyne Teu, II, James W. Nichol, Special Attorneys, Attorneys for Respondent.

Munn, Anderson & Liddy, Attorneys for Petitioners. John H. Glaccum, of Counsel.

[*Statement of the case*]

MANTON, Circuit Judge. Petitioners are engaged in the importation and sale in this country of perfumes in competition with others engaged in interstate commerce. They were charged before the Commission with unfair trade practices in connection with their manufacture and sales, and were directed to cease and desist such practices. The Fioret Company imports from France its perfumes in the form of concentrates or compounds which are blended mixtures of various oil extracts from plants and are usually combined with some minor essence, such as musk. When these concentrates arrive in this country, they are not sold commercially before they are blended with varying percentages of alcohol. After such blending, they are sold to the public as perfumes. The alcohol acts as a diluting medium for the concentrates so that when the perfume is applied to an object, such as a handkerchief, the alcohol evaporates leaving only the odor of the concentrate perceptible to the senses. On this record, it can be assumed that the concentrate uncombined with alcohol is not known to the purchasing public as perfume.

Petitioners in blending used domestic alcohol and marked the finished product in a bottle bearing a label in French, the English translation of which tells that the contents of the bottle was made by Fioret of Paris "and are the exclusive property of FIORET, Inc. for the United States of America where they are completed. All Infringements will be vigorously prosecuted." Following this French inscription, appears in English, "Bottled in U. S. A."

[*Finding of unfair competition*]

The Commission found that petitioners were manufacturers of perfume, that the manufacture in the United States was inconsistent with their advertisements describing their products as "imported perfumes", that the use of the label tended to further the impression thus conveyed to the public that they were manufactured in France and held that such practices constituted unfair competition.

[*Conclusiveness of Commission's findings*]

The findings of the Commission having support of substantial evidence are binding upon us. *F. T. C. v. Standard Ed. Society,* 302 U. S. 112, 117. And where the evidence is conflicting, the finding must stand. *L. & C. Mayers Co. v. F. T. C.,* 97 Fed. 2, 367, 365 (C. C. A. 2).

[*Process is manufacturing*]

The issue presented to us is whether on the facts so found, petitioners are manufacturers of perfume and if so, are they using unfair methods of competition. The findings, sufficiently supported by the evidence, justify the conclusion that petitioners do not import a perfume but only some of its ingredients which are then combined with American alcohol to produce a marketable product known as perfume. Concentrates alone are not what petitioners usually sell, but their dilutions with alcohol, and it is the alcohol that makes the finished product. Our necessary concern here is to ascertain by whom and where the product is made for use. "Manufacture is transformation—the fashioning of raw materials into a change of form for use." *Kidd v. Pearson,* 128 U. S. 120. See: *Allen v. Smith,* 173 U. S. 389, 399-400.

The petitioners must be regarded as manufacturers of perfume within the unfair competition laws. To be sure, they are importers of concentrates; but blending the

concentrates with a French alcohol which is imported results in a perfume of different chemical properties and of different odor. The difference between French and American alcohol in its effect upon the blending of perfumes, stands uncontradicted in this record.

[*Purported importation an unfair practice*]

By representing their product as an imported perfume, petitioners unfairly compete. The purchaser is unversed in the art of making a finished perfume and to say that a given perfume is imported must mean to him that the entire fluid is imported, not that only 5% of it is. To the purchasers of perfumes imported products are preferable to domestic products. By their conduct, petitioners are infringing upon the interest of the consuming public which purchases under the mistake that it is buying an imported perfume, a product rendered marketable and fit for use. They also compete unfairly with those importers of perfume whose concentrates and alcohol are blended in France and with those tradesmen who import, like petitioners, the concentrates and dilute them with domestic alcohol but who, unlike petitioners, sell their products accurately represented and advise the purchasing public that they are selling a domestic perfume.

[*Misleading use of foreign language*]

There is the representation that the contents is "Bottled in U. S. A.", but there is possible a misleading idea that the fluid was in its entirety made in France and merely bottled here, having been imported in bulk. Again, the inscription in French tends to mislead the public into the belief that the perfume was completed in France; that is to say, the warning in French to infringers of violations of its trade mark without any corresponding English legend, clearly lends itself to stimulating the suggestion already implanted in the purchaser's mind, that the entire product is one imported from France. Such misleading use of a foreign language was said by this court in *Coty Inc. v. Prestonettes Inc.* (285 Fed. 501) to be objectionable. Confusion in words created in the public mind has been held to constitute an unfair competition. *Coty Inc. v. Le Blume Import Co.*, 292 Fed. 264. It is sufficient to sustain the order, if there is a probable tendency, by petitioner's conduct, to deceive. *Coty Inc. v. Parfums de Grande Luxe Inc.*, 298 Fed. 865, 870 (C. C. A. 2). Probable injury to particular interests is unnecessary since it is the totality of all interests conceived as the public interest which is decisive. *F. T. C. v. Algoma Lumber Co.*, 291 U. S. 67, 81; *F. T. C. v. Royal Milling Co.*, 288 U. S. 212, 217; *F. T. C. v. Raladam Co.*, 283 U. S. 643, 651. The unfair practice may well be avoided by a legend stating that the contents of the package or bottle was bottled and diluted in the United States.

[*Conclusion*]

The petition is denied and the order affirmed.

[¶ 55,197] The State of Wyoming v. Lloyd G. Langley, d/b/a Black and White Grocery.

Wyoming Supreme Court. Decided December 5, 1938.

Reserved questions from the District Court, Laramie County.

The Wyoming Unfair Competition and Discrimination Act, in its regulation of businesses regardless of whether they are clothed with a public interest, is a constitutional exercise of the Legislative power where the purpose of the act is to prevent harmful price cutting, rather than to fix prices, and the Act, which attempts to ensure that each merchant shall pursue a course of fair competition, is not arbitrary.

Where the "cost" established by the Wyoming Unfair Competition and Discrimination Act is not intended to be an exact figure, but rather the approximate cost as determined by the exercise of reasonable rules, the standard prescribed is reasonable and the Act, which requires no more than good faith on the part of merchants affected, is constitutional.

BLUME, C. J., RINER and KIMBALL, J.J., concur, with reservations.

[Quotations from certain of the authorities cited by the Court are omitted from the report of the decision, as indicated herein].

[*Counsel*]

For the plaintiff there was a brief by Ray E. Lee, Attorney General, Thomas F. Shea, Deputy Attorney General, Wm. C. Snow, Assistant Attorney General, and Edward T. Lazear, all of Cheyenne, and oral argument by Mr. Lee and Mr. Lazear.

For the defendant there was a brief and an oral argument by C. A. Lathrop, of Cheyenne.

[*Statement of the case*]

BLUME, Chief Justice. An information was filed against the defendant in this case for unlawfully selling some merchandise at less than cost in violation of Section 2 of Chapter 73, Session Laws of Wyoming of 1937, which reads as follows:

"It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this State, to sell, offer for sale or advertise for sale any article or product, at less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article or product for the purpose of injuring competitors and destroying competition.

The term cost as applied to production is hereby defined as including the cost of raw materials, labor and all overhead expenses of the producer; and as applied to distribution, cost shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

The cost of doing business or overhead expense is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor, including salaries of executives and officers, rent, legal rate of interest on capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising."

Section 5 of the Act excepts from its provisions (a) merchandise sold in liquidation, (b) sales of perishable merchandise and seasonal goods, (c) damaged merchandise or merchandise deteriorated in quality sold as such, (d) merchandise sold under order of court, (e) merchandise sold in meeting the legal prices of a competitor. Section 12 of the Act provides as follows:

"The Legislature declares that the purpose of this Act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This Act shall be literally construed that its beneficial purposes may be subserved."

[*Questions certified*]

The defendant entered a plea of guilty and thereafter filed a motion in arrest of judgment, claiming that the statute is unconstitutional as hereinafter mentioned. Thereupon, the court certified to us certain difficult constitutional questions, namely, whether Section 2, supra, is in violation of the 14th amendment of the Constitution of the United States, which provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law," or in violation of Section 6 of Article 1 of the Constitution of Wyoming, which provides: "No person shall be deprived of life, liberty or property without due process of law," or in violation of Section 7 of Article 1 of the Constitution of Wyoming, which provides that "absolute arbitrary power over the lives, liberty or property of freemen exists nowhere in a republic, not even in the largest majority."

1. The legislation now before us would probably not cause more than ordinary anxiety, or deserve greater consideration than the ordinary constitutional question, were it not for the times in which we live, the depression now existing, the unrest now prevailing, the mass of social legislation in the last few years, the wonder whither we are going, and the frequent queries whether courts are drifting merely with the tide or are rendering their decisions with that steadfast judgment as is their wont. Before discussing the direct questions involved herein, it may be well, even though resulting in the statement of seeming platitudes, to cast a heavy glance over the basic historic facts underlying constitutional law, and the fundamental principles which should govern it; also to make a brief analysis of judicial utterances in that connection, and give our own appraisal thereof. That will perhaps dissipate uncertainties and wavering doubts, lending us self-certitude in the correctness of our decision, and, we hope, affirm the faith and confidence hitherto placed in us by our fellow-men.

[*History of price-fixing*]

The Bill of Rights contained in the various constitutions, including our own, has its direct root in the ideas of the preceding centuries. Prior to the Renaissance prices of merchandise were freely regulated. It was not deemed improper to do so even in our colonies, including New York, New Jersey, Maryland and New Hampshire as late as the time of the Revolution. 28 *Columbia Law Review* 712, note. With the Renaissance began a new period in human history. Thoughts of liberty and freedom took possession of the minds of men, first in the field of religion, then of politics, later in the field of economics. It came to be a part of the legal philosophy of the times that each man has, as such, and because he is a human being, certain natural, inherent and indefeasible rights of which no government should, or has the right, to deprive him. One of the chief exponents of that doctrine was Rousseau, writing in the Contrat Social in the eighteenth century. See Leon Duguit in 31 *Harvard Law Review* 1-185. That doctrine was embodied in the Declaration of Rights of the French National Assembly of 1789 in which it is stated that the end of all union of men in society

is the conservation of their natural and indefeasible rights of man, and in the French Constitution of 1791, which states that the legislative power cannot make any laws which infringe and interfere with these rights. *Idem* 12, 17. The Contrat Social of Rousseau had its repercussions and its influence upon all modern doctrine of legal and political philosophy and Duguit states that "the principle of sovereignty limited by the rights of the individual is still dominant in French classical doctrine." *Idem* 114. Its influence in our own country during the 18th century may be noted in the writings of a contemporary. "The end of all political associations," writes Paine in his "Rights of Man" (Conclusion Part 1) "is the preservation of the natural and imprescriptible rights of man, and these rights are liberty, property, security and resistance of oppression." Liberty of production and exchange was proclaimed no less than political liberty. The "Wealth of Nations" of Adam Smith, e.g., wielded an enormous influence. To illustrate, Thomas Paine, in his work already mentioned, writes that "government is no farther necessary than to supply the few cases to which society and civilization are not conveniently competent * * * The more perfect civilization is, the less occasion has it for government, because the more does it regulate its own affairs, and govern itself * * *. It is but few general laws that civilized life requires." Part 2, c. 1. That theory was naturally accentuated by reason of the existence and the development of our frontier, and the spirit engendered by that development has not lost all of its influence at the present time. The doctrine of natural and inherent rights to life, liberty and property was announced in the Declaration of Independence, in the constitutions of New Hampshire, Virginia, and Pennsylvania in 1776, in the constitution of Vermont in 1777, in that of Massachusetts in 1780, and in that of New Jersey in 1784. Other constitutions followed in the same vein. Section 3 of Article 1 of our own constitution refers to natural rights of man and section 2 of the same article provides that "in their inherent rights to life, liberty and the pursuit of happiness, all members of the human race are equal." There are those who maintain that man has no natural rights: that none can exist except in society, and that whatever rights he has, he, accordingly, receives from society. However that may be theoretically, natural rights are recognized by our constitution. The doctrine is part of the positive law of the land, and section 6 of Article 1 of our constitution provides that no person shall be deprived of life, liberty or property without due process of law. The article evidently refers to the natural and inherent rights otherwise mentioned, and so it becomes apparent, particularly in view of the history above outlined, that the framers of the constitution meant that the protection thereof is important and that they, though loosely defined, should not be unduly invaded.

[*Recognition of police power*]

Now let us look at the other side of the problem. It may be observed that section 6 of Article 1, *supra*, does not state that "no person shall be deprived of life, liberty or property," but states that no person shall be deprived thereof "without due process of law." That is a recognition of the fact that the natural and inherent rights are not absolute or unlimited, but are relative. It is a recognition, in other words, of the police power. That power, giving the legislature the right to enact laws for the health, safety, comfort, moral and general welfare of the people, is an attribute of sovereignty, is essential for every civilized government, is inherent in the legislature except as expressly limited, and no express grant thereof is necessary. 11 Am. Jur. 966-968. It is expressly recognized in our constitution, which in Sec. 2 of Article 10, states that "the police power of the state is supreme over all corporations as well as individuals."

[*Due process limitation of police power*]

That power, on the other hand, is not unlimited. The phrase "due process of law" has, on its face, but a procedural aspect, relating to proceedings before judicial or quasi-judicial tribunals, and in the early cases, appeal to that phrase was made from that standpoint only. It was not until the second half of the 19th century that a contrary view came definitely to be taken. The doctrine of natural and inherent rights asserted itself. So in *Commonwealth v. Alger*, 7 Cush. (Mass.), decided in 1853, and in *Thorpe v. Rutland R. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625, decided in 1855, it was held that the police power is not unlimited. That rule came soon to be fixed more definitely, and in *Wynehamer v. People*, 13 N. Y. 378, (1856), the court decided that the police power is definitely limited by the constitutional provision for due process, and that that provision has, accordingly, a substantive aspect as well as a procedural one. See Mott, Due Process of Law, 313-317. That is the view which has been maintained by the courts ever since that time, and so we find it stated as a general rule that it has reference also to the enactments of the legislature. 12 C. J. 1190.

Nearly every law abridges individual freedom of action to a more or less extent. In nearly all instances when one is enacted, it gives rise, or may give rise to a conflict

between such freedom on the one hand, and the power of the legislature to abridge it on the other. The solution of the conflict is judicial in its nature. Courts must be, and are, whether willingly or not, the ultimate arbiters as to whether or not there is, in a particular case, an unwarranted invasion of the guaranteed rights above mentioned. 11 Am. Jur. 1087. They have found that solution,—the only one possible or just under the circumstances—in the standard of reasonableness. 6 R. C. L. 236; 11 Am. Jur. 1073-1074. That standard is indefinite. What is reasonable depends on the facts and circumstances. 11 Am. Jur. 1074; 6 R. C. L. 236, 239; 19 R. C. L. 807. Paine's thought that, as civilization progresses, men will more and more regulate their own affairs has not proved itself correct. Altruism has not proceeded that far. History is replete with the wreckage of rules of private law. It would be no less than surprising, if it were otherwise in the field of public law. As the number of people increases, as trade develops, as civic centers become crowded, as society becomes more complex, more and more problems arise which must be solved, and the freedom of movement and of action of the individuals must be harmonized with equal rights for all. That is not always easy to do. Certain rules have been laid down to help.

[*Factors in constitutionality*]

In order that a statute may be valid, the purpose, aim, or end thereof must be within the scope or purview of the police power, and in furtherance thereof; the means adopted must be reasonable and not arbitrary, and must be appropriate for the accomplishment of the end in view; in other words, there must be a substantial connection between the purpose in view and the actual provisions of the law. 12 C. J. 929-930; *State v. Buck Mercantile Co.,* 38 Wyo. 47, 264 Pac. 1023; 57 A. L. R. 675. Furthermore, courts recognize that the legislative department of the government is the department primarily constituted to determine what measures are necessary and proper to further the legitimate purposes or objects of the power above mentioned, and they accordingly hold that if a statute reasonably tends to further such object, and is a fairly appropriate and reasonable means for that purpose under all the circumstances, then only the question of the wisdom of the law remains, which, in view of the purpose of the existence of the legislative department, should be left to it to determine. *State v. Buck Mercantile Co., supra;* 11 Am. Jur. 1080, 1081. Moreover, courts, recognizing that that department is of equal dignity with the judicial, deem it proper to go even further. They proceed upon the assumption (unfortunately at times out of harmony with the facts) that the members of that department will investigate and determine for themselves as to whether or not any proposed law will violate the constitution, and they have, accordingly, adopted the rule that no law will be declared unconstitutional unless it is clearly so. Some judicial utterances would seem to go beyond the rules here stated. Thus it is said—without any dissent —in *Noble State Bank v. Haskell,* 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112 (a statement oft repeated by other courts) that the police power "may be put forth in aid of what is * * * held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." The eminent jurist who wrote that opinion, somewhat emphasizing the foregoing, stated in his dissenting opinion to *Tyson & Bro. v. Banton,* 273 U. S. 413, 47 Sup. Ct. 426, 434, that aside from the fact that property cannot be taken without just compensation, "the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it," and that if the people, speaking through the legislature, want anything, there is nothing in the constitution which forbids them having it. That seems not to be in consonance with our constitution, which in Section 7 of Article 1 provides that "absolute arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." It is hardly a debatable question whether majorities may not act as arbitrarily as King John or Louis the Fourteenth. We are not able to state whether, in the long run, courts will be able to withstand preponderant majorities. That is for the psychologist to say. It may be that, in the long run, might will make right. But it would seem that courts should not adopt such fatalistic attitude, so long as the constitution commits to them the power and duty to say what is "right." It would seem further that in view of the position which courts occupy under our constitutional form of government, and to uphold true democracy under the constitution, it is incumbent upon them, in deciding constitutional questions such as the one before us, to avoid Scylla on the one hand and Charybdis on the other, and to travel at all times, so far as is humanly possible, along the path of the golden mean. Let us then examine the immediate question before us in that light.

[*Intent of statute*]

2. The statute in question condemns acts committed with intent (a) to injure competitors and (b) to destroy competition. Some contention is made that the clause of the statute "for the purpose of injuring

competitors and destroying competition" affects only the clause immediately preceding, and not the clause relating to the sale and advertisement below cost. We think, however, that this was not the intent of the legislature, and we need not add anything on this point beyond what was said in *People v. Kahn* (Cal. App.) 60 P. (2d) 696; *Balzar v. Caler* (Cal. App.) 74 P. (2d) 839; *Great Pacific Tea Co. v. Ervin*, 23 Fed. Supp. 70; *Wholesale Tobacco Bureau etc. v. National Candy & Tobacco Co.* (Cal. Sup. Ct.) 82 P. (2d) 3.

[*Exercise of police power for economic end valid*]

3. *Scope of Police Power.*

In many cases it is readily conceded that the aim of a statute comes within the purview of the police power. That is true, for instance, when legislation aims at the preservation of health or morals. It is not so readily conceded in cases in which the aim of the law is purely along economic lines, as in the statute before us—at least to a large extent—and it may be well, accordingly, to briefly consider that point separately. That the legislature may make provision for the economic welfare of the people generally has been decided many times, and cannot now be doubted. *Miller v. Board*, 195 Cal. 477, 234 Pac. 381, 38 A. L. R. 1479; *Chow et al. v. Santa Barbara*, 217 Cal. 673, 22 P. (2d) 5; *Pettis v. Alpha Alpha Chapter*, 115 Nebr. 525, 213 N. W. 835; *CB&Q. Ry. Co. v. People*, 200 U. S. 561, 26 S. Ct. 341, 50 L. Ed. 596; *Nebbia v. New York*, 291 U. S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469. In *Smith v. Commonwealth*, 175 Ky. 286, 194 S. W. 367, it was said that the power extends "to insure such economical conditions as are required by an advancing civilization." Thus the legislature may enact legislation to encourage agriculture (*American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. Ed. 102, 21 Sup. Ct. 43); to encourage steam laundries and discourage hand laundries (*Quong Wing v. Kirkendall*, 223 U. S. 59, 32 Sup. Ct. 192); to encourage marketing associations (*Liberty Warehouse Co. v. Burley Tob. Growers etc. Ass'n.*, 276 U. S. 71, 28 Sup. Ct. 291); to prohibit the manufacture of oleomargarine (*McCray v. U. S.*, 195 U. S. 769, 24 Sup. Ct. 769). Many more illustrations might be given.

[*Federal unfair competition regulation*]

Approaching nearer to the question involved herein, all combinations or agreements which unreasonably suppress competition or restrain trade were illegal at common law as against public policy. 41 C. J. 101. The Sherman Anti-Trust Act was passed pursuant to that policy. Here was an interference with business in the field of competition—different, it is true, than that evidenced by the statute before us, but an interference nevertheless, and the aim was partially at least the same as under our statute, namely, the maintenance of fair competition. The Clayton Act was passed in 1914 to supplement the Sherman Anti-Trust Law. Section 2 of the Act (15 U. S. C. A. Sec. 13) prohibits price discrimination between different purchasers. The validity of the Act is not questioned. It, too, directly interferes with business in the field of competiton, and declares discriminatory sales to be an evil. The Federal Trade Act, the validity of which is not questioned, was passed in 1914. That Act (15 U. S. C. A. Sec. 45) declared unfair methods of competition in commerce unlawful. That in its ultimate analysis is true under the statute before us. Its aim is to maintain fair competition, but to prevent unfair and ruinous competition. Whether free and unlimited competition, or the contrary, shall prevail, is an economic question, and the policy with reference thereto, is, primarily at least, for the legislature to determine. That was held thirty-five years ago in *Northern Securities Company v. United States*, 193 U. S. 197, 337, 24 Sup. Ct. 436, 457, 48 L. Ed. 679. The statute evidently seeks to protect not only the public, but also individual competitors; it seeks to give the latter a fair opportunity in the economic field. It has been held that, in the furtherance of promoting economic welfare, the legislature may, for the public good, in a reasonable manner, equalize economic opportunities. In *Whitney v. Newbold*, 270 Ky. 209, 109 S. W. (2d) 406, the court found partial justification for regulating private carriers in the fact that common carriers would otherwise be exposed to financial ruin. In *Kelley v. Finley*, 207 Ind. 557, 194 N. E. 157, justification for regulating private carriers was found partially in the fact that the railroad system in the state might otherwise be destroyed. In the case of *Great Atlantic & Pacific Tea Company v. Grossjean*, 301 U. S. 412, 57 Sup. Ct. 772, it was said by Mr. Justice Roberts for the majority of the court:

"Taxation may be made the implement of the exercise of the state's police power, and proper and reasonable discrimination between classes to promote fair competitive conditions and to equalize economic advantages is therefore lawful. If in the interest of the people of the state, the legislature deemed it necessary either to mitigate evils of competition between stores and chains or to neutralize disadvantages of small chains in their competition with larger ones, or to discourage merchandising within the state by chains grown so large as to become a menace to the general welfare, it was at liberty to regulate the matter directly or to resort to

the type of taxation evidenced by the Act of 1934 as a means of regulation."

Some of the justices who sat in the case dissented, but so far as their opinion shows, there was dissent from the statement here quoted.

We have no facts or figures to show how the public at large would fare if unlimited competiton were permitted. In some cases at least, with the possibility in all, competitors could be driven out of business, enabling the survivor to raise the prices to the injury of the public. In regard to the use of so-called "leaders" it has at times been urged that the public at large is injured thereby; that the loss incurred by the use of such leaders will either have to be made up by higher prices charged on other commodities, or by the enforcing of various economies, such as the lowering of wages, discharge of employees, lowering of rents, etc. See *Wholesale Tobacco Dealers Bureau v. National Candy & T. Co.* (Cal.) 82 P. (2d) 3, 13. In any event there is a large portion of the body politic which believes that, from a social standpoint, price cutting in the long run adversely affects public interest, and that the public will be adequately protected against excessive prices by the ordinary play of fair competition. *Max Factor & Co. v. Kunsman,* 5 Cal. (2d) 446, 55 P. (2d) 177. See also *Old Dearborn D. Co. v. Seagram-Distillers Corporation,* 299 U. S. 183, 57 Sup. Ct. 139, 81 L. Ed. 109, 106 A. L. R. 1476, where the opinions for and against this view are stated. See further *Federal Trade Comm. v. Baladam Co.,* 283 U. S. 643, 51 Sup. Ct. 587.

It is not only recently that courts have recognized the fact that ruinous competition may be an evil. The court in *Ware-Kramer Tobacco Co. v. American Tobacco Co.,* 180 Fed. 160, 170 (1910), stated that "while it is true that fair competition is the life of trade, it is equally true that unfair and excessive competition is death to trade." In the case of *Palmer v. Stebbins,* 3 Pick. (Mass.) 188, decided in 1825, approved in *Whitney v. Slayron,* 40 Me. 224, 230 (1855), the court said [*Portion of opinion omitted*].

That was written in the days when the doctrine of *laissez faire* was still in vigor; when the existence of the spirit of individualism in this country was not questioned. If ruinous competition was an evil then, the legislature may, we think, recognize it as an evil now, and find a proper remedy for it. Sometimes that spirit of individualism can best be fostered by want of legislation. But that is not always true. No legislation in that connection was necessary while this country was being developed. The situation has changed. Great aggregations of wealth control much of the merchandising field of today. It is not necessary to say that that is an evil. We may even admit that it is a benefit. At the same time we still have with us the independent merchants. They, too, of course are subject to the prohibition of the statute, but it was probably intended mainly for their benefit. They have hitherto been considered as part of the "backbone" of every community, radiating their influence throughout the length and breadth of the state, maintaining, not alone fair competition, but adding to, and upholding, the moral fibre of the communities, upon which, in the long run, the existence of the commonwealth depends. The legislature has the right, we think, to give them a fair chance in the field of competition; to give them a chance to remain a pillar of support, thus at the same time giving an opportunity for the maintenance of individualism, still of importance in our day, and which, except for such legislation, might be entirely crushed.

4. *Means Adopted.*

We pass on to the next question, namely, whether or not the means adopted by the legislature is reasonable and appropriate to the end in view. Is it a reasonable remedy to cure the evil mentioned? That is a different question from that already discussed. But it is closely associated with it, since, if ruinous price cutting is an evil, which the legislature has the right to remedy, it can do so, it would seem, only, or at least only effectively, by some sort of limitation set upon prices. Hence some further reference will be found to the point already discussed as we proceed herein. In this case the statute has made the intent specified therein an important element of the prohibited acts, and we need but to inquire as to whether or not the legislative act in question is reasonable and appropriate in view of that fact. Great stress was laid on the oral argument on that intent, and it is contended, if we understand counsel correctly, that no matter how lawful, *per se,* the sale below cost may be, if it is made with the intent specified in the statute, that fact itself should make the sale actionable in a civil case and punishable in a criminal case. The claim is too far-reaching. The character of the act itself, disassociated from the intent—the sale below cost—must also be considered. The law does not deal with a man's inner feelings disassociated from his acts even in criminal cases. Wharton on Criminal Law (11th Ed.) Sec. 152. Many decisions hold that the law takes no account in a civil case of the intent with which an act is done, if the act itself is lawful. See note 62 L. R. A. 673; Cooley on Torts (4th Ed.) Sec. 534; 21 *Iowa Law Review* 181; 18 *Harvard Law Review* 41; review of the thought under the Roman and the Civil Law in 22 *Harvard Law Review* 501-

519. If one does an act which is lawful in itself, and the right to do so is absolute, he should not be subjected to the judgment of a capricious jury to determine whether or not there was some secret motive behind the act. *Beardsley v. Kilmer,* 236 N. Y. 80. A man, for instance, has the undoubted and inherent right, in order to make a living, to establish an ordinary business in a community. He will naturally and inevitably injure a competitor or competitors already there. The newcomer would not engage in his venture except with the thought that he will be able to get some of the business away from the others. He has in all such cases, in the very nature of things, the specific intent to injure the latter, and in most instances, if not all, to drive out competition as nearly as he is able to do so. But it would not do to hold that he can be punished. His excuse and justification lies in the fact that he engages in business for the purpose of making a living, and to do that is, of course, an absolute and inherent right which the legislature should not be able to take away. If, however, he does not engage therein for that purpose, but merely for the purpose of injuring another, a different question arises. See *Tuttle v. Buck,* 107 Minn. 145, 119 N. W. 966, 22 L. R. A. N. S. 599; *Dunshee v. Standard Oil Company,* 152 Iowa 818, 132 N. W. 371, 36 L. R. A. N. S. 263. The editor of the note in 62 L. R. A. *supra,* on page 727, summarizing his conclusion as to the weight of authority in this connection, states the following two rules:

(1) "If one does an act which he has a perfect right to do, to accomplish some real benefit or pleasure to himself, or others in whom he has a genuine interest, and for doing which in good faith no action would lie, he is not rendered liable to an action therefor by the fact that he did it from bad motive and with intent to injure another, and such injury results."

(2) "But if one with the sole and malicious purpose of injuring another, and without any benefit, interest, or pleasure (other than that which he derives from his wicked intent) to himself or others, commit an act which, if done in good faith, would be justifiable, he is liable in an action in favor of such other person for the damage he may have sustained therefrom."

[*Contentions of defendant*]

The legislature may, of course, within reason, go beyond the common law rules and declare acts tortious or criminal which were not so previously. That, doubtless, would be true in connection with cases covered by the second rule above mentioned. But the legislature went beyond that rule. It has declared acts unlawful though the motive of gain co-exists with the intent to injure—acts, accordingly, which at common law would be entirely innocent, and would fall within the first of the above mentioned rules. Can the legislature modify that rule? Since the intent alone cannot be punished, we are logically driven to a consideration of the act itself—disassociated from the intent—the sale below cost—and must inquire whether that is subject to regulation, and can thus be made unlawful when done, as the statute requires, with the intent therein specified. Counsel for the defendant contends that the act is not subject to the regulation undertaken by the legislative act in question; that defendant has an inalienable right to sell his property at his discretion; that the statute fixes prices; that it violates his fundamental rights, and undertakes to take his property and interfere with his right to contract without due process of law. He relies on *Wolf Packing Co. v. Court of Ind. Relations,* 262 U. S. 522, 43 S. Ct. 630, 61 L. Ed. 1103; *Tyson & Bro. v. Banton,* 273 U. S. 418, 47 S. Ct. 426, 71 L. Ed. 718, 58 A. L. R. 1236; *Williams v. Standard Oil Co.,* 278 U. S. 235, 49 S. Ct. 115, 73 L. Ed. 278, 60 A. L. R. 596; and see *H. Earl Clack Co. v. Public Service Com.,* 94 Mont. 488, 22 P. (2d) 1056. In these cases the legislature sought to fix, absolutely, the price of a commodity or labor. It was held that the subject sought to be regulated was not affected with a public interest and that the attempted regulation was unreasonable. These cases, of course, are clearly distinguishable from the case at bar. The legislature, by the statute here in question, sought, not to fix prices, but to prevent ruinous price cutting, by which competitors might be injured and competition be destroyed. To do that, it was, of course, necessary to fix some limit. It might, perhaps, have set other limits than that which was fixed. The limit of "not below cost" was only one of a number of others which might, perhaps, have been selected. The one actually selected was thought to be the most just under the circumstances. It was but a means to an end, not an end in itself. As was said in *Stephenson v. Binford,* 287 U. S. 251, 53 S. Ct. 181, 77 L. Ed. 288, speaking of the power of a commission to fix the minimum rate for private carriers: "The authority is limited to the fixing of minimum rates. The contract carrier may not charge less than the rates so fixed, but is left free to charge as much more as he sees fit and can obtain. Undoubtedly this interferes with the freedom of the parties to contract, but it is not such an interference as the fourteenth amendment forbids." See also *State v. Drayton, infra.*

[*No limitation to public interest*]

The statute before us covers all business and not only that which has been held to be affected with a public interest, as com-

monly understood. And inasmuch as it was clearly the intention of the legislature not to separate the various kinds of business, the constitutionality of the statute will depend on whether or not the legislature can make the regulation as to all sales including sales of property not affected with a public interest. A few cases directly in point have been decided lately, namely, *People v. Kahn,* 19 Cal. App. 2d Supp. 758, 60 P. (2d) 596; *Balzar v. Caler* (Cal. App.) 74 P. (2d) 839; *Rust v. Griggs* (Tenn.) 113 S. W. (2d) 733; *Wholesale Tobacco Dealers Bureau v. Nat. Candy & T. Co.* (Cal.) 82 P. (2d) 3. All these cases, except *Balzar v. Caler,* have upheld legislative acts similar to the one before us. In order that it may not be thought that these cases merely followed a popular wave prevalent at the present time, we shall hereafter refer, among others, to cases which were decided a number of years ago, the ruling principle of which bears an analogy to the ruling principle which should govern in the case now before us.

[*Constitutionality of similar legislation*]

In a number of instances legislatures have interfered with, and have limited, the absolute discretion of the seller in the disposition of property not affected with a public interest. That has been true under statutes which made it unlawful for a party to sell at discriminatory prices in different places in the state. While in these cases the legislature aimed at uniform, instead of minimum prices, the interference with the right to set prices at discretion was as sharp as in the statute in question here. And the ultimate aim—sales at ruinous prices so as to stifle or destroy competition—was the same as at least part of the aim contained in our statute. In *Fairmont Creamery Co. v. Minnesota,* 274 U. S. 1, 71 L. Ed. 893, 47 S. Ct. 506, 52 A. L. R. 163, the Supreme Court of the United States held unconstitutional a law of Minnesota which forbade discriminatory prices in different parts of the state without giving opportunity to meet competitive prices. Statutes, however, which forbade discriminatory prices with intent to destroy or stifle competition have been uniformly upheld as constitutional by the state courts as well as by the Supreme Court of the United States. *State v. Drayton,* 82 Nebr. 254, 117 N. W. 768, 23 L. R. A. N. S. 1287; *State v. Creamery Co.,* 153 Iowa 702, 133 N. W. 895, 42 L. R. A. N. S. 821; *State ex rel. Standard Oil Co.,* 111 Minn. 85, 126 N. W. 527; *State v. Bridgman,* 117 Minn. 186, 134 N. W. 496; *State v. Central Lumber Co.,* 24 S. D. 136, 123 N. W. 504, 42 L. R. A. N. S. 804; *Central Lumber Co. v. State,* 226 U. S. 157, 33 Sup. Ct. 66. See note 52 L. R. A. 172. Of particular interest here is the Nebraska case. [Quotation omitted.]

In *Porto Rican American Tobacco Company v. American Tobacco Company,* 30 F. (2d) 235, the defendant was enjoined from selling Lucky Strike cigarettes in Porto Rico at a less price than in the United States. Judgment was entered pursuant to Section 2 of the Clayton Act (15 U. S. C. Sec. 13) which makes it unlawful to discriminate in price between different purchasers where the effect of such discrimination is to substantially lessen competition or tend to create a monopoly. The appellate court, in upholding the trial court, while not passing on the constitutionality of the act, stated: [Quotation omitted.]

In the case of *State v. Atlantic Ice & Coal Company,* 210 N. C. 742, 188 S. E. 413, it appears that a statute of that state made it a misdemeanor to wilfully injure a competitor so as to drive him out of business, including among the prohibited acts sales made without adequate profit. The evidence tended to show that the defendant established prices, and made sales, below cost. On appeal from conviction the constitutionality of the statute was upheld, the court among other things stating that "Ruinous competition by lowering prices has been recognized as an illegal medium of eliminating weaker competitors." In *Nebbia v. New York, supra,* the court stated: [Quotation omitted.]

[*Validity of trademarked product protection*]

Of analogy herein, too, we think, are the cases which deal with legislative acts aimed at preventing price-cutting of articles sold under a trade or brand name or under a trademark, and providing that when goods are originally sold under a contract fixing the retail price, they shall not be sold for a price less than that so fixed. While such statutes are made for the protection of manufacturers, they go further than that. The basic theory of such statutes is, as stated in *Max Factor & Co. v. Kunsman,* 5 Cal. (2d) 446, 55 Pac. (2d) 177 (affirmed 299 U. S. 198, 57 Sup. Ct. 147), "that, from a social standpoint, price cutting in the long run adversely affects public interest, and that the public will be adequately protected against excessive prices by the ordinary play of fair and honest competition between manufacturers of similar products." Statutes of that character have been upheld as constitutional in the case just cited, and in *Old Dearborn Dist. Co. v. Seagrams Dist. Co.,* 363 Ill. 559, 2 N. E. (2d) 929, 104 A. L. R. 1435, affirmed by the Supreme Court of the United States, 299 U. S. 183, 57 Sup. Ct. 139. See also note to 104 A. L. R. 1452; *Johnson & Johnson v. Weisboard* (N. J. L.) 191 Atl. 873; *Weco Products Co. v. Reed Drug Co.* (Wisc.) 274 N. W. 426.

It is undoubtedly true that under our form of government, the use of property and the making of contracts are and should be normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. *Nebbia v. New York, supra.* But neither property rights nor contract rights are absolute. The ordinary business is not conducted for the purpose of loss. The legislature has not undertaken to compel merchants to do anything out of the ordinary, but only what is usual and customary. It has merely attempted to have each merchant give a fair chance to the other and do business without evil intent. That cannot be considered arbitrary. "Altruism ought to have some place in the consideration of ennobling motives." *Beardsley v. Kilmer, supra.* We think, accordingly, that we cannot say that the means adopted by the legislature in furtherance of the purpose of the law, are unreasonable. Nor can we say that they are inappropriate. The court in *Balzar v. Caler, supra,* thought that the statute in question tends to encourage monopolies and destroy competition rather than the contrary, on account of the fact that large industrial concerns can at all times undersell merchants with limited capital. We do not think that the legislature was compelled to accept that view as conclusive. The court in that case considered merely the question of prices. It overlooked the factor of good will. The independent, or any other, merchant may be able to maintain himself on account of such good will, notwithstanding the fact that others undersell him to some extent, provided they do not undersell him too much. See further on this subject *Wholesale Tobacco Dealers v. National Candy & T. Co., supra.*

5. *Indefiniteness.*

It is claimed that the statute is void for uncertainty, because it is impossible under it to determine the cost of merchandise. It is a general and universally accepted rule that in creating an offense which was not a crime at common law, a statute must be sufficiently certain to show what the legislature intended to prohibit and punish, otherwise it will be void for uncertainty. 16 C. J. 67. However, reasonable certainty is all that is required and liberal effect is always to be given to the legislative intent when possible. 16 C. J. 68. And if a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional, it is the duty of the court to adopt that construction which, without doing violence to the fair meaning of the language, will render it valid. 12 C. J. 788. Let us examine the section of the statute under consideration in the light of these rules.

The first paragraph of Section 2 of the act does not attempt to define the cost of each article, but merely forbids, under the conditions named, the sale or giving away of merchandise below cost. The second paragraph attempts to define the cost of a stock of merchandise, fixing it at invoice price or replacement cost, plus cost of labor and overhead expenses. That is a general definition, and it would seem that no exceptions to such definition could be taken, unless it is too indefinite. The third paragraph attempts to define somewhat more accurately the cost of doing business, or overhead expenses, and requires to be included therein labor, salaries, rent, interest on capital, depreciation, selling cost, maintenance of equipment, delivery cost, etc. The court in *Balzar v. Caler, supra,* thought that these various items were, by this section, to be added to each item of merchandise—instead of the proper proportion thereof. There seems to be no justification for such construction. These items must be included in the cost of doing business—nothing more. The proportion to be added to each item of merchandise is not attempted to be stated, but that this must be done is implied in the language of the statute. *People v. Kahn, supra.* It can scarcely be doubted that each of these items are proper items to be taken into consideration. The extent thereof is not stated, and the court in *Balzar v. Caler, supra,* thought that this should have been done. [Quotation omitted.]

[*Definiteness of standards*]

The argument at first blush seems formidable. But it would seem that, upon analysis, it will be found that if the legislature should attempt to do what that court intimates it should do, a greater interference with freedom of action would result than by the legislative act in question. Would it be feasible or advisable or consistent with inherent rights for the legislature to prescribe that a merchant shall not be permitted to spend more than a certain, limited amount for advertisement? Should it prescribe the amount for depreciation? If so, it would be required, in order to obviate constitutional objections, to make a multitude of classes, and be exceedingly careful in its classification, for the proper amount varies, as is pointed out in the above case, in the various classes of business. The proper period of time to be included in estimating overhead expenses may not be the same in the case of one merchant as in the case of another. Time may make little difference for a candy kit-

chen; three months time may be proper for a butcher; six months time for the clothier, for, by way of example, replacement cost may vary in the various classes of business. These illustrations suffice to show the obstacles in the way of the legislature to do what the California court above mentioned intimates should be done, and that these matters had better be left to general business methods. The legislature, doubtless, had such general business methods—reasonable standards of cost-accounting for the various classes of business—in mind and believed them to exist. If they do not exist—if cost cannot be ascertained—then the act in question should be held to be unconstitutional. If, on the other hand, the cost is ascertainable, under reasonable methods, then such cost is purely a question of fact, definite and certain, and the standard of conduct set by the legislature, too, is definite and certain. The non-existence of such reasonable methods cannot be presumed by the court, and if that is so, then the burden of showing it, in order that we might act upon it, was on the defendant, for upon him lies the duty to show the statute to be unconstitutional (12 C. J. 791-794), but no evidence was introduced in this case. Cost-accounting has been in vogue for centuries, as shown in the article on that subject in Vol. 6 of the 14th edition of the Encyclopaedia Brittanica, and, as there shown, many books on that subject have been published from time to time. It is stated in *Rieder v. Rogan,* 12 Fed. Supp. 307, 318, that courts take judicial notice of the fact that modern systems of accounting have become very accurate. However that may be, it was, in any event, not alone the right, but the duty of the legislature in framing the statute in question to take into consideration the manner in which business is being done in the state. *Nicol v. Ames,* 173 U. S. 509, 43 L. Ed. 786, 19 Sup. Ct. 522. We may presume that it did so. Hence, we should hardly be justified, in the absence of evidence to the contrary, in holding that it did not have in mind such reasonable accounting methods in the belief that they in fact exist. Of course, no two merchants adopt exactly the same method. One man may be more cautious than another. One may allow more for depreciation, advertisement, etc., than another. One man may think that the percentage to be added to his invoice price should be that based on the overhead expenses of the past year; another may think that the past six months, or three months, should be the criterion. If a man just starts up in business, he necessarily, in order not to face bankruptcy, must act upon the experience of others, and obtain his information the best way be can. The invoice price of goods which come into the store is known. All else is more or less proximate, for the expenses may increase or decrease; the rapidity of the turn-over may fluctuate. All of these facts are well known. We cannot hold that the legislature did not know them. Knowing them, and composed of rational beings, we should assume that it took them into consideration and acted upon them, when it passed the law. Courts presume that it meant the law to be reasonable and just. 12 C. J. 790. Hence, in the absence of provisions to the contrary, we must presume that the legislature did not intend to prescribe that the cost must be absolutely exact, and that it must be based upon the precise method of accounting which any one merchant might adopt, but meant, by "cost," what business men generally mean, namely, the approximate cost arrived at by a reasonable rule. Hence, if a particular method adopted by a merchant cannot, under the facts disclosed, be said to be unreasonable, and does not disclose an intentional evasion of the law, the method so adopted should be accepted as correct. In other words, all that a man is required to do under the statute is to act in good faith. *Hygrade Provision Co. v. Sherman,* 266 U. S. 407, 69 L. Ed. 203, 45 Sup. Ct. 141. In that view of the case, the standard set by the legislature is virtually reduced to one of "reasonableness." And it is held that "reasonableness" as "a standard of an act, which can be determined objectively from circumstances, is a common, widely-used, and constitutionally valid standard in law." *People v. Curtis* (Cal. App.) 300 Pac. 801, 805, and cases cited. Construed as here mentioned, the statute may, in so far as here discussed, be upheld. There is ample authority for this conclusion. Some of them have gone much farther than it is necessary to go herein—perhaps too far. It appears in *State v. Atlantic Ice and Coal Co.,* 210 N. C. 742, 188 S. E. 413, that the legislature made it unlawful to sell any article by lowering the price so as to leave an unreasonable or inadequate profit for a time, with the purpose of increasing the profit later. The court held the act sufficiently definite. In *Nash v. United States,* 229 U. S. 373, 33 Sup. Ct. 780, the defendant was indicted for conspiracy in restraint of trade, by selling, among other acts, far below cost in order to compel competitors to meet prices ruinous to everybody, and by fixing the price of turpentine below the cost of production, for the purpose of driving competitors out of business. The charge was held sufficiently definite. The Federal Trade Act (15 U. S. C.) Sec. 45 provides that "unfair methods of competition in com-

merce are declared unlawful." That, it may be noted, is a sweeping provision, fixing no standard at all. The provision was attacked in the case of *Sears v. Federal Trade Commission* (CCA) 258 Fed. 307, 6 A. L. R. 358. The court, in holding it not void, stated: [Quotation omitted.]

In the case of *Old Dearborn D. Co. v. Seagram Distillers Corporation, supra,* the description of articles in "fair and open competition" was held to be sufficiently definite. In *Rust v. Griggs,* (Tenn.) 113 S. W. 733, a statute similar to the one here under consideration was involved. The statute of Tennessee provides that the term "cost" to the retailer shall mean (2) "the replacement cost of such product or commodity to the retailer at the time of sale in the quantity last purchased by the retailer, less any legitimate trade discounts * * * and plus a mark up amounting to less than the minimum cost of distribution by the most efficient retailer." The last clause mentioned was attacked. The court said on that point:

> **"Included in this assignment of error is the proposition that an unreasonable and oppressive burden is placed upon the retailer to locate at his own risk the most efficient retailer and then from the private records of such efficient retailer to ascertain his cost of distribution. We think the words 'most efficient retailer' were not intended to designate any particular individual. The words were used in a generic sense. The cost of distribution, within the contemplation of the legislature, was the cost of distribution by the most efficient retailers. To ascertain such cost of distribution is no great task. Matters of that sort are readily available in numerous trade surveys contained in trade journals and other publications."**

In *Omaechevarria v. Idaho,* 246 U. S. 243, 38 Sup. Ct. 323, it appears that the legislature made it unlawful to herd sheep on a range previously occupied by cattle. It was claimed that the statute was too indefinite because it failed to provide for the ascertainment of the boundaries of a range and for determining what length of time was necessary to constitute a prior occupation a usual one within the meaning of the act. The court held it sufficiently definite, and stated that "furthermore, any danger to sheepmen which might otherwise arise from indefiniteness is removed" by reason of the fact that a criminal intent was necessary to constitute a crime under the act. The same point was mentioned in *People v. Kahn, supra,* and *Hygrade Provision Co. v. Sherman, supra,* and is applicable here, although it need not be determined how much importance should be attached to it. It may often be difficult to prove the intent required by the statute, particularly in criminal cases. Perhaps *State v. Debolt,* 104 Iowa 105, 109, 73 N. W. 499; *Brown v. State,* 156 Ark. 288, 245 S. W. 813; *People v. Flores,* 86 Cal. App. 235, 260 Pac. 822; *State v. Clark,* 98 Wash. 81, 167 Pac. 84; *Western Lumber Co. v. State,* 17 Okl. Crim. 427, 189 Pac. 868; *Dunshee v. Standard Oil Co.,* 152 Iowa 818, 132 N. W. 371, 36 L. R. A. N. S. 263, 265, might shed some light thereon. We are not concerned with that point in the case at bar in view of the plea of guilty herein. We should add, that the statute has a number of exceptions and provides that the law shall not be applicable under circumstances—or at least many or most circumstances—which make it impossible or improper for a merchant to sell goods at or above cost. The statute, then, should not prove to be a burden to anyone who acts in good faith.

The question of definiteness of the law has herein been fully considered by the writer hereof. It is his opinion that while the defendant by his plea of guilty admitted that he sold below cost with the intent mentioned in the statute, the question is whether these acts constitute a crime; that if they do not, because of the indefiniteness of the law, punishment for his acts in such case would not be due process of law; (*Old Dearborn D. Co. v. Seagram-Distiller Corp. supra*); that the point should, accordingly, be decided in this case. My learned associates, however, constituting the majority of the court, think that the point is not involved in this case. Their reasons, briefly stated, are these: The constitutional objection on the ground of indefiniteness is because the statute provides that the "cost of doing business," as therein defined, may be added to the invoice or replacement cost as a part of the "cost" of the article sold. The asserted defect is that the "cost of doing business" may not be known to the seller. The defendant, however, by his plea of guilty, admits making the sale below cost for the purposes denounced by the statute. It must be assumed that he knew the cost of the article, and it may be that the sale alleged in the information was for a price less than the invoice or replacement cost. Defendant's cost of doing business was not determined by the trial court, and may not have been estimated or considered by defendant in making his plea of guilty. In these circumstances a majority of the court are of opinion that it is unnecessary in this case to discuss those parts of the statute which undertake to define the cost of doing business. (See *Latson v. Wells,* 136 Ga. 681, 686, 71 S. E. 1052, 1055; *Simpkins v. State,* 35 Okl. Cr. 143, 150, 249 Pac. 168, 171; *Fenner v. Boykin,* 3 F. (2d) 674, 678. See, also, *Wholesale Tobacco Dealers Bureau v. National Candy Co., supra; Balzar v. Caler,* 82 P. (2d) 19, under

a similar statute); that the contention that the statute is invalid for indefiniteness might not have been made if defendant had anticipated our holding that a sale for less than cost was criminal only when made "for the purpose of injuring competitors and destroying competition." See *Hygrade Provisions Co. v. Sherman*, 266 U. S. 497, 501; *Omaechevarria v. Idaho, supra.*

[*Conclusion*]

With the reservation made by the majority of the court as above mentioned, the constitutional questions submitted to us are answered in the negative. We might add that no other sections of the statute except those herein mentioned have been considered.

RINER and KIMBALL, JJ., concur, with the reservations above mentioned.

[¶ 55,198] United States of America v. International Fur Workers Union of United States and Canada, Fur Dressers Union, Local No. 2, Fur Floor Workers Union, Local No. 3, Pietro Lucchi, Morris Reiss, Isaac B. Hertzberg and Philip Silberstein.

United States Circuit Court of Appeals, Second Circuit. Decided December 19, 1938.

Appeal from the District Court of the United States for the Southern District of New York.

Labor organizations may not be made party to a conspiracy in restraint of interstate commerce within the prohibition of the Sherman Anti-Trust Act by the actions of their officers where guilt is sought to be attributed to the associations on the basis of the positions held by the individual officials, without proof of any authorization or ratification of the unlawful conduct by defendant Unions.

Before HAND, L., SWAN and HAND, A., C. J.

[*Counsel*]

Markewich & Null, Attorneys for appellants; Robert H. Elder, Samuel Markewich, Arthur K. Garfinkel and Joseph G. M. Browne, of counsel.

Thurman W. Arnold, Assistant Attorney General, John Harlan Amen, Special Assistant to the Attorney General and Moses M. Lewis and William L. McGovern, special attorneys, for appellee.

[*Statement of the case*]

SWAN, Circuit Judge: The appellants were convicted on four counts of an indictment under the Sherman Anti-Trust Act, charging respectively (1) conspiracy to restrain interstate commerce in fancy fur skins, (2) conspiracy to monopolize such commerce, and (3) attempting to monopolize such commerce, and (4) monopolizing such commerce. Sentence was suspended as to the appellant International Fur Workers Union of United States and Canada. The appellants Fur Dressers Union, Local No. 2 and Fur Floor Workers Union, Local No. 3, were fined $1500 each under count 1, and sentence was suspended under counts 2, 3 and 4. The appellants Lucchi, Reiss and Hertzberg, for whom the jury recommended clemency, were sentenced to ten months in jail under each of the four counts, the sentences to run concurrently. Lucchi was president of the International Union, Reiss and Hertzberg were delegates of Local No. 2 and Silberstein, whose appeal has abated by his death, was business agent of Local No. 3. The three labor unions were unincorporated associations whose members were workers in the shops of employers known as "dressers."

[*Nature of the industry*]

The industry relating to fancy fur skins may be briefly described as follows: Raw skins are purchased by "collectors", from hunters and trappers in various states of the Union and in foreign countries; the collectors sell the raw skins to "dealers" located in and about New York City and cause them to be shipped to the dealers through the channels of interstate and foreign commerce. The dealer causes the raw skins so shipped to him to be taken sometimes directly from the railroad or ship terminal and sometimes after receipt at the dealer's premises, to the shop of a "dresser" who dresses or tans them. This process takes from three to ten days. About ninety per cent. of the dressers are located in New York and ten per cent. in New Jersey. After dressing, the skins are returned in trucks to the dealer who then sends them to a dyer. After being dyed, they are sold to manufacturers, unless the dealer is himself a manufacturer, and are made into the finished furs which are sold. Some of the manufacturers are located in states other than New York.

[*Case for the prosecution*]

The indictment under which the appellants were convicted originally named more than ninety defendants as parties to the conspiracy to restrain interstate commerce in fancy fur skins. Some fifty of the defendants pleaded guilty before trial; a severance was granted as to twenty-nine; and the case went to trial against eleven, nine of whom were convicted and two acquitted. The theory of the Government's case, as stated by counsel, may be summarized as follows: Three corporations, which for brevity will be referred to as Factor Corporation, Associated Corporation and Allied Corporation, comprised within their memberships a large majority of the persons, firms and corporations engaged in the business of dressing fancy fur skins within the states of New York and New Jersey. Factor Corporation and Allied Corporation were formed pursuant to a conspiracy having as its purpose the enabling of their members to control and dominate the entire industry of dressing fancy fur skins within the metropolitan area of New York; Associated Corporation, which had been organized several years before, became a mere appendage to Factor Corporation after the latter was formed. The purposes and effects of the conspiracy were (a) to eliminate competition among the dressers; (b) to fix uniform, excessive and non-competitive prices to be charged by dressers who were members of the three above-named corporations; (c) to pool all orders for dressing received by said members and allot them on a specified "quota" basis; (d) to coerce non-member dressers to become members and to prevent non-members from doing business; and (e) to employ exclusively members of the appellant unions in shops of dressers and to increase the wages of such union workers. It is contended that the appellants cooperated with Factor Corporation, Associated Corporation and Allied Corporation in carrying the conspiracy into effect.

[*Appellants' contentions*]

On their part, all the appellants contend that the evidence was insufficient to connect them with the conspiracy or with acts committed in furtherance of it. They assert that their activities were not directed to furthering the unlawful ends of the dressers but to furthering the lawful ends of the unions, namely, the betterment of the economic conditions of their members. They further contend that the dressing of skins is not commerce, so that the proven restraint and monopolizing of such business were not within the prohibitions of the Sherman Anti-Trust Act; and that reversible error was committed in the admission of evidence and in the court's charge and refusal of requested charges. The labor union appellants also advance special contentions based on the ground that they are unincorporated associations.

[*Formation of employers' association*]

During the year 1931 there was in force a collective bargaining agreement between the dressers, represented by Associated Corporation, and their employees represented by the appellant unions. In the autumn of that year, the unions were pressing for an increase of wages; not formally for an increase, but for what amounted to one, because the employers had not been living up to the agreed schedule and the unions were insisting that it be restored. When the two sides met in conference, the employers' representatives said that business was so bad they could not afford to meet the workers' demands; to which the union representatives replied "We want our price and you get your price; you can get your price by joining an association." At the conferences the unions were represented by the individual appellants; the employers by Shuter, Mendelson and Stern, who testified for the Government. The employers' committee agreed that an association should be formed; Morris Hillquit, an attorney, was consulted, and under his direction Factor Corporation was organized in December 1931. There was testimony that the individual appellants were present in his office when the committee representing the employers conferred with him. After the employers had agreed to form Factor Corporation, the agreement dated November 24, 1931, but actually executed later, was signed between Associated Corporation and the unions, restoring the former schedule of wages and providing for the exclusive employment of union workers. After Factor Corporation was organized practically all the dressers who were members of Associated Corporation became members of Factor Corporation, and by intimidation and violence many non-member dressers were coerced into joining.

[*Union culpability a jury question*]

The appellants contend that although their pressure may have caused the employers to make an unlawful agreement to restrain trade in dressing skins, they did not become parties to the agreement; that they were merely acting to further their own interests in a way they were privileged to do.

It is doubtless true that if an employer refuses to pay a living wage and it results in some of his men committing theft, he will not be a party to their larcenies, even though he knows that they are going to steal; but he is not at liberty to urge them to supplement their wages by theft. Similarly, workmen may refuse to work except for such wages as they demand, but they may not agree with the employer that he shall commit crime to supply the wages. Mendelson testified that someone of the union representatives said that they "wanted" the employers to form an association and fix higher prices so that they could pay the increased wages demanded by the union, and that what was meant was "to belong to Factor." He testified that Lucchi said "Well, join the association, you will get the price." Under the evidence in the record, viewing it in the light most favorable to the Government, as we must after verdict, we think it was a jury question whether the appellants merely came to terms with the employers with knowledge that the latter intended to find the money by unlawfully suppressing competition or whether they urged and agreed that it should be found in this way.

[*Union solicitation for the association*]

Moreover, there is evidence that the appellants participated in acts in furtherance of the conspiracy by urging recalcitrant dressers to join the Factor Corporation. Thus, Reiss and Silberstein informed Meseritz that they would not supply him with labor unless he joined "the new association," in spite of the fact that he was willing to pay the union scale of wages and sign a labor contract. In consequence he decided that he would have to join, and did so; thereupon his employees returned to work. There are several instances in which one or more of the individual appellants asked a dresser to join the association and other instances in which they advised joining, stated that otherwise the dresser would have to contract with the unions and deposit $5,000 as security for performance of his contract. The appellants contend that reference to "the association" in these conversations referred to Associated Corporation and not to Factor Corporation; and that the appellants were privileged to urge dressers to join the Associated because it had a contract with the unions, long antedating the alleged conspiracy, by the terms of which Associated guaranteed in the amount of $5,000 performance of the wage contracts of each of its members, and stipulated that the unions should demand a like security from non-member employers to whom they supplied union labor Granting that the unions were privileged to advise employers to join the Associated Corporation and to insist upon the depositing of security by those who were not members, there was no privilege to advise them to join Factor Corporation whose purpose was known to be suppression of competition in the dressing industry. Under the testimony we think it was a jury question whether the advice given by the appellants referred to Associated or to Factor.

[*Interstate character of operations*]

Since there was evidence of the appellants' complicity in the conspiracy to suppress competition in the dressing industry, we must determine whether such conspiracy is forbidden by the Anti-Trust Act. The conspiracy was certainly in restraint of trade, its immediate purpose being to monopolize the dressers' business, divide it among members of Factor Corporation, raise the prices of the services performed, and suppress competition. The dressers' business consisted in getting raw skins from "dealers," some of whom were also manufacturers, cleaning them, and sending them back to the dealers from whom they were received. About ten per cent. of the dressers in the New York area were located in New Jersey, and took skins from New York dealers and redelivered them in New York. The record shows that at least four of these New Jersey dressers, Goodman, Ryan, Saletan and Hadegoff, were victims of the conspiracy. There was also National Fur Dressing & Dyeing Co., located in Chicago, Illinois, which did business in New York, sending skins for dressing in Chicago and return thereafter to their New York owners. Hence part of the trade restrained included transporting raw skins and returning dressed skins across state lines; this was clearly interstate commerce. The shipping of the raw skins from the state of New York into the states of New Jersey and Illinois is alleged in paragraph I of the indictment, and the reshipment in paragraph II.

[*Restraint upon interstate commerce*]

The Government has argued the issue of interstate commerce upon much broader grounds, contending that the dressing is done while the skins are "in a direct and continuous flow of interstate trade," which is apparently supposed to start with the initial shipment to the dealer and to continue until the manufactured fur garment is received by the consumer. Were it neces-

sary to adopt this theory in full, or even to hold that interstate commerce continued while the skins were being dressed, serious questions would be presented. We are referred to no evidence that the suppression of competition among dressers affected the number of skins shipped into New York, nor was it intended to lessen the supply of such furs. Neither do we know what percentage of raw skins after manufacture into finished garments is usually shipped out of the state, nor that the conspiracy to suppress competition among dressers decreased the usual percentage. In short, it does not appear that either the purpose or effect of the conspiracy was to lessen the quantity of raw skins brought into the state or the quantity of manufactured furs shipped out of it; its only effect was upon the persons who dealt with the raw skins after they got here. Hence, with respect to the large percentage of skins which are shipped to dealers in New York and are dressed, dyed and manufactured here, the issue of interstate commerce presents grave difficulties. But we need not decide this question since there can be no doubt that the conspiracy did restrain interstate commerce with respect to such skins as were transported across state lines for dressing and return.

It is true the distinction we have taken was not made in the charge of the court. The charge on this subject was very general. Interstate commerce was correctly defined as commercial intercourse that goes across state lines; and the jury was then told that they must be satisfied that "the fancy fur dressing industry, as its activities were revealed to you here, was a matter of interstate commerce, that is, that these skins for their treatment went back and forth across the lines of the states of the United States, from New Jersey, Pennsylvania, and from Maine and various other portions of the country." What constitutes interstate commerce is a question of law, once the facts are established. Since it was proved without contradiction that the persons controlling Factor Corporation aimed to prevent New Jersey dressers from doing business with New York dealers except upon terms of price-fixing and "quota" allotments approved by Factor, the court should have charged that a conspiracy existed to restrain interstate commerce in skins which were to be transported across state lines for dressing and return, and that the jury need decide only whether the defendants were parties to such conspiracy. But the appellants requested no such charge and cannot complain that it was not given. The court did not distinguish between skins which were shipped across state lines for dressing and return, and those which were shipped from outside, say Maine, and were dressed in the same state in which they were received by the dealer-consignee. But no such distinction was requested. Since the evidence was sufficient for conviction and the charge was correct in telling the jury that they must find that the skins went back and forth across state lines for treatment, we cannot reverse on the ground that the charge was not amplified in a respect not requested. The request at fol. 7556 does not reach this point.

It is urged that if the conspiracy exerted only so limited a restraint on interstate commerce as we have indicated, the monopoly counts cannot stand. We are disposed to think they can (see 15 USCA § 2), but we need not decide because since the sentences ran concurrently, it would avail the appellants nothing to reverse on the other counts if conviction on the first count be affirmed.

[*Consideration of assignments of error*]

The appellants have seen fit to make 335 assignments of error. To discuss each one in this opinion would, of course, be impossible. It must suffice to say that we have considered all which have been urged in the voluminous briefs, but shall discuss only a few of them. No reversible error is found in the charge as given, or in refusals to charge as requested, with respect to presumption of innocence, burden of proof, circumstantial evidence, absence of motive, conspiracy, weight of evidence, good character testimony, or the testimony of Foxworth and Trapani, special agents for the federal bureau of investigation.

There were presented numerous requests to charge with respect to the privileges of labor unions in dealing with employers of labor. The court declined these as framed and stated to the jury:

"* * * There is no doubt that a labor union has the right to say that it wants to have this condition or the other, and the labor union at times, as a condition to putting men in your plant may say you will have to deposit money; that is easily conceivable; but the question here is whether or not this was part and parcel of the plan, of the offenses charged in the indictment, not that they may do a particular thing in and of itself which may be perfectly lawful. The question is whether or not that thing alone, with other things, contributed and were part and parcel of an unlawful plan."

We think this was sufficient; a defendant cannot insist that a charge shall be couched in the precise words he suggests to the court. Complaint is made that the court's reference to "an unlawful plan" left the jury without guidance as to what plan the court had in mind; but it must have been

obvious to the jury that he was referring to the conspiracy as charged in the indictment and as proved upon the trial.

[*Evidence of violence admissible*]

There was introduced a large amount of evidence respecting threats of violence and actual batteries and bombings directed against dressers who were not, or refused to become, members of Factor Corporation, and in many instances there was no identification of the persons making the threats or committing the violence. It is urged that such evidence was in no way connected with the appellants and that error was committed in denying their motion to strike it out. The indictment alleged that it was part of the conspiracy that the conspirators should employ various acts of violence to carry it out, and the proof was clear that Factor Corporation set on foot a reign of terror against recalcitrant dressers. The evidence objected to was competent to prove the character of the conspiracy. While there was no credible evidence that the unions or their representatives contributed to the acts of violence, there was other evidence upon which the jury could, and did, find that they were parties to the conspiracy. Consequently, the evidence competent to prove the character of the conspiracy was competent against them.

[*Criminal proceeding against Union under anti-trust laws*]

Finally, we come to the contentions peculiar to the unions. That unincorporated associations may be made parties defendant in civil proceedings brought under the Sherman Anti-Trust Act was established in *United Mine Workers v. Coronado Co.*, 259 U. S. 344. No reason is apparent why they may not be prosecuted in criminal proceedings under that statute. In *Brown v. United States*, 276 U. S. 134, Mr. Justice Sutherland said at page 142:

"The provisions of the act creating criminal and civil liability against such an association necessarily carry the implication that it may be proceeded against by its common name to enforce the liability. Consequently, for a violation of the Anti-Trust Act, it may be prosecuted, indicted, and convicted, and judgment rendered against it and satisfied by execution out of its assets."

But an officer of an unincorporated association, no more than an officer of a corporation, is not authorized merely by virtue of his office to make his principal a party to an unlawful conspiracy. See *Coronado Co. v. United Mine Workers*, 268 U. S. 295; *Hill v. Eagle Glass & Mfg. Co.*, 219 F. 719 (C. C. A. 4), modified on other grounds in *Eagle Glass & Mfg. Co. v. Rowe*, 245 U. S. 275. All that the court said on this subject was that if the individual defendants did the things charged against the unions "upon behalf of the unions," they might be found guilty along with the individuals. To this the appellant unions excepted. It was erroneous; it excluded the issue whether the unions had authorized or ratified what their officers did upon their behalf. For this reason the conviction of each of the labor union appellants must be reversed.

[*Judgment affirmed*]

As to the individual appellants, however, we have found no error requiring reversal, and the judgment as to them is affirmed.

[¶ 55,199] Soma Peto v. Thomas Howell.

United States Circuit Court of Appeals, Seventh Circuit. Decided December 14, 1938.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

The purchase of corn "futures" with a resulting "cornering" of the market in the commodity in commerce at the specific time complained of constitutes a restraint of interstate commerce within the meaning of the Grain Futures Act and is a monopoly in restraint of trade, prohibited by the Anti-Trust statutes, as the restraint is effected upon that part of the current of interstate commerce which is represented by the commodity present at the point of delivery and geographically available.

Recovery for damages arising from the "cornering" of a commodity within the prohibition of the Anti-Trust Acts is not barred by a state gambling statute where the evidence adduced does not justify a finding of positive intent, on the part of plaintiff vendor, not to effect delivery.

Before MAJOR and TREANOR, C. J., and LINDLEY, D. J.

[*Statement of the case*]

LINDLEY, District Judge. Plaintiff sued to recover damages alleged to have been caused by a monopoly by defendant in violation of Section 2, Chapter 1, Title 15, U.S.C.A., which provides that "every person who shall monopolize, or attempt to monopolize, * * * any part of the trade or commerce among the several states * * * shall be deemed guilty" of a violation of the law, suing under Title 15, Chapter 1, Section 15, U.S.C.A., providing that any person injured in his business or property by reason of any violation of the Anti-Trust Laws may sue and recover three-fold the damages by him sustained. Plaintiff is a dealer in grain living in Kansas City, and defendant a grain trader and member of the Chicago Board of Trade.

Plaintiff, in his second amended complaint, charged that corn is a staple commodity, grown principally in western United States, shipped largely to eastern states in interstate commerce, moving from west to east, from one state to another, on through railroad rates, under tariffs permitting grain to be stored temporarily in Chicago; that the Board of Trade conducts a public market for the purchase and sale of grains for present and future delivery; that grain, to be deliverable on future contracts, must be in public warehouses in the Chicago district designated as "regular"; that Chicago is the principal corn market of the United States and that the price of corn throughout the country is based upon the prices quoted there.

It was further alleged that defendant, for the purpose of monopolizing trade in Chicago and throughout the United States, in violation of the federal statutes, on April 24, 1931, began to purchase on the Board, large amounts of "July corn," that is, corn to be delivered in Chicago during the month of July; that by May 25, 1931, defendant had purchased approximately 3,250,000 bushels of July corn; that thereafter in the middle of May, he purchased 4,250,000 additional bushels and held on June 1, 1931, approximately 7,500,000 bushels; that he made additional purchases until, on July 1, 1931, he owned future contracts for delivery of July corn in the amount of 8,500,000 bushels; that this amount exceeded the supply of corn available for delivery in Chicago in July that the purchases were made with the intention on the part of defendant of withholding the commodity from the market and thereby causing a sharp increase in its price; that he withheld the corn from the market and that his action in so doing caused a rapid rise in the price; that delivery of corn to persons holding contracts for the purchase thereof was customarily made by delivery of warehouse receipts; that defendant had received on July 30, 1931, in performance of his contracts of purchase, warehouse receipts covering all of the deliverable July corn in storage in the Chicago district; that there was in storage in Chicago, 5,650,000 bushels of deliverable corn; that this had all been delivered to defendant; that he had received in addition some 1,500,000 bushels which he had thereafter sold and delivered outside of the United States; that the total corn delivered to defendant by the socalled shorts to apply on his contracts, amounted to approximately 7,000,000 bushels, so that on July 30, 1931, defendant still owned contracts for delivery of 1,500,000 bushels of July corn; that there was then no corn in Chicago of deliverable grades that could be delivered; that those who had contracted to deliver corn could not procure it; that thereby defendant cornered the market, became the dictator of the price in Chicago corn and exacted of those unable to deliver, in settlement, an excessive sum of money; that plaintiff was amongst those and thereby was forced to pay in settlement, a large amount of money; that the action of defendant as related constituted a monopoly of the corn market of Chicago and of the United States, amounted to direct obstruction to interstate commerce in said commodity, unreasonably restrained interstate commerce therein, and artificially caused an increase in the price, all contrary to the acts of Congress.

[*Statutory provisions relied upon*]

Plaintiff relied upon the Grain Futures Act, Title 7, Chapter 1, Section 5, U.S.C.A., as follows:

"Transactions in grain involving the sale thereof for future delivery as commonly conducted on boards of trade and known as 'futures' are affected with a national public interest; that such transactions are carried on in large volume by the public generally * * *; that the transactions and prices of grain on such boards of trade are susceptible to a speculation, manipulation and control, and sudden or un-

reasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation or control, which are detrimental to the producer of [or] the consumer and the persons handling the grain and products and by-products thereof in interstate commerce, and that such fluctuations in prices are an obstruction to and a burden upon interstate commerce in grain and the products and by-products thereof and render regulation imperative for the protection of such commerce and the national public interest therein. (United States Code, Title 7, Chapter 1, Section 5; Sept. 21, 1922, c. 369, paragraph 3, 42 Stat. 999.)"

"Section 3—When transaction deemed in interstate commerce. For the purposes of this chapter (but not in any wise limiting the definition of interstate commerce in the preceding section) a transaction in respect to any article shall be considered to be in interstate commerce if such article is part of that current of commerce usual in the grain trade whereby grain and grain products and by-products thereof are sent from one state with the expectation that they will end their transit, after purchase, in another * * * (Sept. 21, 1922, 2, 42 Stat. 998)";

held constitutional in *Chicago Board of Trade v. Olsen,* 262 U. S. 1.

Plaintiff's evidence tended to substantiate all of the averments of the bill. It appeared clearly that the defendant began to enter into July future contracts in April, 1931; that such futures were selling then at the lowest price in eight years; that the price continued to fall; that defendant added to his holdings; that at the end of May, the price had declined to 54¼ cents and that he had, as alleged, acquired contracts for approximately 8,358,000 bushels of July corn; that this constituted approximately 90 per cent of the "total commercial visible supply of corn" in the United States; that during the last three days in July there was no more corn in Chicago to be delivered; that those who had contracted to deliver to him were unable to procure corn in Chicago or elsewhere because of lack of time; that the fluctuations in price in the last three days were unusual and of much wider range than under normal conditions; that the price was such that corn in Iowa normally destined for other places moved to Chicago; that the price was artificially raised about 25½ cents per bushel; that on August 1, following the expiration of the delivery month, corn fell in price some 10 per cent and before the end of August had depreciated some 40 per cent.

Defendant admits that liquidation of his holdings at any time prior to the expiration of July by an attempt to sell his future contracts would have caused a wide break in the market price "with serious effect upon the defendant and the country." He further says that the ordinary method of disposing of such contracts was to accept delivery and that some of the shorts never made delivery and settled with him as alleged by plaintiff.

The purchases of defendant were made through some sixteen different accounts with eight different grain brokerage houses. He purchased corn not only in his own name but in the names of other persons, in these sixteen accounts. He shipped to Canada about 900,000 bushels of corn, delivered to him under these contracts, before the expiration of July. He made a substantial profit upon all of his contracts. He also purchased cash corn in July of 322,000 bushels, which are included in the total of 8,358,198 bushels. He had left at the end of July, 7,440,975 bushels. The commercial visible supply of corn on August 1, 1931, was 8,123,000 bushels, and of this amount 7,673,000 bushels were in Chicago. In other words, defendant had at that time 97 per cent of the total of deliverable corn in Chicago, and that in Chicago was 94 per cent of the entire amount in the United States; hence defendant held 90 per cent of the entire national commercial visible supply.

[*Determination of lower court*]

The court held the evidence insufficient to support a verdict for plaintiff and directed a verdict for defendant. Plaintiff now insists that there was substantial evidence of monopoly and of an attempt to monopolize a part of interstate commerce, forbidden by Section (2) of the Act. Defendant insists that all of the deliveries to him were intrastate in character; that he purchased in Chicago, contracts for the delivery of corn in Chicago; that he did not monopolize or attempt to monopolize any part of interstate commerce and that plaintiff is without right to recover because he was engaged in a gambling transaction.

[*Plaintiff's contentions*]

Stated succinctly, plaintiff's case is this: "I have been injured in my business by reason of defendant's violation of the Anti-Trust law in that he monopolized or attempted to monopolize that part of trade or commerce among the several states which consists of the commercial visible supply of corn in the Chicago market of July, 1931," applicable to contracts for delivery in that month. The statute forbids monopolies of "any part" of interstate commerce. "Any part" of commerce may cover commerce in a vast district, or that in a small district, that occurring over a long period of time or over a short period of time, but it is not to be conceived that a monopoly of all that part of interstate commerce in the city of Chicago for one day is any less a violation of the law than a monopoly over the same product and the same market for thirty days or for a year. It is the act of monopoly over a product in any part of

interstate commerce that is forbidden. It seems apparent here that plaintiff proved that defendant had a monopoly over and controlled by a corner all of the future contracts for corn to be delivered,—capable of being delivered in the Chicago market in the month of July; that in addition, he purchased in the cash market, available corn in the Chicago market amounting to over 300,000 bushels, and that at the end of the month, he controlled all but 3 per cent of the available commercial supply of corn for the Chicago market. Consequently when the end of the month arrived, some of the persons who had agreed to deliver to him corn found no available supply from which they could procure the commodity to deliver to him, for the simple reason that defendant then had a monopoly of the visible commercial supply of corn in the Chicago market, which constituted 90 per cent of such supply in the entire country.

[*Jurisdictional issue*]

If this suit were brought under the state statute forbidding such transactions, it might well end with these statements; but the essential and crucial question involved here is whether the court had jurisdiction of the cause by virtue of the federal statute and that in turn resolves itself into a question of whether the facts recited constitute not only a monopoly of corn in the Chicago market as stated but also the monopoly of "some part" of interstate commerce. That question is the battlefront of the respective parties and upon its decision must rest the final determination of the correctness of the District Court's action.

In *Hill v. Wallace,* 259 U. S. 44, the Supreme Court held the Future Trading Act then in existence unconstitutional, on the ground that future delivery contracts involve purely intrastate matters. The court suggested that sales for future delivery cannot come within the regulatory power of Congress as such until Congress finds from the evidence before it that they interfere directly with interstate commerce so as to be an obstruction to or a burden thereon. Congress heeded the instruction of the court contained in this remark and in the Grain Futures Act, controlling in this action and hereinbefore set forth, found as a fact that contracts for future delivery are affected with a national public interest; that as a result, speculation, manipulation and control, coincidental with sudden or unreasonable fluctuations in prices frequently work detrimentally to the producer, consumer and dealers in the products and by-products in interstate commerce. It expressly found that such fluctuations and speculations are an obstruction to and a burden upon interstate commerce in grain and the products and by-products thereof, and necessitate regulation for the protection of such commerce. Having found this situation to exist, Congress provided that a transaction in respect to any article shall be considered to be interstate commerce, if such article is part of that current of commerce usual in the grain trade whereby grain and its products and by-products are sent from one state with the expectation that they will end their transit, after purchase, in another, and proceeded to establish rules for the regulation of Boards of Trade and trading on such Boards. Congress did not in so many words say that the subject matter of future contracts is a part of interstate commerce. It did say that they and their practical results are an obstruction to and interference with interstate commerce and the current thereof from state to state, which renders regulation necessary.

[*Constitutionality of statute*]

An attack upon the constitutionality of this Act failed in *Chicago Board of Trade v. Olsen,* 262 U. S. 1. Mr. Chief Justice Taft pointed out that Congress had in this legislation found that by manipulation such contracts had become a constantly recurring burden upon and obstruction to interstate commerce. He remarked that it was impossible to distinguish cash grain, the sales to arrive and the grain actually delivered in fulfillment of future contracts from the current of stock shipments, declared to be interstate commerce in *Stafford v. Wallace,* 258 U. S. 495. He said that this was the necessary consequence of the conclusions reached in *Swift & Company v. U. S.,* 196 U. S. 375, wherein the court refused to permit local incidents of great interstate movements, which incidents taken alone are intrastate, to characterize the movement. That doctrine, he said, applies to future sales of grain, which is a part of the current of interstate commerce to the same extent as it applies to the current of stock shipments under consideration in *Stafford v. Wallace.* He said:

"* * * The sales on the Chicago Board of Trade are just as indispensable to the continuity of the flow of wheat from the West to the mills and distributing points of the East and Europe, as are the Chicago sales of cattle to the flow of stock toward the feeding places and slaughter and packing houses of the East."

In *United States v. Patten,* 226 U. S. 525, the court commented that a corner consists, broadly speaking, in acquiring control of all or the dominant portion of a commodity with the purpose of artificially enhancing the price, one of the important features of which is purchase for future delivery, coupled with a withholding from sale for a limited time. The court held that a corner

in the available supply of a staple commodity such as cotton, normally a subject of trade and commerce among the states, and the consequent enhancement artificially of its price throughout the country and compelling all who have occasion to obtain it to pay the enhanced price, or else to lease their needs unsatisfied, is within the terms of Section 1. There the court said: "The corner was to be conducted on the Cotton Exchange in New York city, but by means which would enable the conspirators to obtain control of the available supply and to enhance the price to all buyers in every market of the country. This control and the enhancement of the price were features of the conspiracy upon the attainment of which it is conceded its success depended. Upon the corner becoming effective, there could be no trading in the commodity save at the will of the conspirators and at such price as their interests might prompt them to exact. And so, the conspiracy was to reach and to bring within its dominating influence the entire cotton trade of the country. * * * It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition."

In *Swift & Company v. United States*, 49 L. Ed. 525, Justice Holmes said: "So, again, the line is distinct between this case and *Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290, 19 Sup. Ct. Rep. 40. All that was decided there was that the local business of commission merchants was not commerce among the states, even if what the brokers were employed to sell was an object of such commerce. * * * Whether the case would have been different if the combination had resulted in exorbitant charges was left open. * * * commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another state from that of the seller and of the cattle. And we need not trouble ourselves at this time as to whether the statute could be escaped by any arrangement as to the place where the sale in point of law is consummated. See *Norfolk & W. R. Co. v. Sims*, 191 U. S. 441, 48 L. Ed. 254, 24 Sup. Ct. Rep. 151. But the 6th section of the bill charges an interference with such sales, a restraint of the parties by mutual contract, and a combination not to compete in order to monopolize. It is immaterial if the section also embraces domestic transactions." It does not follow that because such a corner as that considered by the court in *United States v. Patten*, is local in character, geographically and is a contract in restraint of trade, it is not a monopoly of a part of interstate commerce, if it places within the power of the person accomplishing it the substantial control of the market even though for a limited period and even though in one commodity, if in that commodity 90 per cent of the commercial visible supply of the country is included. Monopoly is the acquistion of something for one's own self, not necessarily the whole of a given commodity or the whole commerce therein but control, at least, of a part thereof sufficient to constitute withholding from the public the right to deal therein in an open market. As has been said, Congress had chiefly in mind not so much the monopoly of a whole as the much more likely case of a monopoly of a smaller part. *United States v. Keystone Watch Case Company*, 218 F. 502. And the Supreme Court has said in *Standard Oil Company v. United States*, 221 U. S. 1: "The commerce referred to by the words 'any part' construed in the light of the manifest purpose of the statute has both a geographical and a distributive significance; that is, it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce." If "any part" has both a geographical and a distributive significance, it is equally true that it may have a significance of limitation in time.

[*Monopolistic effect of acts*]

Here it is shown that Chicago is the greatest corn market in the world; that 90 per cent of the corn of the United States finds its way from all the Mississippi Valley and midwestern states into the Chicago market; that many cars of corn were shipped from Iowa in the latter part of July and became a part of the visible commercial supply in Chicago. This corn necessarily passed to the defendant in satisfaction of his contracts of purchase. When those contracts were made, when he acquired the corn that had to come from other states for future delivery, he knew that the corn would

pass from the farmers to the dealers and then to the railroads into the current of interstate commerce, some of which would not find final destination in Chicago but would pass to the eastern market, but might remain in warehouses in Chicago before its final resting place in commerce was found. He knew that he was buying corn which would have to come in from the west to meet his contracts for future delivery. He immediately replaced 900,000 bushels in commerce, shipping it to Canada, thus removing it from interstate commerce into commerce with a foreign nation and taking it out of the available supply. There is substantial evidence that the acts of defendant interfered with interstate commerce and attempted to monopolize and did monopolize that part of interstate commerce represented by his contracts for future delivery in July, viz., 90 per cent of the available corn of the commercial visible supply of the entire country.

[*Interference with interstate commerce*]

As the Supreme Court said in *Chicago Board of Trade v. Olsen,* the fact that a corner in grain is brought about by trading in futures shows the direct relation between cash prices and actual commerce on the one hand and dealing in futures on the other, because a corner is not a monopoly of contracts only, "It is a monopoly of the actual supply of grain in commerce." And as the court said there, if a corner and the enhancement of prices produced by buying futures directly burden interstate commerce in the article whose price is enhanced, it would seem to follow that manipulations of futures which unduly increases prices of grain in interstate commerce and directly influence consignments into that commerce are equally direct. Here there was proof that the enhanced price in Chicago caused the diversion of a substantial lot of available corn in the state of Iowa and caused it to be shipped into Chicago in the latter part of July in large quantities. The proof was that this corn would normally go to other markets but, because of the tightness of the market brought about by defendant, came to Chicago. This diversion was clearly an interference with the current of interstate commerce within the contemplation of the decision in the *Olsen* case. It should be observed, too, that defendant purchased 207 cars of corn on track in Chicago in July, aggregating 322,000 bushels. These were on the railroad tracks, clearly within the current of interstate commerce.

Monopolies, as such, the federal government has no control over; only when a monopoly of some part of interstate commerce is involved does jurisdiction attach to the federal government. Consequently, it must be that Congress, in speaking of monopolies of any part of interstate commerce, must have had in mind such restraints of such part of that commerce as bring about an extraordinary control of any part of the commodities in the stream of commerce. Thus the Supreme Court said in *Standard Oil Company v. United States,* 221 U. S. 1:

"* * * having by the first section forbidden all means of monopolizing trade,—that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even though the act by which such results are attempted to be brought about, or are brought about, are not embraced within the general enumeration of that section."

The court added:

"Undoubtedly, the words 'to monopolize' and 'monopolize' as used in the section, reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade."

In *Schechter Poultry Corporation v. United States,* 295 U. S. 495, the court said:

"* * * And combinations and conspiracies to restrain interstate commerce or to monopolize any part of it are none the less within the reach of the Anti-Trust Act because the conspirators seek to attain their end by any means of intrastate activities."

In *Stafford v. Wallace,* 258 U. S. 495 at 518, Mr. Chief Justice Taft said:

"Although the combination alleged embraces restraint and monopoly of trade within a single State, its effect upon commerce among the States is not accidental, secondary, remote or merely probable. * * * Here the subject matter is sales and the very point of the combination is to restrain and monopolize commerce among the States in respect of such sales. * * * The application of the commerce clause of the Constitution in the *Swift* Case was the result of the natural development of interstate commerce under modern conditions. It was the inevitable recognition of the great central fact that such streams of commerce from one part of the country to another which are ever flowing are in their very essence the commerce among the States and with foreign nations which historically it was one of the chief purposes of the Constitution to bring under national protection and control. This court declined to defeat this purpose in respect of such a stream and take it out of complete national regulation by a nice

and technical inquiry into the non-interstate character of some of its necessary incidents and facilities when considered alone and without reference to their association with the movement of which they were an essential but subordinate part."

In the present case the evidence indicates clearly that the only manner by which the defendant's contracts for future delivery could be performed would be by the shipment of corn into Chicago, and the proof is that no small portion of this corn that was so shipped in came from states other than Illinois. He knew that the commercial visible supply of July corn was such that his contracts could not be completed by delivery unless corn was brought from states other than Illinois into Chicago.

[*Anti-Trust law violated*]

Under these decisions there was substantial proof that defendant had violated Section 2 of the Anti-Trust Act.

Defendant relies upon the announcements of the Supreme Court in *Ware & Leland v. Mobile County*, 209 U. S. 405; *Hill v. Wallace*, 259 U. S. 44; *Albers v. Spencer*, 205 Mo. 105; *Moore v. New York Cotton Exchange*, 270 U. S. 593. *Ware & Leland v. Mobile* had to do with the right of a state to tax persons on transactions on a board within its jurisdiction, prior to the enactment of the Grain Futures Act. The court held that the state might legally tax such acts of commerce. In *Hill v. Wallace* the original Futures Trading Act was held unconstitutional. There the court held that sales for future delivery were not in themselves interstate commerce, and added that they could not come within the regulatory power of Congress unless the latter should find from evidence that they directly interfered with interstate commerce so as to be an obstruction thereto or a burden thereon. This decision should be read in connection with the *Olsen* case, wherein the later act, free of the defects of the first, was held constitutional. The court, distinguishing the case of *Ware & Leland v. Mobile County, supra,* in *United States v. Patten,* said that that case presented only one question, namely, the effect upon interstate trade or commerce of the taxing by a state of the business of a broker. *Moore v. New York Cotton Exchange, supra,* follows closely *Ware & Leland v. Mobile County, supra.*

Albers v. Spencer, supra, was decided in 1907, many years before the decision of the *Stafford* and *Olsen* cases by the Supreme Court of the United States; in view of the latter, the language of the Missouri Court is not deemed of controlling weight here.

Defendant denies monopoly by saying that there were hundreds of thousands of bushels of corn in the farms and granaries and in registered warehouses and that the term "visible commercial available supply" is misleading. Obviously farmers raise corn to feed stock. The testimony of Paul Mehl, Senior Economist of the Chicago Office of the Commodities Exchange Administration, was to the effect that while the annual corn crop exceeds two billion bushels, the greater part of the crop is used by farmers and feeders; that only a relatively small percent age moves into commercial channels and that of corn that did enter such channels, most of it is consumed by July by manufacturers of corn products. He testified that the commercial visible supply as calculated by the government includes corn in elevators and regularly authorized warehouses located in all of the twenty-four prominent grain centers of the United States. Obviously the corn on the farm is not a part of any current of interstate commerce and, when defendant had completed his acquistion of control of July futures and the time within which to deliver was rapidly expiring, it was too late for any of that corn to reach Chicago. So while the corner in corn did not cover all the commodity in the United States, it did cover that part in the current of interstate commerce represented by corn in cars in Chicago and available geographically. It was too late for any corn from any other sources to reach the Chicago market to prevent the full effectuation of the monopoly. It is on the basis of "Commercial Visible Supply" figures posted weekly that grain traders make their commitments, and with reference to which they contract.

[*Existence of product not in commerce no defense*]

The existence of corn not in commerce seems to us no defense inasmuch as defendant dominated and controlled the market of corn in commerce at the specific time complained of. *Baush Machine Tool Co. v. Aluminum Co.,* 72 Fed. (2) 236, and *United States v. New England Fish Exchange,* 258 Fed. 732. In the latter case, the court, after commenting that Boston controlled 95 per cent of the interstate trade of fresh ground fish, that the Fish Pier at Boston owned by the defendants, was in control of the trade and that from 70 to 80 per cent of the fish handled were sold in interstate commerce, said:

"The result of the combined action of the dealers was that 83% of all the fresh fish and 95% of all the ground fish brought to Boston was landed at the Fish Pier which gave absolute control to these dealers of all the fish passing through the pier and a predominating control

of all the fresh fish dealt in throughout the North Atlantic States, rendering it impossible for an outside dealer to build up a business in interstate trade.

"We think, therefore, that the defendant dealers, by combining in the manner above outlined, with a view to centralizing and controlling the flow of fish in interstate commerce and the acquisition of that control, violated the Sherman Law, and unduly and unreasonably restrained interstate trade in fresh fish."

[*Price increase as injury*]

It is urged by defendant that plaintiff showed no actionable damage to him and that the acts of defendant were not the proximate cause of such damage is he had any. But it is in evidence that plaintiff was compelled to settle with defendant at a greatly enhanced price and that a substantial loss ensued. The price was controlled, dictated and fixed by defendant. The situation is within the language of this court in *Moore v. Backus*, 78 Fed. (2) 571, where it said:

"Accepting as true the allegations of the declaration in the legal action, it would seem that the decedent suffered a property injury within the meaning of the Sherman Anti-Trust Act."

In *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U. S. 390, the court held that the increased price the city was compelled to pay, constituted an actionable injury, saying:

"It was injured in its property, * * * by being led to pay more than the worth of the pipe. A person whose property is diminished by payment of money wrongfully induced is injured in his property."

In *Story Parchment Company v. Paterson*, 282 U. S. 555, Mr. Justice Sutherland, in discussing the sufficiency of the evidence to support a verdict for damages, said:

"There was evidence from which the jury reasonably could have found that in pursuance of the conspiracy respondents sold their goods below the point of fair profit, and finally below the cost of production; that petitioner had an efficient plant and sales organization, and was producing a quality of paper superior to that produced by either of the three companies; and that current prices, shown in detail, were higher during a period antedating the unlawful combination and price cutting in pursuance of it than afterwards. It does not necessarily follow, of course, that these higher prices would have continued except for the conspiracy, but it is fair to say that the natural and probable effect of the combination and price cutting would be to destroy normal prices; and there was evidence of the prices received by petitioner before the cut prices were put into operation, and those received after, showing actual and substantial reductions, and evidence from which the probable amount of the loss could be approximated. The trial court fairly instructed the jury in substance that if they were satisfied that the old prices were reasonable and that they would not have changed by reason of any economic condition, but would have been maintained except for the unlawful acts of the respondents, the jury might consider as an element of damages the difference between the prices actually received and what would have been received but for the unlawful conspiracy.

"Upon a consideration of the evidence we are of opinion that it was open to the jury to find that the price cutting and the resulting lower prices were directly attributable to the unlawful combination; and that the assumption indulged by the court below, that respondents' acts would have been the same if they had been acting independently of one another, with the same resulting curtailment of prices, must be rejected as unsound.

"Nor can we accept the view of that court that the verdict of the jury, in so far as it included damages for the first item, cannot stand because it was based upon mere speculation and conjecture. This characterization of the basis for the verdict is unwarranted. * * * Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. *Eastman Kodak Co. v. Southern Photo Co.*, 273 U. S. 359, 379. Compare *The Seven Brothers*, 170 Fed. 126, 128; *Pacific Whaling Co. v. Packers' Assn.*, 138 Cal. 632, 638. As the Supreme Court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party."

[*Proof establishes prima facie case*]

Defendant insists that plaintiff has alleged a monopoly effective in Chicago and throughout the United States and that he must prove such an allegation; but we do not deem this essential. A monopoly in violation of the act, even though limited to Chicago or to a specific time, is still in violation of the law. The facts alleged disclose definitely that plaintiff sought to recover for damages caused by the monopoly of defendant or by his attempt to build up a monopoly and the proof is that he was in control of 97 per cent of the commodity in Chicago, constituting 90 per cent of the same throughout the country. We think the allegations of the complaint were such that plaintiff made a *prima facie* case thereunder.

[*Question of gambling contract for jury*]

Defendant also insists that the motion for directed verdict was properly allowed be-

cause plaintiff's evidence disclosed that the damages he sought to recover grew out of his illegal gambling contract. Under Section 328, Chapter 38 of the Illinois Revised Statutes, a contract for future delivery of commodities is denominated a gambling contract and void, if both parties intend at the time of making it that it shall be settled not by the delivery of the property involved but by payment only of differences in prices. The statute of Missouri (Section 4324 Missouri code) provides that all purchases of grain without any intention to receive the same or to have the same delivered shall be deemed gambling contracts and unlawful. In view of the similarity of the statutes of the two states and of the interpretation thereof by the courts of the respective jurisdictions, no question of conflict of law arises.

In llinois the courts have held that in order for a contract to be void as a gambling transaction, both parties must intend that it is to be settled by payment only of differences. *Riordan v. McCabe*, 341 Ill. 506. Existence or non-existence of intention is a question of fact. Consequently in order to justify the court's direction of a verdict on the ground that the contract is illegal, we must say that the evidence submitted, construed most favorably in behalf of plaintiff, discloses proof of a specific intent on his part not to deliver. To do this, it would be necessary for us to place ourselves in the place of the jury and to usurp its function. The plaintiff testified directly that he intended to make delivery of the corn he had sold; and that he was in position to do so and, ready, willing and able to perform his undertaking in that respect. True in the end, he settled by differences. But the evidence is such that we cannot say as a matter of law that he had the positive intent at the time he made the contract not to deliver. The question was one of fact for the jury. It might disbelieve the direct testimony of plaintiff as to his intention and ability; it had the right to consider also all other evidence bearing upon his intention, including the nature of the final settlement, plaintiff's facilities for dealing in commodities, his financial ability and all other relevant circumstances bearing in any wise upon the existence or non-existence of that intangible thing, intention. There having been substantial evidence of an intent to deliver offered by plaintiff, the trial court was without right to direct a verdict upon the ground that the contracts were gambles.

[*Conclusion*]

The judgment is reversed and the cause remanded with costs to plaintiff and with directions to proceed in accord with the views herein expressed.

[¶ 55,200] The Connecticut Importing Company v. Frankfort Distilleries, Inc., McKesson & Robbins, Inc., David A. Rosow, and Libbey & R. C. Williams Corporation.

United States Circuit Court of Appeals, Second Circuit. Decided January 9, 1939

Appeals from the United States District Court, District of Connecticut.

The existence of a price-fixing conspiracy in violation of the Sherman Anti-Trust Act becomes a question for determination by the jury where evidence tends to establish that the refusal of defendant manufacturer to supply the distributor with a product arises from the distributor's breach of an agreement in restraint of trade.

The equitable doctrine of "clean hands" has no application in a suit for damages for breach of contract occasioned by plaintiff's violation of an agreement in restraint in trade, and the unlawful conduct of plaintiff is no bar to recovery where plaintiff is no longer a party to the wrong when the cause of action accrues.

Recoverable damages in an action under the Sherman Anti-Trust Act are limited to damages sustained from accrual of the cause of action until institution of suit.

Before Hand, Swan and Chase, Circuit Judges.

[*Counsel*]

Robert J. Woodruff, Arthur Klein, David S. Day, Charles G. Albon, attorneys for appellant. Raymond E. Hackett, Mark W. Norman, Henry J. Marks, Herman J. Levy, attorneys for appellees.

[*Statement of the case*]

Chase, Circuit Judge: The plaintiff has recovered a judgment for treble damages in a suit brought under the Sherman Anti-Trust Act (15 U. S. C. A. Sec. 15) and tried to a jury in the District Court for the District of Connecticut where the jury returned a verdict for the plaintiff. The defendants have appealed and the plaintiff has also appealed on the ground that the

verdict was restricted to the damages sustained up to the date the suit was brought.

The plaintiff was one of several distributors in the State of Connecticut for products manufactured by Frankfort Distilleries, Inc., one of the defendants; and the other defendants were also distributors of the same products in that state. The evidence was conflicting but there was enough to justify the jury in finding, as it did, that the defendants and others, including the plaintiff, formed a conspiracy in restraint of trade in violation of the Sherman Anti-Trust Act by agreeing to maintain fixed prices in selling the products to retail dealers in Connecticut; that the plaintiff did not always conform to that agreement by maintaining such fixed prices; and that, after warnings that unless it did maintain those prices its supply of the products would be stopped, it continued to sell at cut prices and consequently Frankfort Distilleries, Inc., did refuse to supply it with its products; and that thereafter the defendants continued in the conspiracy. The plaintiff had been selling those products since sometime in December 1933 under an agreement that it was to have the right to continue as a distributor so long as it took the required amount of them and paid for them promptly. Its supply was cut off on January 14, 1937 solely because of its under selling and it has since been unable to fill the orders of its customers for those products except to the extent of the stock it then had. This suit was brought February 10, 1937.

[*Evidence requires jury determination*]

The judge charged the jury fairly and adequately as to what had to be proved by the plaintiff to show a conspiracy in restraint of trade under the Sherman Anti-Trust Act to support a recovery under that statute and made it perfectly clear that the producer, in the absence of such an unlawful agreement, was not liable in this action merely because it refused to supply the plaintiff with its products after the plaintiff sold at cut prices; and as there was enough to take the case to the jury, the refusal to direct a verdict for the defendants was not erroneous.

[*Conduct prior to cause of action not controlling*]

The defendants assert further that the plaintiff cannot recover since, if there was an unlawful agreement, it was a party to it and so in *pari delicto* with them. The plaintiff has urged that such a defense is unavailable because not pleaded as required by the Connecticut procedure but we do not find it necessary to decide that. This cause of action did not arise in any event until Frankfort Distilleries, Inc., stopped supplying the plaintiff with its products and at that time whatever connection the plaintiff had had with the conspiracy was severed and it since has not been a party to that. This is not a suit in equity where the clean hands doctrine is applicable but merely a suit on a special statute which takes no account of the conduct of the plaintiff prior to the time the cause of action arose. Cases like *Eastman Kodak Co. v. Blackmore,* 277 Fed. 694 and *Bluefields S. S. Co. v. United Fruit Co.,* 243 Fed. 1, upon which the defendants rely and which denied recovery for the period of the participation by the plaintiff in the conspiracy do not extend to a subsequent period when the plaintiff was no longer a party to the unlawful agreement. This suit, on the contrary, is in this respect like *Victor Talking Mach. Co. v. Kemeny,* 271 Fed. 810 where a party to an unlawful agreement in restraint of trade recovered damages suffered after he was no longer a party to that. As the plaintiff was not *in pari delicto* with the defendants after this cause of action accrued, there was no error in refusing to charge as requested in respect to that subject. And for the same reason evidence as to price lists plaintiff filed with the Board of Trade showing the prices at which it sold the Frankfort products while it was in the conspiracy were properly excluded. What plaintiff did while a member of the conspiracy was immaterial.

[*Proof of damages competent*]

Complaint is also made about the introduction of proof by the plaintiff through the testimony of a certified public accountant of a computation he had made from the plaintiff's books of account to show damages which flowed from the cutting off of its supply of the products of the Frankfort Distilleries. That was competent evidence. *William H. Rankin Co. v. Associated Bill Posters of U. S.,* 42 Fed. (2d) 152. If the computation was incorrect it was subject to being overcome by proof to that effect but that did not make it inadmissible.

[*Extent of damages recoverable*]

Neither do we find any error on the plaintiff's appeal. The recoverable damages were only those sustained by the plaintiff from the time the cause of action accrued up to the time the suit was brought. *Frey & Son, Inc. v. Cudahy Packing Co.,* 243 Fed. 285. Damages which accrue after the suit is brought cannot be recovered in the action unless they are the result of acts done before the suit was commenced. *Lawlor v. Loewe,* 235 U. S. 522-536. Here the plaintiff's damages, if any, after the commencement of the suit were due to

continued refusal or refusals, in furtherance of the conspiracy, or supply it with the Frankfort products after that time. The unlawful acts which would give rise to such damages had from their nature to be committed in carrying out the conspiracy after the suit was brought. It would be impossible to predict how long such a conspiracy would remain in existence or how long the refusal to sell to the plaintiff would continue and, even if such damages could, in a sense, be treated as the result of refusing to supply before suit was brought, they would be purely speculative.

[*No abuse of discretion in fee allowance*]

Nor do we find any error in the amount of the fees allowed the plaintiff's attorneys. That was a matter for the sound exercise of the discretion of the trial judge and his decision is to be given effect unless an abuse of discretion is made plainly to appear. *Rankin Co. v. Associated Bill Posters etc., supra.*

Affirmed.

[¶ 55,201] Myer J. Lichterman, individually and doing business as Artistic Cleaners and Dyers, Respondent, v. Laundry and Dry Cleaning Drivers Union Local No. 131, et al., Appellants.

Minnesota Supreme Court. Filed December 9, 1938.

The Minnesota Unfair Trade Practices Act, prohibiting price discrimination and sales below cost, is interpreted.

A labor dispute is presented in an action of an employer against a labor union which threatens to resort to picketing because of the employer's proposal to reduce prices charged his customers and thereby lessen the compensation of numerous employees working on commission. It is not determinative that the issue is not between the employer and his own employees.

[*Statement of the case*]

STONE, J.: Defendant Laundry and Dry Cleaning Drivers Union, Local No. 131, and the individual defendants, who are certain of its officers and members, appeal from a judgment enjoining them from picketing and related activities.

Plaintiff is in the cleaning and dyeing business in Minneapolis. The issue is not directly between him and his employes, but wholly between him and defendant union, of which most if not all, of plaintiff's drivers are members.

Both legal and factual background for the controversy is L. 1937, c. 116, prohibiting, under penalty for disobedience, "unlawful discrimination in the production, manufacture or distribution of certain commodities, articles, wares and merchandise" and "unfair competitive trade practices." It is referred to as our "Unfair Trade Practices Act."

[*Nature of controversy*]

Pursuant to that law, the Minneapolis Cleaners and Launderers Association, Inc., of which plaintiff is a member, made a cost survey in the local field of their industry, and thereon published a schedule of prices. Plaintiff, not wanting to be bound by either survey or prices, proposed to put into effect a lower schedule.

Thereupon defendant union threatened to picket plaintiff's place of business and actually did some picketing. As to the manner of (rather than the occasion for) the picketing, threatened or actual, there is no complaint that it was unlawful.

[*Stipulation to decide case on motion to strike*]

Plaintiff moved to strike defendants' answer as sham and frivolous. Thereupon the parties stipulated that (plaintiff having withdrawn his claim for damages) the court should decide the case finally on the motion to strike and the showing by affidavits for and against. By that stipulation, it was agreed that if the case did not present a labor dispute as defined by L. 1933, c. 416, plaintiff should have judgment for an injunction; but that if such a labor dispute was presented, defendants should prevail. The decision and resulting judgment went for plaintiff. To defendants' credit, be it said, the judgment has been obeyed. Their rights are being enforced by the methods of law and order rather than by those of illegality and disorder.

[*Employees paid on commission basis*]

Many of plaintiff's employes, and all his drivers, work for a minimum wage, plus a commission on business procured by them. Hence, their compensation goes up and down with the prices plaintiff charges his customers.

[*"Labor dispute" defined*]

The term "labor dispute," as defined by L. 1933, c. 416, § 12 (c), includes "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employ-

ment, regardless of whether the disputants stand in the proximate relation of employer and employee." Section 12 also declares:

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; * * * whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; * * * or when the case involves any conflicting or competing interests in a 'labor dispute' (as hereinafter defined) of 'persons participating or interested' therein (as hereinafter defined).

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation."

Applying these declarations to the inescapable facts of this case, we consider that a labor dispute is plainly presented.

[*Unfair Trade Practices Act*]

By the Unfair Trade Practices Act of 1937 both common law and former statutory concepts of unlawful restraint of trade are modified. That statute recognizes that there is such a thing as too much competition, and aims to restrain it in the manner and to the extent indicated. The economic reaction upon its labor of ruinous or excessive competition in a given trade or industry is obvious.

[*Issue a "labor dispute"*]

The instant case involves "persons who are engaged in the same occupation." The issue is one in which plaintiff's direct interest is plain. That being true, how can it be said that local labor in the industry lacks a similar direct interest? It is enough under the statute that the parties have an indirect interest. On that ground we hold that the issue is a "labor dispute" within the meaning of the statute.

This being so clearly a case which both as to parties and subject matter involves "conflicting * * * interests in a 'labor dispute'," little more need be said. By the very terms of the statute it is not determinative that the issue of the moment is not between an employer and his own employes. *American Furniture Co. v. I. B. of T. C. & H. of A.*, 222 Wis. 338, 268 N. W. 250; *Senn v. Tile Layers Protective Union*, 222 Wis. 383, 268 N. W. 270; *Lauf v. Shinner*, 303 U. S. 323, 82 L. ed. 515; see also McClintock, Minnesota Labor Disputes Injunction Act, 21 Minnesota Law Review, 619, 635; Note, 21 Minnesota Law Review, 467.

[*Conclusion*]

The decision below seems to have been controlled by the idea that defendants have no right to dictate to plaintiff what charges to make against his customers. That is true, but it doesn't reach the proposition that the members of defendant union, whom it lawfully represents, have a manifest interest in opposing a manner of doing business, or any charges therein, which threaten their own security as to status or wages. Cf. *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552, 82 L. ed. 683, where defendant organization had no right to dictate to plaintiff that plaintiff's employes should be negroes. But defendant was held to be within the protection of law in resorting to peaceful picketing to prevent discrimination against negroes. That racial issues were involved did not remove or lessen the determinative effect of the "labor dispute" found to be present.

Employers have the same right to organize as employes. Here we have evidence of the activities on the one side of an employers' and on the other of an employes' organization. Modern labor laws are intended as aids to a greater degree of economic security and social order. The Unfair Trade Practices Act of 1937 has a similar general purpose. In proportion as federations of employees and employers mutually recognize, respectfully and ungrudgingly, the rights of each other, will they advance the interests of industrial democracy. Thereby they will serve their own members and the public in maintaining that degree of "social discipline" which should be the goal of both. That function is said to be well performed by such associations in Sweden. See Robbins & Heckscher, Collective Bargaining in Sweden, 24 American Bar Ass'n. Journal, 926. Such achievements of democratic processes will be insurmountable obstacles to totalitarianism of any kind.

[*Judgment reversed*]

Inasmuch as the case presents a labor dispute, the judgment must be and is reversed.

[¶ 55,202] United States, ex rel., Biaggio Angelica, v. M. F. Hammond, United States Marshal; United States, ex rel. O. H. Carlisle, v. M. Frank Hammond, United States Marshal for the Southern District of Texas.

United States Circuit Court of Appeals, Fifth Circuit. Decided November 4, 1938.

Appeals from the United States District Court, Southern District of Texas.

Pending appeals from judgments in *habeas corpus* proceedings to test warrants of removal for trial for alleged violation of the Sherman Anti-Trust Act are terminated by the Act of June 29, 1938, abolishing appeals for that purpose, where the legislative intent was to cut off all such appeals including causes pending upon the effective date of the Act.

SIBLEY and HUTCHESON, Circuit Judges, concur; HOLMES, Circuit Judge, dissents.

[*Counsel*]

No. 8792. Horace Soule, for appellant.
Douglas W. McGregor, United States Attorney, and George O'Brien John, Asst. U. S. Attorney, *contra;*—all of Houston, Texas.
No. 8607. Jno. F. Green Jr., Robt. F. Carter and Archie D. Gray, all of Houston, Texas, for appellant.
Grant W. Kelleher, Spl. Attorney, Department of Justice; John Henry Lewin and Hammond E. Chaffetz, Spl. Assts. to the Attorney General—all of Washington, D. C.; and Douglas W. McGregor, United States Attorney, and George O'Brien John, Asst. U. S. Attorney, both of Houston, Texas, *contra.*

[*Nature of proceedings*]

SIBLEY, Circuit Judge: These are appeals from judgments in *habeas corpus* cases to test warrants of removal to other States for trial on federal offenses. The appellee moves to dismiss the appeals on the ground that since they were taken the Act of June 29, 1938, has gone into effect, which he urges prevents consideration of them, there being in the Act no saving of pending cases. The Act amends 28 U. S. C. A. § 463(a) by inserting a proviso so that it shall read thus:

"In a proceeding in habeas corpus in a District Court, or before a District Judge, or Circuit Judge, the final order shall be subject to review on appeal by the Circuit Court of Appeals of the Circuit wherein the proceeding is had: Provided, however, that there shall be no right of appeal from such order in any habeas corpus proceedings to test the validity of a warrant of removal issued pursuant to the provisions of Section 1014 of the Revised Statutes, or the detention pending removal proceedings. . . ."

[*No determination of appeals prior to Act*]

The question is whether the words "There shall be no right of appeal from such order" merely prevents the taking of an appeal after the date of the Act, or whether they also cut off the prosecution of one already taken and its decision by the appellate court. We think the latter is the true intent of Congress. The Committee Reports on the Act show that there had been experience of delay and obstruction of justice through such appeals, and the purpose of the Act was to have the accused after a decision against him on this preliminary matter to have his next hearing in his trial in the court to which removed, with the usual right to appeal there. The title of the Act reads: "An Act to abolish appeals in habeas corpus proceedings brought to test the validity of orders of removal." The language in the body of the Act denies any "right of appeal." We think it clear that the intent is to cut such appeals off entirely, without saving those that are pending. It is usual to add a saving clause if pending cases are to be excepted.* There is no good reason why an accused who has just taken an appeal should be favored over another who is about to take one. The words "right of appeal" do not mean simply the right to appeal or to take an appeal, but refer to the whole appellate procedure. When the right of appeal is cut off, a pending appeal dies, just as when a statutory cause of action is cut off by repeal without saving clause a pending action upon it dies. *Norris v. Crocker,* 13 How. 429; *Western Union Telegraph Co. v. Louisville & Nashville R. R. Co.,* 258 U. S. 13. The appellants no longer have a standing in court. The appellate court in such a case acts according to the law as it is when judgment is to be rendered, and not as it was when the appeal was taken. 3 Am. Jur. Appeal and Error, § 1157.

[*No vested right in pending appeal*]

The same result is reached if the Act be treated as affecting the jurisdiction of the court. That it was so intended is likely, for it is an amendment of the statute which gives appellate jurisdiction over *habeas cor-*

* Recent instances of saving clauses where a right of suit was abolished are the Acts of May 14, 1934, and August 21, 1937, § 2. 28 U. S. C. A. § 41(1)(a) and (b).

pus judgments. A repeal of the law giving the appellate court jurisdiction prevents a judgment though the case has been argued and submitted for decision. *Ex parte McArdle,* 7 Wall. 506. So does an amendment which excludes the pending case. *Railroad Co. v. Grant,* 98 U. S. 398. See also *Insurance Co. v. Ritchie,* 5 Wall. 541. There is no vested right in a pending appeal. This Act operates only prospectively, but it is effective to abolish the appeals to which it relates whether already taken and pending at its date or not. The appeals are accordingly

Dismissed.

HOLMES, Circuit Judge, dissenting:

It is well settled that, when the jurisdiction of a cause depends upon a statute, the absolute repeal of the statute takes away the jurisdiction; but in this case the statute conferring jurisdiction to review, on appeal, all final orders in *habeas corpus* proceedings was not repealed. It was reenacted *in haec verba,* except that a proviso was added which must be construed as operating prospectively unless, expressly or by necessary implication, a contrary intention is indicated. No such intention is indicated in the act or by anything said or done in the Congress at the time of its passage.

The act in question is fairly construed to read that the final order in all *habeas corpus* proceedings shall be subject to review by the circuit courts of appeals: provided, however, that hereafter there shall be no right of appeal in the particular class of cases mentioned. This construction preserves jurisdiction to review cases pending on appeal, but denies to litigants the right of appeal after the date of the act.

That the Congress knew exactly what it was doing is indicated by the report of the committee that its purpose was to plug loopholes for delay in criminal cases. The delay in this case has already occurred. The appeal is pending, our jurisdiction to review it was expressly conferred by re-enactment, and a dismissal instead of a decision on the merits will probably cause still further delay. This is also indicated by a comparison of similar legislation. The act under consideration in *Railroad Co. v. Grant,* 98 U. S. 398, restricted the jurisdiction of the court to re-examine, reverse, or affirm any final judgment upon writ of error or appeal, and expressly repealed all prior acts inconsistent therewith. The opinion opens with the statement by the Chief Justice that the single question presented for decision "is whether there is any law now in force which gives us authority to re-examine, reverse, or affirm the judgment in this case." The court held that the act was prospective in operation, that it did not vacate or annul an appeal already taken, but that it took away the right of the court to hear and determine the cause. The court distinguished between the right of appeal and jurisdiction to consider an appeal. The case at bar is the converse of the *Grant* case. There the right of appeal remained, but the jurisdiction was gone; here the jurisdiction remains, but the right of appeal is gone. See also *U. S. v. Boisdore,* 49 U. S. (8 How.) 113, where a motion to dismiss was overruled, and the court's jurisdiction was held to continue in force, unless repealed by Congress, until a final disposition of all appeals regularly brought up from the district court.

In *Merchants Ins. Co. v. Ritchie,* 5 Wall. 541, and *Ex Parte McCardle,* 7 Wall. 506, the repealing statute took away the entire appellate jurisdiction in cases of the character mentioned. In the latter instance, the act expressly took away jurisdiction in appeals which had been taken, as well as those which might thereafter be taken. Pending appeals fall when the grant of jurisdiction is repealed. This is obvious, for once jurisdiction is lost, the court can take no further action of any kind, except to dismiss the case. It has lost all power to deal with the appeal. This was clearly stated in *Ex Parte McCardle,* as follows:

"What, then, is the effect of the repealing Act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle."

In the present case, it is clear that the Act of June 29, 1930, did not repeal the grant of jurisdiction in any respect; it was prospective in operation and did not vacate or annul appeals already taken. It merely provided that, in the future, there should be no right of appeal in such cases. The sole question then, as in *Railroad v. Grant, supra,* is whether there is any law now in force which gives us the right to re-examine, reverse, or affirm the judgment in this case. Eliminating the proviso which, according to the Chief Justice, does not annul appeals already taken, we find our jurisdiction unimpaired by the re-enactment which says that the final order in this case is subject to review, on appeal, by the circuit courts of appeals. Had Congress intended to abolish jurisdiction in pending appeals, it would have been easy to accomplish the purpose, according to the *Grant* and *McCardle* cases, as follows:

"In a proceeding in habeas corpus . . . the final order shall be subject to review on appeal, by the Circuit Court of Appeals . . . except in any habeas corpus proceeding brought in connection with removal proceedings pursuant to section 1014 of the revised statutes."

By substituting the single word "except" for the words "provided, however, there shall be no right of appeal from such order," the statute would have dealt with the jurisdiction of this court rather than with the right of a litigant to sue out an appeal. Without limiting or restricting the jurisdiction of this court, the act of 1938 prospectively withdrew the right of appeal in the particular class of cases.

The act under consideration is careful to distinguish between the court's jurisdiction and the petitioner's right of appeal. We should not confuse the two. There is no right of appeal in a court; the aggrieved party is given a right of appeal which, when properly invoked in a particular case, confers jurisdiction on the court having legal capacity to receive it. When jurisdiction attaches, it cannot be taken away until the power is exercised, except by operation of law or with the consent of the court. This is

true, even though the party who invoked the jurisdiction does not desire to proceed further with the cause. The jurisdiction in this case was full and complete before the Act of June 29, 1938, was passed. It was expressly preserved by the act, as amended, and was not affected by the provision prospectively depriving litigants of the right of appeal in similar cases.

The error in the decision about to be rendered apparently is this: An amendatory proviso, which admittedly may be construed as prospective only, will be given a retroactive effect. An act which was intended to abolish the right of future appeals is made the basis of dismissing pending appeals, notwithstanding the provision in the same act that the "order [under consideration] shall be subject to review, on appeal, by the circuit court of appeals of the circuit wherein the proceeding is had."

Briefly put, the Act of June 29, 1938, said, in effect, that this court should have jurisdiction in all habeas corpus appeals, but that, in the future, there should be no right of appeal in such cases as this. If Congress had expressly inserted in the proviso the words "in the future," no one would have mistaken the meaning; but, under well-settled principles, the courts construe such legislation to operate prospectively only. All of the act except the proviso operates retroactively as well as prospectively, because all of the rest of it is old and deals with jurisdiction. The proviso is the only thing new in the act, and it does not deal with jurisdiction but relates solely to the right of a litigant to invoke in the future the jurisdiction conferred by law upon a court constitutionally capable of accepting it.

If, instead of rewriting the old act conferring jurisdiction in this class of cases, a separate and independent law had been enacted abolishing the right of appeal in future cases, it would be clear that jurisdiction in pending cases had not been affected. Yet, in principle, there is no difference.

The absence of jurisdiction in this case must be arrived at, if at all, by an implied repeal of a previous grant; and such repeals are not favored in law. There is no express repeal of prior inconsistent provisions, as in *Railroad v. Grant*; no expressed retroactive intention, as in the *McCardle* case. What then is there to work an implied repeal? What is there in the proviso so repugnant to the prior grant as to indicate a congressional intent that the jurisdiction of appeals previously taken cannot stand with the abolished right of appeals to be taken in the future? *A fortiori*, what is there in the proviso so repugnant to the contemporaneous grant as to indicate such a congressional intent? An appeal is a proceeding by which a cause is brought from an inferior to a superior court for rehearing, re-examination, or review. The right of appeal is the right to take proceedings for the removal of such cause for the purpose mentioned. In other words, it is the right to call upon a higher court to decide an issue of law or fact, or both.

Under the construction of the majority, the Congress granted jurisdiction in one sentence and, by the use of different words took it away in another in the same paragraph. Under such construction, the power of a court to review an order and the right of a litigant to appeal from such order mean exactly the same thing. By judicial construction, the word "review" is substituted for "appeal" in the proviso, and it is made to read as follows: "Provided, however, that there shall be no right of review of such order in any habeas corpus proceeding to test the validity of a warrant of removal."

It is a cannon of construction that ordinary words should be given their ordinary meaning and technical words their technical meaning. When we speak of the right of appeal, we do not ordinarily refer to the jurisdiction of a court to hear and determine the case. In common speech, the mind of the hearer of such words is directed to the right of an unsuccessful litigant to invoke the jurisdiction of a higher court for the purpose of correcting an alleged injustice. It is a right which may be waived or become extinct by lapse of time. It is not a vested right, because it may be abolished before it is exercised; nor is there any vested right to have the court review the case after its jurisdiction has been invoked. Courts may dismiss an appeal without hearing the case on the merits and the Congress may abolish the jurisdiction of courts in pending cases, but no human agency can take away the right of appeal which has been properly exercised. It is a right which has become an accomplished fact, and, like the grace of a day that is gone, can never be taken away. In *U. S. v. Goodwin*, 7 Cranch 110, Chief Justice Ellsworth is quoted as follows: "An appeal is a civil law process, and removes a cause entirely, subjecting the law and facts to a review and re-trial."

The removal of a cause from a court of inferior to one of superior jurisdiction for the purpose of obtaining a review and retrial is a matter of practice. Speaking for this court, Judge Sibley said: "Statutes regulating appeals are remedial and should have a liberal construction in furtherance of the right of appeal." *In re Hurley Mercantile Co.*, 56 F. (2) 1023, 1025. See, also, Appeal and Error, 2 R. C. L. 6.

In *U. S. v. St. Louis Railway Co.*, 270 U. S. 1, Mr. Justice Brandeis said: "That a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application. It has been applied by this court to statutes governing procedure, *United States Fidelity & Guaranty Co. v. United States*, 209 U. S. 306; and specifically to the limitation of actions under another section of the Transportation Act, 1920. *Fullerton-Krueger Lumber Co. v. Northern Pacific Ry. Co.*, 266 U. S. 435."

In *Foster v. Missouri, etc.*, 37 S. W. (2) 450, the statute was repealed under which writ of error was granted. In overruling a motion to dismiss, the court said:

"The proceeding under review was initiated under, and its disposition must be governed by, the act providing pensions for the deserving blind, as passed in 1923. Laws 1923, page 302 *et seq.* In 1925, section 9 of the act was repealed and a new section enacted in lieu of it. Laws 1925, pp. 316, 317, now section 8901, Rev. St. 1929. Under its provision any person aggrieved by the action of the Commission for the Blind may appeal to the circuit court, where a trial *de novo* shall be had 'and the judgment rendered thereupon shall be final.' In other words, such judgments are not now reviewable on appeal or writ of error. But as the writ of error in this case was sued out before the act

of 1925 went into effect, it must be proceeded with in all respects in accordance with the law as it stood prior to the change. Section 658, Rev. St. 1929."

In *Kepler v. Rinehart,* 70 N. E. 806, the Supreme Court of Indiana said:

"As a general rule, the right of appeal is governed by the law applicable thereto in force when the final judgment is rendered and, unless it is evident from the terms of a statute which gives, modifies, or takes away the right of appeal that it was intended to have a retrospective effect, it has no application to causes in which final judgment was rendered prior to the time such act took effect."

In *Goode v. Keel,* 116 Pac. 777, the Supreme Court of Oklahoma declared:

"It is a rule of statutory construction that all statutes are to be construed as having a prospective operation unless the purposes and intention of the Legislature to give them a retrospective effect is expressly declared, or is necessarily implied from the language used. 36 Cyc. 1205. In every case of doubt the doubt must be resolved against the retrospective effect."

See, also, *Catterline v. Bush,* 59 Pac. 706; *Salisbury v. LaFitte,* 115 Pac. 533.

The intention of Congress to cut off a hearing on appeal, in a pending cause involving human liberty should be plain before the court refuses to hear and determine the merits. No such intention having been manifested by the language of the act in question, I think the motion to dismiss should be overruled.

[¶ 55,203] United States, ex rel. O. H. Carlisle, v. M. Frank Hammond, United States Marshal for the Southern District of Texas.

United States Circuit Court of Appeals, Fifth Circuit. Decided December 9, 1938.

Appeal from the United States District Court, Southern District of Texas.

Appeal may not be allowed under the Act of March 3, 1887, from judgments under the anti-trust laws remanding causes removed from state courts and a decision rendered upon the merits of an appeal from an order of remand filed prior to the effective date of the Act affords no basis for the allowance of appeals where the prohibition of the statute is applicable.

Sibley and Hutcheson, Circuit Judges, concur; Holmes, Circuit Judge, dissents.

Sibley, Circuit Judge: The new matter in the motion for rehearing is the course of the decisions when the appeal from a judgment remanding a case removed from a state court which was permitted by Section 5 of the Act of March 3, 1875, 18 Stats. 470, was discontinued by the Act of March 3, 1887, 24 Stats. 553. In *Sherman v. Grinnell,* 123 U. S. 679, the order of remand was made before the Act of 1887 went into effect, but the writ of error was taken after. The writ was dismissed. *Chicago, B. & Q. R. R. Co. v. Gray,* 131 U. S. 396, presented a similar situation with a like result. But in *Rosenthal v. Coates,* 148 U. S. 142, decided in 1893, we are told that the appeal was taken three days before the Act of 1887 went into effect, and was decided on the merits. No motion to dismiss it was made, and no opinion was expressed on the effect of the Act of 1887 upon the appeal pending at its passage. The Act of 1887 did not in terms abolish such appeals, nor destroy the right of appeal. Its provision was: "No appeal or writ of error from the decision of the Circuit Court so remanding such cause shall be allowed." An appeal that had already been allowed before the Act was passed would seem not affected under this language. There was in addition, however, in Section 6 an express repeal of the appeal provision of the Act of March 3, 1875, which in *Sherman v. Grinnell, supra,* was emphatically asserted to destroy the whole basis of the Supreme Court's jurisdiction. We do not think the failure of the Supreme Court to question its own jurisdiction in the *Rosenthal* case can be taken as establishing anything to the contrary.

Motion Denied.

Holmes, Circuit Judge, dissents.

[¶ 55,204] **United States of America v. Jess R. Anderson, et al.**

United States Circuit Court of Appeals, Seventh Circuit. Decided January 17, 1939.

Appeals from the United States District Court, Southern District of Illinois, Southern Division.

Convictions of labor union members of conspiracy to violate the Sherman Anti-Trust Act are sustained where the existence of a conspiracy to effect, by violence, a general stoppage of transportation as a strike weapon during a union jurisdictional dispute, and the contribution of support to the general conspiracy by the individual defendants acting in local areas, are established by substantial evidence.

Imposition of sentences for conspiracy may not be cumulative, although the concerted action has diverse illegal objects, where the conspiracy forms the basis of the charge.

EVANS and SPARKS, Circuit Judges, and LINDLEY, District Judge, concur.

[*Statement of the case*]

SPARKS, Circuit Judge. On December 8, 1936, forty-one persons, including the thirty-four appellants, were indicted by a United States Grand Jury in the Southern Division of the Southern District of Illinois. There were two separate indictments against all the defendants. The first indictment, hereinafter referred to as the mail indictment, charged a conspiracy under section 37 of the Criminal Code, 18 U. S. C. A. section 88,[1] to violate section 201 of the Criminal Code, 18 U. S. C. A. section 324.[2]

The second indictment hereinafter referred to as the antitrust indictment, charged the violation of section 1 of the Sherman Anti-Trust Act, 15 U. S. C. A. section 1.[3] The first count of this indictment charged that the Progressive Miners of America were organized on or about September 2, 1932, and immediately thereafter sought to prevent the operation of all coal mines within Illinois, by miners other than Progressives, and to require all owners of Illinois mines to employ Progressives; that in order to carry out that purpose, appellants, with others, engaged in a conspiracy in restraint of trade, that is to say, they conspired to obstruct, retard, prevent, and interfere with the transportation in interstate commerce of express, passenger and freight, including coal, over four specified railroad lines; their objects, among others, being to obstruct, retard and prevent the interstate transportation of coal mined and handled by non-Progressives, and to prevent such transportation, by intimidating such operators, miners and railroad employees by damaging and destroying railroad property, equipment and personal property, thus rendering such transportation more hazardous.

Count 2 of this indictment averred the same facts with respect to foreign commerce. Both counts alleged that in carrying out the conspiracy appellants bombed and burned railway bridges, lines, trucks, trains, freight and motor cars.

The court overruled appellants' amended motions to quash, and pleas of not guilty were interposed. It denied appellants' motion, filed nine days before trial, for leave to withdraw their pleas of not guilty in order to interpose a demurrer to the indictments. It denied appellants' motion for a bill of particulars under the mail indictment, and granted in part and denied in part a like motion addressed to the antitrust indictment. On the Government's motion the actions were consolidated for trial; appellant Gent's motion for a separate trial was denied, and appellants' motion to require the Government to elect the count of the consolidated indictments upon which it would rely was overruled, and it was not again renewed. No exceptions were saved to any of these rulings except to the court's denial of leave to withdraw pleas of not guilty in order to interpose demurrers.

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[1] "If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

[2] "Whoever shall knowingly and willfully obstruct or retard the passage of the mail, or any * * * carrier, or car * * * or other conveyance * * * carrying the same, shall be fined not more than $100, or imprisoned not more than six months, or both."

[3] "Every * * * conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall * * * engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

[*Conviction in lower court*]

The jury returned a verdict of guilty as to all appellants on all counts, and the court entered judgment in accordance with the verdict, that is to say, on each of the two counts of the antitrust indictment, there was a sentence of imprisonment for a term of one year and a fine of $5,000. On the mail indictment there was a sentence of imprisonment for a term of two years and a fine of $10,000, and the sentences were to run consecutively.

The record in the case is voluminous and it is neither practical nor necessary to excerpt it at length. [Here the Court reviews the transfer in affiliation of certain members of the United Mine Workers of America, which had a closed shop contract with the mine operators, to the Progressive Miners of America and the bombings and other violence which resulted from enforcement of the existing collective agreement after the jurisdictional cleavage.]

[*Substantial evidence of conspiracy*]

A recital and discussion of the evidence in this case would serve no good purpose, and would extend the limits of the opinion beyond the bounds of reasonable propriety. It is sufficient to say that a reading of the entire record is quite convincing that the existence of a conspiracy as charged in both indictments is supported by substantial evidence, and we can not disturb the finding of the jury in this respect. Whether all the appellants were parties to the conspiracy within the meaning of the law is a matter we will discuss later in this opinion. We are convinced, however, that the Progressive Union was the perpetrator and abettor of the entire program.

[*Conspiracy to effect general stoppage*]

It is contended by appellants that the three areas of operations, and the times and manners of the activities in each, conclusively show that the depredations in each were unrelated to the others, hence they urge that the participants in one area were not the same as those in the other areas and can not be held accountable therefor. However, the theory of the indictments is that the operations in each area were a part of the larger conspiracy which included all, and had one common purpose, viz: to stop production of the mines by stopping the railroad transportation in each area. There was substantial evidence to support this theory, and the verdict in this respect is binding upon us. We think there was no variance between the averments of the indictments and the proof. It is quite true that all of the appellants did not actually participate in the commission of each offense in all the areas, or all of the offenses in any one area, nor did they concertedly agree that each particular offense in any one or more areas should be committed. However, each contributed a material part in carrying out the general plan of stopping production in all the areas by doing his part in his home area, or where he was assigned for that purpose. The general plan was plainly described by defendant Keck, who was secretary and treasurer of the Progressive Union from 1932 to February 1935, and president of that Union from the latter date until February 1937. His official residence was at the headquarters in Gillespie, and in early February, when asked by a member of the Franklin County Strike Committee what the policy of the organization was for striking miners, he replied that he had one of two things to do—discontinue the strike or stop production of the mines, and that he had no intention of calling the strike off. This policy was certainly consistent with what had transpired in all the areas prior to that time, and was faithfully carried out afterwards in the Springfield and Franklin County areas. The record is replete with evidence of acquaintanceship and frequent contacts of the leaders of all the districts; the furnishing of dynamite by those in charge of the Progressive headquarters at Gillespie; the finding of unexploded dynamite of the same kind, and other materials such as fuses, wire and batteries at the scenes of bombings or attempted bombings; and the pertinent testimony of witnesses as to what they saw and heard leaves no doubt in our minds that the evidence was quite substantial to support the charge of a general conspiracy as described in the indictments.

[Convictions under the mail indictment are affirmed where, although no express agreement to cause interference is shown, defendants-appellants by conspiring to cause a general stoppage of railroad transportation are presumed to have intended the resulting interference with the mails.]

[*Affirmative showing of withdrawal from conspiracy required*]

Appellants Newman, Lowe and Stewart contend that the court erred in not directing a verdict as to them because all of their proved activities admittedly occurred more than three years prior to the return of the indictments. It was charged and proved by substantial evidence that the conspiracy was a continuing one, and the same evidence was relied upon to support both indictments. This contention is without merit under the ruling in *Hyde v. United States,* 225 U. S. 347, and *Boyle v. United States,* 259 Fed. 803. In the latter opinion

it is said: "While the parties entering into such unlawful combination might have withdrawn from such combination and thereby have relieved themselves from further liability, and the statute of limitations would have begun to run from the time of such withdrawal, yet it required some affirmative act on the part of the conspirators to avoid the liability which their entry into the combination created." Here there was no affirmative act which in any manner indicated a withdrawal, and there was no error in denying a directed verdict for these three appellants.

[*Refusal of directed verdicts not error*]

It is further contended by appellants that the court erred in overruling their joint and several motions for a directed verdict as to each indictment for lack of competent evidence. These motions in effect deny the existence of substantial evidence to support either indictment. From what we have said it is obvious that this contention must fail as to the existence and purpose of a conspiracy as alleged, and we are concerned now with the question whether appellants or any of them were participants therein. What amounts to guilty participation in a conspiracy is quite fully discussed in *Allen v. United States*, 4 F. 2d 688, and *Marino v. United States*, 91 F. 2d 691, and it is unnecessary to repeat the principles therein enunciated. A perusal of this record convinces us that there was substantial evidence from which the jury was warranted in concluding that each appellant was a party to, and knowingly participated in the conspiracy. Much is said by appellants about incredible witnesses and untrustworthy evidence, but counsel must know that with these questions we are not permitted to concern ourselves. There was no error in overruling the motions for directed verdicts.

[*Provocation no defense*]

Appellants further insist that the court erred in not admitting evidence of other bombings, burnings, use of firearms, and the killing of a Progressive miner, by persons other than Progressives. These incidents offered in evidence were, in the court's opinion, unconnected with the depredations charged against appellants, and he remarked that if they were able to assure the court that the incidents were thus connected he would admit the testimony, to which appellants' counsel responded that he was unable to give that assurance. Under these circumstances they were properly excluded. It is now urged for the first time by appellants that such incidents tended to show provocation by others for retaliatory acts upon the part of appellants. This, if true, would not constitute a defense.

[*Admissibility of union publication*]

It is further contended by appellants that the court erred in admitting as evidence Government's Exhibit 221, an article which appeared in the Progressive Miner on June 23, 1933. [A reprint of the publication, issued as a statement of policy of the Progressive Miners of America, is appended to the decision in a foot note.] This publication is a weekly newspaper published in Illinois for the members of the Progressive Miners organization, and purported to be the "Voice of the Rank and File of the Progressive Miners of America." It had been published regularly under the supervision of the executive officials of the Union since September 16, 1932, and the exhibit was published by the editor under the direction of the Executive Board, which consisted of seven members, two of whom, McGill and Evans, are appellants. It is quite true that the appellants who testified concerning this matter denied having authorized or read the article before its publication, or that they approved or ratified it afterwards. There is substantial evidence, however, that appellants McGill and Evans authorized the publication, as members of the Executive Board, and the evidence in this record is quite convincing that the activities of all the appellants, whenever they occurred, were quite consistent with the principles set forth in the publication. Many of these activities occurred after the publication, and as to them there can be no doubt that the exhibit was properly admitted. We are convinced that it was properly admitted against all. From the cases above referred to it seems to be well settled that knowledge on the part of individual conspirators is a matter of inference from the facts proved. It is not necessary that one be fully informed as to the scope of the conspiracy in order to justify an inference of knowledge on his part. The question is, did he join the others with a knowledge of the purposes and objects of the conspiracy. He may not know all the conspirators, yet if he knows there is a conspiracy, and has knowledge of its objects, he adopts as his own the past and future acts of all the other conspirators, and this is true, unless he withdraws, even though the subsequent activities of the conspirators are extended beyond his original purpose and intent. In support of the contention that the publication was improperly admitted, appellants rely upon *United Mine Workers v. Coronado Co.*, 259 U. S. 344, and analogous cases. In the *Coronado* case the court held that communications from outsiders, and editorials published in the United Mine Workers Journal giving accounts of past occurrences, and representing that the troubles were due

to the aggression of the armed guards of the mine owners, and that the action of the union men was justified, did not constitute such a ratification by the Board or the president as to make the International Union liable for what had been done. We think the case is not in point. There the question of admissibility of evidence was not in issue. Here there was positive substantial evidence that the Board authorized the publication.

[*Admissibility of testimony not error*]

Appellants assign as error the admission of the testimony of certain witnesses. The record does not disclose that any defendant saved an exception to any of these rulings. Counsel for appellants state that by consent of court they presented a "blanket exception" to all such rulings, although they do not refer us to that part of the record where it may be found, and we are unable to find such an order. However, we have considered each of these assignments and we are convinced that the ruling in each instance was proper.

[*Denial of separate trials not prejudicial*]

The court's denial of appellants' motion to set aside their pleas of not guilty and to permit them to file demurrers to the indictments was a matter largely in the discretion of the court and under the circumstances we think that discretion was not abused. The same may be said with respect to the consolidation of the cases for trial, and the denial of a separate trial to any one defendant. Each of the indictments, and each of the two counts of the antitrust indictment was based upon precisely the same facts, and we perceive no just reason why both indictments and all the defendants should not be tried at the same time and by the same jury.

[*Cumulative sentences erroneous*]

It is also contended by appellants that the court erred in the imposition of cumulative sentences, and we think this contention must prevail. There was but one conspiracy and its primary object was to stop the transportation of coal. However, as appellants are presumed to have intended the natural consequences of their acts, the objects of their conspiracy became diverse by implication, for interference with both interstate and foreign commerce, as well as the United States mails followed as a natural consequence. In *Frohwerk v. United States,* 249 U. S. 204, Mr. Justice Holmes said that, "The conspiracy is the crime, and that is one, however diverse its objects." This related to the question whether a count was duplicitous, and it may be that it was dictum, but we think the principle is sound as applied to the facts here. This does not mean that both indictments were not properly pleaded, as a precautionary matter, but we can not believe that Congress intended to permit the accumulation of sentences upon diverse objects of a conspiracy where there was but one conspiracy and the evidence supporting each was precisely the same. The Government concedes that the precise question has not been decided by the Supreme Court, and it recognizes that many authorities support appellants' contention. We are further supported in our conclusion by prior decisions of this court. *Murphy v. United States,* 285 Fed. 801; *Miller v. United States,* 4 F. 2d. 228.

[*Conclusion*]

The judgment is affirmed as to all matters except as to the sentence of imprisonment and fines. As to these the cause is reversed with instructions to enter the sentence of imprisonment and fines in a manner not inconsistent with this opinion, that is to say the sentences of imprisonment as to each appellant should run concurrently, and the payment of one fine by any appellant shall be considered as payment of all fines assessed against such appellant, regardless of whether or not the District Court deems it proper under all the evidence to fix the fines and terms of imprisonment the same under each indictment and each count.

[¶ 55,205] Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle, et al., Appellants, v. The United States of America. Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., et al., Appellants, v. The United States of America.

Supreme Court of the United States. Decided February 13, 1939.

Appeals from the District Court of the United States for the Northern District of Texas.

In a suit under the Sherman Anti-Trust Act to enjoin motion picture distributors and exhibitors from an alleged conspiracy in restraint of trade, unanimity of action among distributors in requiring minimum admission prices and prohibiting double features, after a written request for such action, is held to justify the inference that the distributors acted in concert and in common agreement in imposing the restrictions.

Agreement is held not a necessary prerequisite to an unlawful conspiracy. It is held enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it.

Failure to call as witnesses the officers of defendant motion picture distributors who were in a position to know whether they had acted in pursuance of agreement is held persuasive that their testimony, if given, would have been unfavorable to defendants.

Because a patentee has power to control the price at which his licensee may sell the patented article, it does not follow that the owner of a copyright can dictate that other pictures may not be shown with the licensed film or dictate the admission price which shall be paid for an entertainment which includes features other than the particular picture licensed.

The fact that the restrictions may have been of a kind which any one distributor could have voluntarily imposed does not legalize an agreement among the distributors to impose such restrictions, which operate as a calculated restraint upon the distribution and use of copyrighted films moving in interstate commerce.

An agreement illegal because it suppresses competition is held not any less so because the competitive article is copyrighted. The fact that the restraint is made easier or more effective by making the copyright subservient to the contract does not relieve it of illegality.

Mr. Justice STONE delivered the opinion of the Court.

[*Statement of the case*]

This case is here on appeal under § 2 of the Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. § 29, and § 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. § 345, from a final decree of the District Court for northern Texas restraining appellants from continuing in a combination and conspiracy condemned by the court as a violation of § 1 of the Sherman Anti-Trust Act, 26 Stat. 209, 15 U. S. C. § 1, and from enforcing or renewing certain contracts found by the court to have been entered into in pursuance of the conspiracy. 20 F. Supp. 868. Upon a previous appeal this Court set aside the decree and remanded the cause to the District Court for further proceedings because of its failure to state findings of fact and conclusions of law as required by Equity Rule 70½. 304 U. S. 55. The case is now before us on findings of the District Court specifically stating that appellants did in fact agree with each other to enter into and carry out the contracts, which the court found to result in unreasonable and therefore unlawful restraints of interstate commerce.

[*Business of appellants*]

Appellants comprise the two groups of defendants in the District Court. The members of one group of eight corporations which are distributors of motion picture films, and the Texas agents of two of them, are appellants in No. 270. The other group, corporations and individuals engaged in exhibiting motion pictures in Texas, and some of them in New Mexico, appeals in No. 269. The distributor appellants are engaged in the business of distributing in interstate commerce motion picture films, copyrights on which they own or control, for exhibition in theatres throughout the United States. They distribute about 75 per cent of all first-class feature films exhibited in the United States. They solicit from motion picture theatre owners and managers in Texas and other states applications for licenses to exhibit films, and forward the applications, when received from such exhibitors, to their respective New York offices, where they are accepted or rejected. If the applications are accepted, the distributors ship the films from points outside the states of exhibition to their exchanges within those states, from which, pursuant to the license agreements, the films are delivered to the local theatres for exhibition. After exhibition the films are reshipped to the distributors at points outside the state.

The exhibitor group of appellants consists of Interstate Circuit, Inc., and Texas Consolidated Theatres, Inc., and Hoblitzelle and O'Donnell, who are respectively president and general manager of both and in

active charge of their business operations. The two corporations are affiliated with each other and with Paramount Pictures Distributing Co., Inc., one of the distributor appellants.

Interstate operates forty-three first-run and second-run motion picture theatres, located in six Texas cities.[1] It has a complete monopoly of first-run theatres in these cities, except for one in Houston operated by one distributor's Texas agent. In most of these theatres the admission price for adults for the better seats at night is 40 cents or more. Interstate also operates several subsequent-run theatres in each of these cities, twenty-two in all, but in all but Galveston there are other subsequent-run theatres which compete with both its first- and subsequent-run theatres in those cities.

Texas Consolidated operates sixty-six theatres, some first- and some subsequent-run houses, in various cities and towns in the Rio Grande Valley and elsewhere in Texas and in New Mexico. In some of these cities there are no competing theatres, and in six leading cities there are no competing first-run theatres. It has no theatres in the six Texas cities in which Interstate operates. That Interstate and Texas Consolidated dominate the motion picture business in the cities where their theatres are located is indicated by the fact that at the time of the contracts in question Interstate and Consolidated each contributed more than 74 per cent of all the license fees paid by the motion picture theatres in their respective territories to the distributor appellants.[2]

[*Letter requesting agreement*]

On July 11, 1934, following a previous communication on the subject to the eight branch managers of the distributor appellants, O'Donnell, the manager of Interstate and Consolidated, sent to each of them a letter[3] on the letterhead of Interstate, each letter naming all of them as addressees, in which he asked compliance with two demands as a condition of Interstate's continued exhibition of the distributors' films in its 'A' or first-run theatres at a night admission of 40 cents or more. One demand was that the distributors "agree that in selling their product to subsequent runs, that this 'A' product will never be exhibited at any time or in any theatre at a smaller admission price than 25¢ for adults in the evening". The other was that "on 'A' pic-

[1] A first-run theatre is one in which a picture is first exhibited in any given locality. A subsequent-run theatre is one in which there is a subsequent exhibition of the same picture in the same locality.

[2] Payments of license fees by Interstate to distributor appellants in the 1934-35 season aggregated $1,077,819.58. Payments by all other exhibitors operating theatres in the same cities aggregated $369,594.72. Texas Consolidated payments for the same period aggregated $594,863.68. All other exhibitors operating in the same cities paid $47,928.22.

[3] "INTERSTATE CIRCUIT, INC.,
Majestic Theatre Building,
Dallas, Texas.

July 11, 1934.

Messrs.: J. B. Dugger, Herbert MacIntyre, Sol Sachs, C. E. Hilgers, Leroy Bickel, J. B. Underwood, E. S. Olsmyth, Doak Roberts.

Gentlemen:

On April 25th, the writer notified you that in purchasing product for the coming season 34-35, it would be necessary for all distributors to take into consideration in the sale of subsequent runs that Interstate Circuit, Inc., will not agree to purchase produce to be exhibited in its 'A' theatres at a price of 40¢ or more for night admission, unless distributors agree that in selling their product to subsequent runs, that this 'A' product will never be exhibited at any time or in any theatre at a smaller admission price than 25¢ for adults in the evening.

In addition to this price restriction, we also request that on 'A' pictures which are exhibited at a night admission price of 40¢ or more—they shall never be exhibited in conjunction with another feature picture under the so-called policy of double-features.

At this time the writer desires to again remind you of these restrictions due to the fact that there may be some delay in consummating all our feature film deals for the coming season, and it is imperative that in your negotiations that you afford us this clearance.

In the event that a distributor sees fit to sell his product to subsequent runs in violation of this request, it definitely means that we cannot negotiate for his product to be exhibited in our 'A' theatres at top admission prices.

We naturally, in purchasing subsequent runs from the distributors in certain of our cities, must necessarily eliminate double featuring and maintain the maximum 25¢ admission price, which we are willing to do.

Right at this time the writer wishes to call your attention to the Rio Grande Valley situation. We must insist that all pictures exhibited in our 'A' theatres at a maximum night admission price of 35¢ must also be restricted to subsequent runs in the Valley at 25¢. Regardless of the number of days which may intervene, we feel that in exploiting and selling the distributors' product, that subsequent runs should be restricted to at least a 25¢ admission scale.

The writer will appreciate your acknowledging your complete understanding of this letter.

Sincerely,
(Signed) R. J. O'DONNELL."

[4] A Class 'A' picture is a "feature picture" having five reels or more of film each approximately 1,000 feet in length, shown in theatres of the specified Texas cities charging 40 cents or

tures which are exhibited at a night admission of 40¢ or more—they shall never be exhibited in conjunction with another feature picture under the so-called policy of double features". The letter added that with respect to the "Rio Grande Valley situation", with which Consolidated alone was concerned, "We must insist that all pictures exhibited in our 'A' theatres at a maximum night admission price of 35¢ must also be restricted to subsequent runs in the Valley at 25¢".

[*Customary practices*]

The admission price customarily charged for preferred seats at night in independently operated subsequent-run theatres in Texas at the time of these letters was less than 25 cents. In seventeen of the eighteen independent theatres of this kind whose operations were described by witnesses the admission price was less than 25 cents. In one only was it 25 cents. In most of them the admission was 15 cents or less. It was also the general practice in those theatres to provide double bills either on certain days of the week or with any feature picture which was weak in drawing power. The distributor appellants had generally provided in their license contracts for a minimum admission price of 10 or 15 cents, and three of them had included provisions restricting double-billing. But none was at any time previously subject to contractual compulsion to continue the restrictions. The trial court found that the proposed restrictions constituted an important departure from prior practice.

[*Conferences and agreements*]

The local representatives of the distributors, having no authority to enter into the proposed agreements, communicated the proposal to their home offices. Conferences followed between Hoblitzelle and O'Donnell, acting for Interstate and Consolidated, and the representatives of the various distributors. In these conferences each distributor was represented by its local branch manager and by one or more superior officials from outside the state of Texas. In the course of them each distributor agreed with Interstate for the 1934-35 season to impose both the demanded restrictions upon their subsequent-run licensees in the six Texas cities served by Interstate, except Austin and Galveston. While only two of the distributors incorporated the agreement to impose the restrictions in their license contracts with Interstate, the evidence establishes, and it is not denied, that all joined in the agreement, four of them after some delay in negotiating terms other than the restrictions and not now material. These agreements for the restrictions—with the immaterial exceptions noted —were carried into effect by each of the distributors' imposing them on their subsequent-run licensees in the four Texas cities during the 1934-35 season. One agreement, that of Metro-Goldwyn-Mayer Distributing Corporation, was for three years. The others were renewed in the two following seasons and all were in force when the present suit was begun.

None of the distributors yielded to the demand that subsequent runs in towns in the Rio Grande Valley served by Consolidated should be restricted. One distributor, Paramount, which was affiliated with Consolidated, agreed to impose the restrictions in certain other Texas and New Mexico cities.

[*Ruling of trial court*]

The trial court found that the distributor appellants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate, and that they agreed and conspired with each other and with Interstate to impose the demanded restrictions upon all subsequent-run exhibitors in Dallas, Forth Worth, Houston and San Antonio; that they carried out the agreement by imposing the restrictions upon their subsequent-run licensees in those cities, causing some of them to increase their admission price to 25 cents, either generally or when restricted pictures were shown, and to abandon double-billing of all such pictures, and causing the other subsequent-run exhibitors, who were either unable or unwilling to accept the restrictions, to be deprived of any opportunity to exhibit the restricted pictures, which were the best and most popular of all new feature pictures; that the effect of the restrictions upon "low-income members of the community" patronizing the theatres of these exhibitors was to withhold from them altogether the "best entertainment

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more for adult admission at night. Approximately fifty per cent. of the pictures released by the distributor defendants in the Texas cities in 1934-1935 were Class 'A' pictures.

[5] The Metro-Goldwyn-Mayer Distributing Corporation agreement with Interstate did not include Houston, where it operated through a subsidiary a first run theatre, and where it did not until the 1936-1937 season license any subsequent run pictures. It agreed with Interstate to impose the restrictions in Houston for the 1936-1937 season.

furnished by the motion picture industry;" and that the restrictions operated to increase the income of the distributors and of Interstate and to deflect attendance from later-run exhibitors who yielded to the restrictions to the first-run theatres of Interstate.

The court concluded as matters of law that the agreement of the distributors with each other and those with Interstate to impose the restrictions upon subsequent-run exhibitors and the carrying of the agreements into effect, with the aid and participation of Hoblitzelle and O'Donnell, constituted a combination and conspiracy in restraint of interstate commerce in violation of the Sherman Act. It also concluded that each separate agreement between Interstate and a distributor that Interstate should subject itself to the restrictions in its subsequent-run theatres and that the distributors should impose the restrictions on all subsequent-run theatres in the Texas cities as a condition of supplying them with its feature pictures, was likewise a violation of the Act.

It accordingly enjoined the conspiracy and restrained the distributors from enforcing the restrictions in their license agreements with subsequent-run exhibitors [6] and from enforcing the contracts or any of them. This included both the contracts of Interstate with the distributors and the contract between Consolidated and Paramount, whereby the latter agreed to impose the restrictions upon subsequent-run theatres in Texas and New Mexico served by it.

[*Grounds of appeal*]

Appellants assail the decree of the District Court upon three principal grounds: (a) that the finding of agreement and conspiracy among the distributor appellants to impose the restrictions upon later-run exhibitors is not supported by the court's subsidiary findings or by the evidence; (b) that the several separate contracts entered into by Interstate with the distributors are within the protection of the Copyright Act and consequently are not violations of the Sherman Act; and (c) that the restrictions do not unreasonably restrain interstate commerce within the provisions of the Sherman Act.

The agreement among the distributors

Although the films were copyrighted, appellants do not deny that the conspiracy charge is established if the distributors agreed among themselves to impose the restrictions upon subsequent-run exhibitors. *Straus v. American Publishers' Association* 231 U. S. 222; *Paramount Famous Lasky Corp. v. United States,* 282 U. S. 30. As is usual in cases of alleged unlawful agreements to restrain commerce, the government is without the aid of direct testimony that the distributors entered into any agreement with each other to impose the restrictions upon subsequent-run exhibitors. In order to establish agreement it is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators.

The trial court drew the inference of agreement from the nature of the proposals made on behalf of Interstate and Consolidated; from the manner in which they were made; from the substantial unanimity of action taken upon them by the distributors; and from the fact that appellants did not call as witnesses any of the superior officials who negotiated the contracts with Interstate or any official who, in the normal course of business, would have had knowledge of the existence or non-existence of such an agreement among the distributors. This conclusion is challenged by appellants because not supported by subsidiary findings or by the evidence. We think this inference of the trial court was rightly drawn from the evidence. In the view we take of the legal effect of the cooperative action of the distributor appellants in carrying into effect the restrictions imposed upon subsequent-run theatres in the four Texas cities and of the legal effect of the separate agreements for the imposition of those restrictions entered into between Interstate and each of the distributors, it is unnecessary to discuss in great detail the evidence concerning this aspect of the case.

The O'Donnell letter named on its face as addressees the eight local representatives of the distributors, and so from the beginning each of the distributors knew that the proposals were under consideration by the others. Each was aware that all were in active competition and that without substantially unanimous action with respect to the restrictions for any given territory there was risk of a substantial loss of the business and good will of the subsequent-run and independent exhibitors, but that with it there was the prospect of increased profits. There was, therefore, strong motive for concerted action, full advantage of which was taken by Interstate and Consolidated in presenting their demands to all in a single document.

There was risk, too, that without agreement diversity of action would follow. Compliance with the proposals involved a radical departure from the previous business

[6] The injunction against the double feature restriction excepted from its operation two distributors, and the agent of one of them, which had previously made a practice of including such a restriction in their license agreements.

practices of the industry and a drastic increase in admission prices of most of the subsequent-run theatres. Acceptance of the proposals was discouraged by at least three of the distributors' local managers. Independent exhibitors met and organized a futile protest which they presented to the representatives of Interstate and Consolidated. While as a result of independent negotiations either of the two restrictions without the other could have been put into effect by any one or more of the distributors and in any one or more of the Texas cities served by Interstate, the negotiations which ensued and which in fact did result in modifications of the proposals resulted in substantially unanimous action of the distributors, both as to the terms of the restrictions and in the selection of the four cities where they were to operate.

One distributor, it is true, did not agree to impose the restrictions in Houston, but this was evidently because it did not grant licenses to any subsequent-run exhibitor in that city, where its own affiliate operated a first-run theatre.[7] The proposal was unanimously rejected as to Galveston and Austin, as was the request that the restrictions should be extended to the cities of the Rio Grande Valley served by Consolidated. We may infer that Galveston was omitted because in that city there were no subsequent-run theatres in competition with Interstate. But we are unable to find in the record any persuasive explanation, other than agreed concert of action, of the singular unanimity of action on the part of the distributors by which the proposals were carried into effect as written in four Texas cities but not in a fifth or in the Rio Grande Valley. Numerous variations in the form of the provisions in the distributors' license agreements and the fact that in later years two of them extended the restrictions into all six cities, do not weaken the significance or force of the nature of the response to the proposals made by all the distributor appellants. It taxes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance.

Appellants present an elaborate argument, based on the minutiae of the evidence, that other inferences are to be drawn which explain, at least in some respects, the unanimity of action both in accepting the restrictions for some territories and rejecting them for others. It is said that the rejection of Consolidated's proposal for the Rio Grande Valley may have been due to the fact that the demand with respect to that territory differed materially from that directed to the six Texas cities. It is urged that the proposal for the Valley was that all pictures once shown in a first-run theatre with a 35 cents admission should not thereafter be exhibited in any city in the Valley for less than 25 cents admission, while the demand in behalf of Interstate with respect to the six Texas cities was that 'A' pictures, after a first-run in theatres charging 40 cents admission or more, should not thereafter be exhibited in the same city for less than 25 cents admission. But reference to the O'Donnell letter shows that both demands related to pictures shown in a first-run or 'A' theatre and were not in terms limited to subsequent-run exhibitions in the same city in which the first run had occurred. The record discloses no reason for the distinction taken between first-run theatres in the six cities charging an admission of 40 cents or more and those in the Valley served by Consolidated charging 35 cents, other than the fact that the cities there were smaller.

The trial court, interpreting the letter in the light of the whole evidence, which showed unmistakably that one purpose of both demands was to protect first-run houses from competition of subsequent-run houses, concluded that the substance of the proposals in one case as in the other was that the restrictions upon the subsequent-run theatres were to be imposed only in the same city in which the first run had occurred. We agree with its conclusion, but in any event since the demand made by Interstate was phrased as broadly as that made by Texas Consolidated, both as to the kind of pictures affected and the scope of the restriction, we can find no basis for saying that one was more limited in its essentials than the other, or that any explanation is thus afforded of the unanimous acceptance of the demands of Interstate in four of the six cities affected by the proposal, and the unanimous rejection of the demand of Consolidated. In the face of this action and similar unanimity with respect to other features of the proposals, and the strong motive for such unanimity of action, we decline to speculate whether there may have been other and more legitimate reasons for such action not disclosed by the record, but which, if they existed, were known to appellants.

The failure of the distributors to make any substantial changes in their business practices in dealing with exhibitors in Austin for the season 1934-35; their failure to unite in imposing the restriction as to admission prices in subsequent-run theatres in that city; and their failure to enter into the proposed restrictive agreement with

[7] See footnote 5.

Interstate for Austin, are likewise unexplained by any inferences to be drawn from the record. The facts that three of the distributors continued their established practice there, as elsewhere, of placing restrictions against double-billing in their license contracts; that the 25 cents admission restriction appeared in the Austin license agreements of one distributor for that year; and that certain of the distributors included the restrictions in their Austin license agreements in later years, do not militate against this conclusion. Taken together, the circumstances of the case which we have mentioned, when uncontradicted and with no more explanation than the record affords, justify the inference that the distributors acted in concert and in common agreement in imposing the restrictions upon their licensees in the four Texas cities.

This inference was supported and strengthened when the distributors, with like unanimity, failed to tender the testimony, at their command, of any officer or agent of a distributor who knew, or was in a position to know, whether in fact an agreement had been reached among them for concerted action. When the proof supported, as we think it did, the inference of such concert, the burden rested on appellants of going forward with the evidence to explain away or contradict it. They undertook to carry that burden by calling upon local managers of the distributors to testify that they had acted independently of the other distributors, and that they did not have conferences with or reach agreements with the other distributors or their representatives. The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. *Clifton v. United States,* 4 How. 242, 247. Silence then becomes evidence of the most convincing character. *Runkle v. Burnham,* 153 U. S. 216, 225; *Kirby v. Talmadge,* 160 U. S. 379, 383; *Bilokumsky v. Todd,* 263 U. S. 149, 153, 154; *Vajtauer v. Commissioner of Immigration,* 273 U. S. 103, 111, 112; *Mammoth Oil Company v. United States,* 275 U. S. 13, 52; *Local 167 v. United States,* 291 U. S. 293, 298.

While the District Court's finding of an agreement of the distributors among themselves is supported by the evidence, we think that in the circumstances of this case such agreement for the imposition of the restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy. It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce, which, we will presently point out, was unreasonable within the meaning of the Sherman Act, and knowing it, all participated in the plan. The evidence is persuasive that each distributor early became aware that the others had joined. With that knowledge they renewed the arrangement and carried it into effect for the two successive years.

It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. *Schenck v. United States,* 253 Fed. 212, 213, aff'd, 249 U. S. 47; *Levey v. United States,* 92 F. (2d) 688, 691. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. *Eastern States Lumber Association v. United States,* 234 U. S. 600; *Lawlor v. Loewe,* 235 U. S. 522, 534; *American Column Co. v. United States,* 257 U. S. 377; *United States v. American Linseed Oil Co.,* 262 U. S. 371.

The protection afforded by the Copyright Act to the contracts between Interstate and the distributors

The decree below enjoined enforcement and renewal of the separate agreements between each distributor and Interstate and of the contract between Paramount and Consolidated imposing the restrictions upon later-run theatres in certain cities in Texas and New Mexico, although the court found no conspiracy among the distributors to effect this latter restriction. Appellants assail this part of the decree on the ground that such separate agreements, if entered into without agreement or concert among the distributors, are a legitimate exercise of the monopoly secured to the distributors by their copyrights.

Under § 1 of the Copyright Act, 35 Stat. 1075, 17 U. S. C. § 1, the owners of the copyright of a motion picture film acquire the right to exhibit the picture and to grant an exclusive or restrictive license to others to exhibit it. See *Manners v. Morosco,* 252 U. S. 317. Appellants argue that the distributors were free to license the films for exhibition subject to the restrictions, just as a patentee in a license to manufacture and

sell the patented article may fix the price at which the licensee may sell it. *Bement v. National Harrow Co.*, 186 U. S. 70; *United States v. General Electric Co.*, 272 U. S. 476. That the parallel is not complete is obvious. Because a patentee has power to control the price at which his licensee may sell the patented article, it does not follow that the owner of a copyright can dictate that other pictures may not be shown with the licensed film or the admission price which shall be paid for an entertainment which includes features other than the particular picture licensed. Cf. *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*, 243 U. S. 502; *Carbice Corporation v. American Patent Development Corporation*, 283 U. S. 27; *Leitch Manufacturing Co. v. Barber Co.*, 302 U. S. 458.

We have no occasion now to pass upon these or related questions. Granted that each distributor, in the protection of his own copyright monopoly, was free to impose the present restrictions upon his licensees, we are nevertheless of the opinion that they were not free to use their copyrights as implements for restraining commerce in order to protect Interstate's motion picture theatre monopoly by suppressing competition with it. The restrictions imposed upon Interstate's competitors did not have their origin in the voluntary act of the distributors or any of them. They gave effect to the will and were subject to the control of Interstate, not by virtue of any copyright of Interstate, for it had none, but through its contract with each distributor. Interstate was able to acquire the control and impose its will by force of its monopoly of first-run theatres in the principal cities of Texas and the threat to use its monopoly position against copyright owners who did not yield to its demands. The purpose and ultimate effect of each of its contracts with the distributors was to restrain its competitors in the theatre business by forcing an increase in their admission price and compelling them through the double feature restriction to make their entertainment less attractive, and to preclude the distributors for the specified time from relaxing the pressure of the restrictions upon them.

The case is not one of the mere restriction of competition between the first showing of a copyrighted film by Interstate and a subsequent showing of the same film by a licensee of the copyright owner. The contract, when applied to the situation existing in the four Texas cities, had a more extensive effect. Both Interstate's first-run and second-run theatres in each of the cities regularly compete with the independent second-run theatres in those cities. Since all are in practically continuous operation during the season, competition between them extends to the exhibition of films furnished by different distributors including those of copyright owners shown by independents, which compete with those of other copyright owners shown at the same time by Interstate. Moreover, the provision in Interstate's contracts for the restriction against double billing stipulated for restraint upon competition with Interstate in the exhibition of films in the double bill in which neither Interstate nor the licensor had any interest by way of copyright or otherwise. The patent effect of the contract was to impose an undue restraint both as to admission price and the character of the exhibition upon competing theatre businesses habitually exhibiting the competitive pictures of different copyright owners. Through acceptance of its terms by the principal distributors the contract became the ready instrument by which Interstate succeeded in dominating the business of its competitors in the Texas cities. The fact that the restrictions may have been of a kind which a distributor could voluntarily have imposed, but did not, does not alter the character of the contract as a calculated restraint upon the distribution and use of copyrighted films moving in interstate commerce. Even if it be assumed that the benefit to the distributor from the restrictions is one which it might have secured through its monopoly control of the copyright alone, that would not extend the protection of the copyright to the contract with Interstate and to the resulting restraint upon the competition of its business rivals.

A contract between a copyright owner and one who has no copyright, restraining the competitive distribution of the copyrighted articles in the open market in order to protect the latter from the competition, can no more be valid than a like agreement between two copyright owners or patentees. *Straus v. American Publishers' Association, supra; Paramount Famous Lasky Corp. v. United States, supra;* see *Standard Oil Co. v. United States*, 283 U. S. 163, 174. In either case if the contract is effective, as it was here, competition is supressed and the possibility of its resumption precluded by force of the contract. An agreement illegal because it suppresses competition is not any less so because the competitive article is copyrighted. The fact that the restraint is made easier or more effective by making the copyright subservient to the contract does not relieve it of illegality. *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20.

Unreasonableness of the Restraint

The restrictions imposed on the subsequent-run exhibitors were harsh and arbitrary. As we have seen, they were forced upon the distributors and upon their custom-

ers as a result of the agreements entered into by Interstate with the distributors. Compliance with the restrictions was a uniform condition of exhibition of the films by subsequent-run theatres. There were wide differences in the location and character of the subsequent-run houses in the four Texas cities, which afforded basis for the corresponding differences in admission prices charged before the restrictions were adopted. Due to the practice of the distributors of establishing clearance periods between the first and each successive run, later runs are progressively less attractive. The poorer class of theatres, exhibiting the later runs, sometimes offered a double bill as an offsetting inducement for patronage. Despite these differences which normally affect the admission price that could be charged by subsequent-run theatres, the 25 cents admission price was to be required of all alike, forcing increases in admission price ranging from 25 per cent. to 150 per cent.

The trial court found that practically all of the later-run exhibitors who bowed to the restrictions would not have done so but for the compulsion of their need of showing the restricted pictures, and that the result was to increase the income of the distributors and Interstate and diminish that of the exhibitors who accepted the restrictions, by deflecting attendance from subsequent-run theatres to Interstate's first-run theatres. There was no testimony that such loss was offset by the higher admission price of the second-run theatres, and there was evidence that some of the poorer class of second-run theatres suffered loss of income by yielding to the restrictions. Some who did not yield were compelled to forego exhibition of the distributors' feature pictures. The effect was a drastic suppression of competition and an oppressive price maintenance, of benefit to Interstate and the distributors but injurious alike to Interstate's subsequent-run competitors and to the public.

The benefit, at such a cost does not justify the restraint. *Eastern States Lumber Association v. United States, supra,* 613; *Duplex Co. v. Deering,* 254 U. S. 443, 468; *Anderson v. Shipowners Association,* 272 U. S. 359, 363; *Bedford v. Stone Cutters' Association,* 274 U. S. 37, 47. It does not appear that the competition at which they were aimed was unfair or abnormal. Cf. *Appalachian Coals, Inc. v. United States,* 288 U. S. 344, 363, 372. The consequence of the price restriction, though more oppressive, is comparable with the effect of resale price maintenance agreements, which have been held to be unreasonable restraints in violation of the Sherman Act. *Dr. Miles Medical Co. v. Park & Sons Co.,* 220 U. S. 373; *United States v. Schrader's Son, Inc.,* 252 U. S. 85. Cf. *United States v. Trenton Potteries Co.,* 273 U. S. 392, 397, *et seq.*

[*Conclusion*]

We think the conclusion is unavoidable that the conspiracy and each contract between Interstate and the distributors by which those consequences were effected are violations of the Sherman Act and that the District Court rightly enjoined enforcement and renewal of these agreements, as well as of the conspiracy among the distributors.

Affirmed.

Mr. Justice FRANKFURTER took no part in the consideration or decision of this case.

[Dissenting Opinion]

[*Charges of bill*]

Mr. Justice ROBERTS.—I think the decree should be reversed. The bill charges that the two exhibitor defendants which were under the same management, knowing that subsequent run houses in Dallas, Houston, San Antonio, Fort Worth, Austin, and Galveston, the largest cities in Texas, and in Waco, Wichita Falls, Tyler, Amarillo, Texas, and Albuquerque, New Mexico, could not operate without the showing of feature films, in order to strengthen these two defendants' monopoly in first run exhibition of such feature films, and to monopolize the business of exhibiting feature films in second or subsequent run houses operated by them in those cities, conspired to notify the distributor defendants that, during the 1934-1935 season, and subsequent seasons, the latter must advise second and subsequent run exhibitors that such feature films could not be operated in second or subsequent run houses for less than twenty-five cents adult lower floor admission or as part of a double feature program and that, unless the distributor defendants would do so, the exhibitors would not maintain a night adult admission price of forty cents or more for the first run exhibitions of feature films licensed by the distributor defendants to them. The bill charged that, upon receipt of advices to this effect from the exhibitor defendants, the distributor defendants joined in the unlawful combination and conspired with the exhibitor defendants to place such restrictions in licenses to second or subsequent run exhibitors.

[*Stipulation of facts and evidence*]

The parties entered into a stipulation of facts, in lieu of evidence, binding upon them for the purposes of suit, and further agreed that any party might introduce additional relevant and material evidence bearing upon the issues "but not inconsistent with any fact contained in" the stipulation. Plaintiff and defendants introduced additional evidence. The testimony of second or subsequent exhibitors called as witnesses by plaintiff and defendants may be said to have been, in some respects, conflicting. The evidence offered by the plaintiff and the defendants with respect to the negotiations between the exhibitor defendants and the distributor defendants, and the conduct of the latter, was uncontradicted upon all points material to a resolution of the fact issues in the cause.

[*Findings of District Court*]

The District Court made ten findings (numbered from 12 to 21, inclusive) of subsidiary or

evidentiary facts and based upon these specific findings one conclusion of ultimate fact,—that the distributor defendants conspired amongst themselves to take uniform action upon the proposals of Interstate and conspired with each other and with Interstate to impose the restrictions requested by Interstate upon all subsequent run exhibitors in Dallas, Fort Worth, Houston, and San Antonio.

[*Appellants' contention*]

The appellants contend, and I think their contention is sound, that the subsidiary findings are insufficient to support the fact conclusion and that these subsidiary findings are, in a number of vital instances, contrary to, or unsupported by, the agreed statement of facts and, in other instances, are in the teeth of uncontradicted and unimpeached testimony.

[*Findings unsupported*]

Since this is a direct appeal from the District Court in an equity suit, and the findings are challenged, this court is bound to review them and to determine whether they have a proper basis in the evidence. I think such a review demonstrates the lack of support of the critical basic findings. No good purpose would be served by a detailed analysis of what I consider erroneous and unsupported findings. But I am of opinion that the findings ought not to stand and that the conclusion that there was a conspiracy, either between the distributor defendants or between them and the Interstate corporation, is unjustified. The opinion of this court accepts and closely follows these findings of fact but, while approving the conclusion of the District Court, finds it unnecessary to give detailed consideration to the appellants' challenge of the accuracy and sufficiency of the subsidiary findings, for the reason that it holds, as matter of law, on uncontradicted facts, that there were eight separate conspiracies unreasonably to restrain trade in interstate commerce in virtue of the agreement of each of the distributor defendants with Interstate to impose restrictions on subsequent run exhibitors in certain cities.

[*Privilege of Copyright Law*]

Separately considered, I think these agreements are not conspiracies contemplated by the Sherman Act and the holding that they are goes far beyond anything this court has ever decided. The distributor defendants are owners of copyrights on moving picture films. The copyright law gives them the exclusive privilege of licensing performances of the photoplays recorded. On the other hand, there are competing concerns whose copyrighted feature films are licensed for the purpose of production. In addition, there are copyrighted films of lower classes well known to the trade. These lower class films are usually licensed to houses that charge lower prices for first run exhibition than those charged by theatres showing feature films, and both the feature films, second and subsequent run, and other films of less attraction and less expensively produced, are exhibited by so-called second run houses. The latter pay a much reduced rate to obtain the feature films for exhibition in the same city after their original showing as feature films in first run houses. Many of the subsequent run houses charge low admission prices, and sometimes put on double bills.

Interstate is the largest licensee of first run feature films in Texas. It has many more first run houses than any other Texas exhibitor. Its first run houses are in the largest cities where the highest admission prices can be obtained. The distributors are, of course, interested in the conservation and protection of the necessarily high license fees which they must obtain for first runs of feature pictures. These are far higher than those received for the second showings of the same pictures in the same city. They naturally have to protect themselves and their licensees from the destruction of the good will and drawing power of these feature films in their first runs. In an effort to accomplish this, by requiring minimum admission charges and prohibiting double billing in subsequent runs of feature pictures, they may, of course, narrow the opportunity of second run houses to obtain feature pictures.

I agree that while the Copyright Act gives a distributor a so-called monopoly, that monopoly cannot be made the cover for a conspiracy to restrain trade or commerce.[1] But I think it obscures the issue to use the phrase "monopoly". What the copyright gives is much the same as what is conferred by the patent law.[2] The exhibition of a photoplay, were it not for the copyright law, would amount to a public disclosure and the use of the material would thereafter be open to the public. All the Copyright Act does is to create a form of property in the literary or artistic production of the author or artist. The Act attaches to the product of his brain certain attributes of property. One of these is the right of exclusive use similar to that attaching to physical property; another is the right to sell the production with consequent exclusive enjoyment in the vendee; another is the right to license others to use the product as one might lease or bail real or personal property. The monopoly, so called, amounts to no more than the attachment to the work of an author or composer or producer of motion pictures of the same rights as inhere in other property under the common law. Therefore, the standing of the distributor defendants toward their customers, as respects the productions proposed to be licensed, differs in no way from that of the owner of any other property toward those to whom he leases or licenses its use or sale.

[*Agreement against cut rate lawful*]

The decision of the court necessarily means that the owner of a product may not agree with an important customer that the former will not sell the product at a cut rate to the latter's competitors in the same city in which he conducts his business. The decision leads to the necessary conclusion that a manufacturer whose skill results in the production of apparatus of superior quality may not, in consideration of a price to be paid him for the bailment of that apparatus to certain users in a city, contract,

[1] *Straus v. American Publishers' Assn.*, 231 U. S. 222; *Paramount Famous Lasky Corporation v. United States*, 282 U. S. 30.

[2] See *United States v. Dubilier Condenser Corp.*, 289 U. S. 178, 186.

as an inducement to the users, that he will not bail the same apparatus at lower and destructive prices to his bailees' competitors in the same city. I think it has never been suggested that an agreement of the sort mentioned, restricted in time and place, amounts to a conspiracy in unreasonable restraint of trade or commerce. The right to make such agreements is essential to the realization of the full value of the property. It is conceded that the distributor defendants might grant exclusive licenses to Interstate, and that an exclusive license to Interstate would not constitute a conspiracy under the Sherman Act, or confer any cause of action on others who desired licenses in the same city; and this remains true however much such action by the licensor might injure the business of others seeking licenses.

[*Restrictions not unreasonable*]

I am of opinion that the restrictions in the licenses of second run exhibitors were not unreasonable restraints of commerce under the Sherman Act. There is no contention that the action of the distributor defendants discouraged competition between them either for the business of Interstate or for that of subsequent run licensees. The restrictions upon the latter were not intended to increase license fees paid by them or those paid by Interstate; they were imposed to prevent destruction of the good will which made possible the continued exhibition of first run feature pictures and to avoid decrease of the revenue from those pictures then and theretofore enjoyed under licenses to Interstate and other first run feature exhibitors. The reasonableness of the restrictions must be judged by the situation of the industry and the propriety of its protection from practices which would seriously injure it.[3] The question always is whether an agreement unduly restrains competition and, in applying this test, consideration must be given both to the intent and effect of the agreement in the light of realities.

[*Clearance without agreement lawful*]

It is settled that the proprietor of a copyright may grant an exclusive license; that is, may covenant with his licensee that he will not license anyone else, as the owner of a patent may grant a similar exclusive license to make or sell the patented article.[4] It is settled that the distributor defendants could lawfully stipulate with their licensees, whether first run or subsequent run, as to the admission price to be paid by patrons and that, so to do, would not be a violation of the Sherman Act.[5] But it is said that if, in order to protect its earnings from first run licenses by enabling its licensees to pay the demanded consideration, the distributor agrees to restrict in anywise the exhibition of the same feature by a subsequent run exhibitor he has violated the Anti-Trust Law. In the nature of things this cannot be true. The record discloses that the distributors have always provided a so-called "clearance" between the first run and subsequent runs of feature pictures. By this is meant that the distributors refuse to license a subsequent run theatre to show such a feature until the expiration of a given number of days or months after the picture has been shown in a first run house. This is a perfectly natural procedure and one obviously required to protect the value of the first run license. Under the decision here, however, if a distributor should agree with a first run house that if it will contract for a given feature picture at a given price the distributor will impose a clearance on second run houses this would be a conspiracy in restraint of trade. Other restrictions tending to preserve the value of the first exhibition of a feature picture such as those challenged in this case are just as necessary and I suppose, in the absence of agreement would be held just as lawful as the restriction known as a clearance.

The opinion of the court recognizes that a distributor may lawfully agree that its exhibitor licensee shall have the exclusive right to exhibit a copyrighted play but condemns the agreements here in controversy although a much less drastic restraint respecting licenses to subsequent run exhibitors results from the provision for licenses with a restriction as to price and as to double billing.

[*Protection of property rights lawful*]

Once the property rights conferred by the Copyright Law are recognized it must follow that the principles governing the right to use, sell, or turn to account other forms of property are equally applicable here. We have often held that a contract containing a covenant in restraint of trade is valid if the restraint is reasonably necessary for the protection of the right granted by the owner of the property. Examples of such lawful contracts are those by which the vendor of a business sold as a going concern agrees that for the protection of its value he will for a period of years refrain from engaging in the same business in a prescribed territory;[6] and those by the vendor with the vendee of an article to be used in business or trade that it shall not be used so as to interfere with the vendor's business;[7] which are held not to offend the Sherman Act if the prohibition has a reasonable relation to the value of the business of the vendor.

[*Knowledge of acts of others*]

The Government stresses the fact that each of the exhibitors must have acted with knowledge that some or all of the others would grant or had granted Interstate's demand. But such knowledge was merely notice to each of them that if it was successfully to compete for the

[3] *Appalachian Coals, Inc. v. United States,* 288 U. S. 344, 358, 359, 360, 362. Compare *Chicago Board of Trade v. United States,* 246 U. S. 231, 238.

[4] *Manners v. Morosco,* 252 U. S. 317; *Bement v. National Harrow Co.,* 186 U. S. 70.

[5] *United States v. General Electric Co.,* 272 U. S. 476, 488-490; *Standard Oil Co. v. United States,* 283 U. S. 163, 179.

[6] *Cincinnati Packet Co. v. Bay,* 200 U. S. 179; *Oregon Steam Navigation Co. v. Winsor,* 20 Wall. 64, 67.

[7] *Fowle v. Park,* 131 U. S. 88; *Board of Trade v. Christie Grain & Stock Co.,* 198 U. S. 236, 250, 252; *Moore v. New York Cotton Exchange,* 270 U. S. 593; *United States v. General Electric Co.,* 272 U. S. 476; *United States v. Addyston Steel Co.,* 85 Fed. 271.

first run business in important Texas cities it must meet the terms of competing distributors or lose the business of Interstate. It could compete successfully only by granting exclusive licenses to Interstate and injuring subsequent run houses by refusing them licenses,—a course clearly lawful,—or by doing the less drastic thing of agreeing to protect the good will of its pictures by putting necessary and not severely burdensome restrictions upon subsequent run exhibitors, which I think equally lawful.

[*Concurring justices*]

Mr. Justice McREYNOLDS and Mr. Justice BUTLER join in this opinion.

[¶ 55,206] The Goodyear Tire & Rubber Co. v. Federal Trade Commission.

United States Circuit Court of Appeals, Sixth Circuit. Decided February 16, 1939.

Petition to review an order of the Federal Trade Commission.

The Federal Trade Commission is without authority to order the discontinuance of price differentials between goods sold to a mail order system and goods purchased by independent dealers where the differentials are reasonably based on quantity, and findings of fact, that the differentials are improperly based and constitute discrimination within the prohibition of the Clayton Act, are not conclusive in the absence of a recognized standard for the appraisal of discriminations on account of quantity without relation to savings in cost.

Setting aside Federal Trade Commission order in Dkt. 2116.

Before HICKS, SIMONS and HAMILTON, Circuit Judges; HAMILTON, Circuit Judge, dissenting.

[*Counsel*]

Argued by: Grover Higgins, Cleveland, Ohio.
On Brief: Newton D. Baker, Grover Higgins, Chapman Rose, Cleveland, Ohio; for the Petitioner.

Argued by P. B. Morehouse, E. F. Haycraft, Washington, D. C.
On Brief: W. T. Kelly, Martin A. Morrison, Everett F. Haycraft, Pgad B. Morehouse, James W. Nichol, Washington, D. C.; for the Respondent.

[*Statement of the case*]

SIMONS, Circuit Judge. The cease and desist order sought to be reviewed charges the petitioner with violation of § 2 of the Clayton Act by discriminating in the price of tires between those sold in interstate commerce to Sears, Roebuck & Company on the one hand and to dealers on the other, with the effect of lessening competition and tending to create a monopoly in their manufacture and distribution.

[*History of the proceedings*]

The case is here for the second time. At the first hearing, upon learning that the offending practices of the petitioner which led to the order had been discontinued under compulsion of the amendment to § 2 of the Clayton Act made on June 19, 1936, by the Robinson-Patman Act (U. S. C. A. Title 15, § 13), and with complete comprehension of the rule that discontinuance of a condemned practice constituting a violation of the act does not render a controversy moot where the offender by the mere exercise of volition may resume them, *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 309, 310, and other cases, yet conceiving ourselves bound by the decision and reasoning in *United States v. Hamburg-Amerikanische Co. etc.*, 239 U. S. 466, and by the analogy of present circumstances to those there adjudicated and the relief there granted, held the controversy moot, set aside the order, and remanded the case, but without direction to dismiss the complaint and without prejudice to the filing of a supplemental complaint under the amended law. *Goodyear Tire & Rubber Co. v. Federal Trade Commission*, 92 Fed. (2d) 677. Neither side supporting our view, the Supreme Court, without indicating departure from the rule announced in the *Hamburg-Amerikanische* case, without pointing to aught inapposite in our analogy or citing the reference, reversed. *Federal Trade Commission v. Goodyear Tire & Rubber Co.*, 304 U. S. 257. Upon its remand the cause is before us for decision upon the merits after full reargument.

[*Price discrimination under Clayton Act*]

As indicated in our former opinion, the controversy involves principally an interpretation given by the Commission to § 2 of the Clayton Act. That section declares it to be unlawful to discriminate in price between purchasers of commodities where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce, subject to the proviso:

"That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition."

The petitioner contends that a discrimination in price is permitted if based upon the quantity of the commodity sold, without respect to whether it makes only due allowance for difference in cost of selling or transportation. The Commission contends that while the proviso permits discrimination on account of differences in quantity such discrimination is not permitted unless reasonably related to and approximately no more than the difference in cost, and that a price discrimination is contrary to § 2 unless it can be shown that it represents and fairly approximates lower costs.

[*Alleged discrimination*]

Prior to 1926 the large mail order house of Sears, Roebuck & Company, with retail stores in many cities of the United States, bought its tires from one or more small manufacturers. Though doing a much larger general business than its principal competitor, Montgomery, Ward & Company, its tire business failed to keep pace with that of the latter. It set about to improve this condition by changing the personnel of its tire department and inaugurating a vigorous advertising campaign, and sought Goodyear as a source of tire supply. Its first contract with Goodyear in 1926 covered its requirements for a period of three years. The price was cost of manufacture plus a profit of 6% later adjusted in some instances to 6½%. Sears was to do its own advertising and to sell the tires under trade-names of its own. In May, 1928, a second contract was concluded covering requirements to December 31, 1932, but terminable on that date by a year of advance notice. In the summer of 1931 Sears, signifying its intention to terminate, a new arrangement was made by which a ten year contract was entered into upon Goodyear paying to Sears a consideration in cash and common stock amounting to $1,250,000. Like preceding arrangements, the contract called for a price of cost plus profit.

Under its several contracts with Sears, Goodyear manufactured and sold to Sears during the eight-year period, 1926-1933, more than 19,000,000 tires, for which Sears paid to it a gross sum of $129,252,984, and a net sum of $116,359,367. The Commission made an exhaustive study of the cost of tires sold by Goodyear under the Sears contracts and that of tires sold to its independent dealers upon a similar volume of business. It found that based upon the profit and loss statement of Goodyear adjusted as the result of such study, Goodyear realized on its sales to Sears during the entire period a total net profit of $7,715,794.56, and on its sales of equal volume to service-station dealers a net profit of $20,425,807.21. The difference of $12,710,012.65 in net profit it found to be the aggregate net price discrimination not accounted for by differences in cost of transportation and selling according to the respondent's own calculations and based upon the method which it itself suggested. It concluded that this price discrimination in favor of Sears against independent service-station dealers was not justified by differences in cost of transportation or selling. Conceding that quantity discounts are exempt because they involve some economic utility that should be preserved, the Commission asserts that the quantity exception does not permit price discrimination without limit or restraint, that while a difference in quantity of the commodity sold must be given reasonable weight in determining whether the discriminatory price is warranted, yet in arriving at a price on account of quantity it is necessary that the difference in price be reasonably related to the difference in cost, though remote and unsubstantial differences in cost may be disregarded.

[*Petitioner's contentions*]

The petitioner, conceding that price discrimination on account of quantity does not mean discrimination without limit, denies that such discrimination must be based on difference in cost or be reasonably related to such difference. It points to the value to Goodyear of the Sears requirements in removing hazard and insuring stability, the avoidance of profit fluctuation inevitable in its other business, and the casting upon Sears of the risk which Goodyear normally bore of raw material price decline and credit losses. It asserts that these advantages, over and above mere savings in costs, are substantial and real, even though they may not readily be measured in terms of dollars, and that the statute by its language permits a discrimination that will measure economic advantage of quantity sales beyond mere savings in cost.

[*Argument of the Commission*]

The Commission dismissed from its consideration all intangible economic advantages of quantity sales over and above savings in cost as being too speculative and remote to justify price discrimination. Accepting the finding that the $12,000,000 difference in profit between tires sold to Sears and an equal volume of business with inde-

pendent dealers measures its discount in excess of savings, the petitioner points out that this discrimination amounts to but 6.96% of the gross price to Sears. The Commission's counsel, however, contends that this calculation is erroneous, in that the profit differential should be related not to the gross selling price of tires to Sears but to the cost of their manufacture, and that so computed the discrimination not accounted for by savings is 11.89%. So it is argued on the one hand that the discrimination on account of quantity is reasonably related to the economic advantages of quantity sales in the volume made to Sears and on the other that discrimination on account of quantity even if permitted by the statute is too great to be so related.

[*Construction of Clayton Act*]

Primary consideration must necessarily be given to the meaning of § 2 of the Clayton Act. It will be observed that by the proviso, nothing contained in the section is to prevent discrimination in price between purchasers of commodities (1) "on account of differences in the grade, quality or quantity of the commodity sold," or (2) "that makes only due allowance for difference in the cost of selling or transportation," or (3) "discrimination in price in the same or different communities made in good faith to meet competition." With the third exception of the proviso we are not concerned, and as to the meaning of the second exception there is no dispute. It is conceded that there may be a discrimination in price based upon quantity, but the Commission would read the second exception as a limitation or qualification of the first. We see no warrant for such construction and the structure of the proviso as well as the history of the section repel it.

The three exceptions of the proviso would seem to be mutually exclusive. If the second qualifies and limits the first, the word "quantity" in the first exception appears to be redundant. Mindful of the rule that statements in debate are of doubtful aid to the construction of the statute, yet when there is common agreement throughout the consideration of legislation such agreement may properly be considered in determining its purpose. *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 650; *Humphrey's, Executor v. United States*, 295 U. S. 602, 624. The history of § 2 of the Clayton Act, both before and after its passage, its subsequent amendment by the Robinson-Patman Act, so that the phrase dealing with differences in quantity reads, "That nothing herein contained shall prevent differentials . . . which make only due allowance for differences in the cost of manufacture, sale and delivery, resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered," point with greater than usual persuasiveness not only to its original purpose but to subsequently discovered infirmities, in the light of matured views upon the necessity of further regulation.

[*Legislative history*]

In its report of the Clayton Bill to the House of Representatives, the House Judiciary Committee made it clear that its primary purpose was to reach the practice of destroying competition in certain sections by lowering prices below cost and thereafter recouping such losses at the expense of the general public when monopoly had been achieved. The Senate Committee adopted the report (Cong. Record, Vol. 51, p. 15857). In the House it was pointed out by Mr. Webb in charge of the bill (ibid., p. 9072), that the practice of giving a cheaper rate to the purchaser who buys in wholesale lots was a business necessity that the Committee did not feel warranted in trying to disturb. When it was objected that this would allow great mail order houses to buy in enormous quantities and so to retain the great advantages they had always had, it was suggested that a section be drawn to correct that evil, but no such amendment was incorporated in the Act. The Clayton Act was passed in 1914, but until the present investigation began the Commission never assumed it had the power to prohibit price discrimination on account of quantity when unrelated to differences in cost. In 1928 Senate Resolution 224 directed the Commission to undertake an inquiry into the chain store system of marketing and distribution. Its final report was filed December 14, 1934 (Senate Document No. 4, 74th Congress, first session). In it the Commission indicated that lower selling prices were a very substantial if not the chief factor in the growth of chain store merchandising, and specifically discussing § 2 of the Clayton Act (p. 97), said:

> "That unless the price discrimination permitted 'on account of' quantity shall make 'only due allowance' therefore, § 2 of the Clayton Act may be readily evaded by making a small difference in quantity the occasion for a large difference in price. If the section is to have any vitality it must either be interpreted and enforced to that effect or it should be amended to that effect."

In its annual report for the year ending June 30, 1935, the Commission recommended the enactment of a law forbidding a seller "to discriminate unfairly or unjustly in price between different purchasers" or else a law "to clearly define the discrimination in price intended to be forbidden." Quite promptly bills were concurrently introduced into the

House and Senate, each of which eliminated the proviso of the old § 2 and substituted the language we have already recited. The two bills were consolidated under the style of the Robinson-Patman Bill, and as consolidated enacted into law June, 1936, with amended § 2 unchanged. In reporting the bill, the House Judiciary Committee (Report 2287, 74th Congress, second session), said:

". . . present § 2 of the Clayton Act places no limit upon quantity differentials of any kind. . . . This proviso is of great importance for . . . it also limits the use of quantity price differentials to the sphere of actual cost differences. . . . In the above exemption the phrase 'which makes only due allowance' is carried over from the present Act, but as coupled with the remainder of the clause, is here extended to limit quantity differentials to differences in cost of manufacture, sale and delivery as provided in said sub-section 2."

In the report of the Senate Judiciary Committee (1502), it was said, "The weakness of present § 2 lies principally in the fact that (1) it places no limit upon differentials permissible on account of differences in quantity. . . ."

[*Consultation of Congressional reports*]

We defer to the rule that when the meaning of an Act of Congress is plain on its face there is no occasion to resort to the reports of Congressional Committees concerning it, *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, and it seems to be clear that § 2 of the Clayton Act permits discrimination in price on account of quantity without relation to savings in cost, and that the distinguishing phraseology employed in the two exceptions must not be ignored. But if in the light of the Commission's own change of view as to its meaning we assume it to be necessary to resort to extrinsic aid to ascertain it, it is made clear by the declaration of the several Committees of the Congress and the history of the section, that the amendment incorporated in the Robinson-Patman Act marks a change in the law and not mere clarification. So concluding we deem the order of the respondent erroneous insofar as it is necessarily based upon a construction of the law, which limits discriminations in price on account of quantity to approximate savings in cost.

We do not find anything in the case of *American Can Co. v. Ladoga Canning Co.*, 44 Fed. (2d) 763 (C. C. A. 7), to conflict with this view. There was in that case direct and substantial evidence that the discriminations there involved were not in good faith made on account of differences in quantity, and that the contention that they were so made was an afterthought first conceived when the case went to trial. There is no such factual situation here.

[*Findings of excess differentials*]

The Commission's counsel insist that even though the Commission is wrong in its construction of § 2, it found as a fact that the excess differential of $12,000,000 on tires sold to Sears over the price to independent dealers on a similar volume of business was not on account of quantity, and that this finding is based upon substantial evidence and so conclusive upon us. The contention requires analysis. We may say at once that it is not a sufficient answer to say, as does the petitioner, that Mr. Litchfield of the Goodyear Company testified that such differential was in good faith made on account of quantity after detailed consideration of the survey and report of experts, and his testimony stands unimpeached, for as we have frequently said, the persuasiveness of evidence may upon occasion be destroyed by analysis even though uncontroverted.

It is urged that the finding that excess discrimination was not on account of quantity is supported by evidentiary facts, including the fact that prices did not vary according to the varying volume of the Sears business, that there was no quantity commitment in the Sears' contracts, and that the discrimination was proportionally greater than that allowed dealers in view of the economic principle that at some point saturation must be reached beyond which no increase in quantity would justify an increase in discount. These evidentiary circumstances do not of themselves, however, sustain an ultimate finding that the differential was not on account of quantity. The lack of a definite commitment when the contract was for Sears' entire requirements, less minor checking orders, the failure of the price to rise and fall concurrently with the rise and fall of quantity shipments, and the lack of relation between the discount to Sears and the gradations of discount to independent dealers, are all inherent in the nature of a cost-plus agreement of such unusual volume as was expected to and did result from the Sears business, for the evidence discloses that it was from thirteen to thirty-six times the volume of that of Goodyear's largest independent customer.

[*Findings based upon error in law*]

All this aside, however, it seems perfectly clear that the findings and conclusions of the Commission that the discrimination in price was not on account of quantity, were all based upon the Commission's interpretation of the law. This permeated all of its discussion and controlled its evidentiary findings and its ultimate conclusions. Sec-

tion 17 of the Commission's findings dealing with the present question is a composite of evidentiary facts, reasoning and conclusion. Without denying that there are economic advantages in dealing with a large customer on the basis of hazard, the stabilizing of production and profit and other factors not translated into dollar and cents advantage, it is determined without pretense of appraising such advantages that they are too speculative, intangible and remote to justify a price discrimination. It is further determined that the discrimination was not a quanity discount as customarily understood in the trade, because the Commission, weighing the testimony of expert economists pro and con, concluded that quantity discounts not justified on approximate savings are in that field considered as a form of price cutting, and so condemned by the law. The conclusion is inescapable that any discrimination in price exceeding by more than a negligible amount a due allowance for differences in cost must have brought about the same result. The Commission found no standard in the law by which a discrimination on account of quantity unrelated to savings in cost is to be judged. There is therefore no finding that the petitioner's differential, whether it be 6.96% or a greater percentage, is not on account of quantity because such discrimination is not permitted and may not be judged by a non-existent standard. Once a discrimination is found unrelated to savings in cost, it is ipso facto to be condemned. So is there not only a misconstruction of the law, but a refusal to recognize a standard of judgment not based on such misconstruction and so impossibility of its application to the facts, if rightly construed.

[*Conclusion*]

Applicable in this connection is the language of the court in *Raladam Company* case, *supra:* "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers nor can they be created by the courts in the proper exercise of their judicial function." We conclude that the Commission had no power to command discontinuance of price differentials reasonably based on quantity, and there is no finding which properly construed determines that those here involved are not so based, since no standard for the making of such finding is recognized.

[*Order vacated*]

The order of the respondent is set aside.

[Dissenting Opinion]

Judge HAMILTON (dissenting).

I am unable to concur in the majority opinion. With all due regard to, and respect for, the legal ability of my associates I believe they have included in the proviso of the statute a case that lies beyond its direct expression and not within its letter or spirit.

This statute should be construed in the light of attendant conditions and the state of the law at the time of its enactment and applied to carry out the intention and meaning of the legislature gleaned from its language. A proviso which operates to limit the application of the general provisions of a statute should be strictly construed to include no case not within its letter. The last rule is especially applicable to the case here under consideration.

A proviso may be used as a guide in the selection of one or the other of two possible constructions of words or phrases found in a statute doubtful in scope, but to read into it a meaning not comprehended by the enactment itself and contrary to its terms, makes it an instrument of discrimination and defeats, rather than clarifies, legislative intent.

Usually provisos find their way into statutes at the behest of persons who are unreasonably apprehensive as to their effect and by those who wish to obtain immunity from their terms. They are the favorite instrument of lobbyists and those who desire to escape the effect of general provisions of a statute applicable to a large class. Having put in a proviso which in many instances is needless, in order to satisfy the persistent and allay a particular class, courts are sometimes led to construe it as to relieve of liability those plainly within the scope of the statute and impose liability on those not so apprehensive of its effect or so diligent to protect their interests.

The problem of monopolies has engaged the attention of organized society for centuries. The first regulatory statute was passed in England in 1624, making all illegal except such as might be authorized by Parliament in respect to new manufacturing enterprises carried on by corporations or companies. The proviso in this statute was used as an excuse for subsequent transgressions of the act and so it is that provisos have since been an avenue of evasion.

A private monopoly is indefensible and intolerable. To this principle all agree. The first Federal law on the subject was passed in 1890 (26 Stat. 209). It was designated An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies and was passed as the result of widespread and vehement popular insistence that something be done to curb the growing tendency toward concentration of industry to the disadvantage of both the consumer and small producer. It declared illegal "every contract, combination in the form of trusts or otherwise or conspiracy in restraint of trade or commerce among the several states or with foreign nations," and that "every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade, or commerce among the several states" violates the act.

Efforts to eliminate restraints or attempted restraints of competition were carried on by the United States under this act for twenty-four years. Its success fluctuated with the courts' interpretation of what the words and phrases of the act meant. There was difficulty in applying such vague terms as "contracts in restraint of trade" and "attempts to monopolize" when the question arose as to the applicability of these terms to concrete situations. The tendency toward industrial concentration continued unabated which resulted in the disappearance of small units of production and brought forth two paradoxical types of economic restraint; one, no competition; the other, ruinous competition. President Wilson, in his message to the Sixty-third Congress, said:

"We are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limit of which experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain."

Such was the historic background and the motives which moved the framers of the legislation which was passed as The Federal Trade Commission Act and the Clayton Anti-Trust Act of 1914 which concerns us here. *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 22.

A study of the debates upon these measures in Congress clearly shows the intent to declare illegal all practices regarded as likely to promote monopolies thus forestalling an evil before its development.

During the course of the debates, Senator Walsh, of Montana, in referring to the Clayton Act, said:

"The purpose of the legislation of which the pending bill forms a part is to preserve competition where it exists, to restore it where it is destroyed and to permit it to spring up in new fields." Congressional Record, Oct. 5, 1914, —Vol. 51, p. 16.

While the Federal Trade Commission Act and the Clayton Act were passed separately they were considered by Congress concurrently, reference to the other being frequently made in the course of the debates on each, and they should be understood as complementary attempts to promote our government's basic concept of economic equality.

In the Federal Trade Commission Act, the Congress attempted to set up a permanent body of trained personnel whose duty it was to safeguard and promote competition in industry. The companion Clayton law was entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and For Other Purposes." Section 2 of the Act (U. S. C. A. 15, Sec. 13) provides:

"Sec. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption or resale. . . . Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: And provided, further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

Respondent found, and the facts conclusively show, that petitioner has violated the above section unless exempt under the proviso. Bearing in mind the rule of interpretation heretofore announced that the intention of the legislature is controlling, the single question in the case is what is meant by the expression "discrimination in price between purchasers of commodities on account of difference in grade, quality or quantity."

The Commission finds, and the undisputed evidence shows, there was no difference in grade or quality between the tires petitioner sold to its dealers generally and those sold to Sears-Roebuck & Company, so the single issue is the true construction of the phrase "on account of the difference in quantity." It is a rule of universal application that words or phrases in a statute must be construed to carry out the manifest intent of the Congress and in all cases they should be construed in the sense which best harmonizes with the context and promotes to the fullest extent the desired objective.

Every technical rule as to the construction or force of particular terms must yield to the clear expression of the paramount will of the legislature and the words and phrases of a statute will be construed in their ordinary sense, and with the meaning commonly attributed to them in the ordinary business affairs of life. *Sproles v. Binford*, 286 U. S. 374, 397.

Excluding the proviso in the statute here, every discrimination in price between different purchasers is prohibited. It was not intended that the prohibition should be cancelled by the proviso. Such an interpretation would lead to an absurdity and if the rule of liberality applied in the majority opinion is applicable to the proviso, it sets up a method of evasion not intended by the Congress. For the reasons heretofore pointed out, a proviso must be strictly construed.

The Congress intended to maintain competitive prices, which means those resulting from the activities of many buyers and sellers, each of whom can affect the outcome only by buying or selling large or small quantities according as the price is at one point or another. It intended to proscribe monopoly prices which are those fixed with a view to the advantage of the purchaser or seller by a single (exclusive) seller or buyer or by a combination of sellers or buyers acting as a unit. Monopolistic prices are always possible when a seller is able to deal differently with the same classes of buyers of the same product or to manage in some other way to sell his goods in virtually separate markets. Recognizing this practice and in order to suppress monopolies at their inception, the Congress penalized sales of the same article to different customers at different prices.

If the contract between the petitioner and Sears-Roebuck falls within the definition of the term "monopolistic prices" above outlined, there

is a violation of the act regardless of difference in quantity, because the transaction is what is commonly known in ordinary business affairs as fixing a discriminatory price and by a device having the monopolistic tendency denounced by the Clayton Act.

The rule to be followed in the construction of statutes relating to commercial transactions is that the descriptive terms applied to articles of commerce shall be understood according to the acceptation given them by commercial men doing business in our country at the time of the passage of the act in which they are found.

Under this rule the expression "discrimination in price between purchasers of commodities on account of difference in grade, quality or quantity of the commodity sold" must be construed in the light of business practices in this regard at the time of the passage of the act. The testimony in the record of those familiar with the industry shows that quantity discounts on account of tire purchases are relatively small and based upon certain definite and known volumes of purchases none of which have any resemblance to the transaction between petitioner and Sears-Roebuck & Company. This being true the acts of the petitioner bring it within the general provisions of the anti-trust laws and exclude it from the protection of the proviso therein.

The statutes here in question do not require the adventitious aid of subsequent kindred legislation for the purpose of elucidation. "In other words, where Congress has expressly legislated in respect to a given matter that express legislation must control in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation." *Rosencrans v. United States*, 165 U. S. 257, 264. It is the primary duty of courts to interpret the meaning of statutes and a resort to contemporaneous or executive construction is both unnecessary and improper where the language used is clear or its meaning can be ascertained by the use of intrinsic aids alone. *Bates v. Payne*, 194 U. S. 106, 112; *United States v. Missouri Pacific Railroad*, 278 U. S. 269, 282.

The mere failure of public officers charged with the public duty to enforce statutes against odious monopolies or their acquiescence in the conditions that permit them to flourish should not be allowed to stand in the way of the administration of such laws or be construed to estop more diligent and efficient public officials when they attempt to terminate monopolistic practices and tendencies.

I am of the opinion the order of the Commission should be upheld.

[¶ 55,207] Ira W. Minter and Clayton A. Minter, individually and as co-partners doing business under the firm names and styles of Minter Brothers and Douglass Candy Company, v. Federal Trade Commission.

United States Circuit Court of Appeals for the Third Circuit. February 14, 1939

A petition for review of a Federal Trade Commission order prohibiting assembling of candy so that it could be sold by lottery, and prohibiting furnishing of dealers with punch boards or other lottery devices, is dismissed.

Before Biggs, Clark, and Buffington, Circuit Judges.

Affirming Federal Trade Commission order in Dkt. 3138.

[*Counsel*]

Counsel for petitioners: David H. Kinley, Philadelphia, Pennsylvania.

Counsel for respondent: W. T. Kelly, Washington, D. C.

[*Practices previously condemned*]

Clark, Circuit Judge. This case seems to us a futile continuation of earlier litigation. The trade practices of these petitioners have already been expressly condemned in a unanimous opinion of the United States Supreme Court, *Federal Trade Commission v. Keppel & Bro.*, 291 U. S. 304, February 5, 1934. As the high court there adopted, or rather amplified, the view of the then minority of this court, we can be supposed to be thoroughly familiar with the holding.

[*"Break and take" method*]

The particular practice whose ceasing and desisting was there and here ordered is known in the marts of commerce as selling by "break and take" (pick and take, draw deals, punch cards and punch boards) rather than by "straight goods" packages. The nomenclature furnishes a clue to the disapproval both of the judicial bodies and encouragingly of the "better element" of the trade itself.

The "break and take" method is the sale of merchandise (or amusement as in the case of motion picture bank nights, 12 Wisconsin Law Review 251, 17 Boston University Law Review 238), by the inducement of a lottery. The customer does not buy only a chance represented by a ticket, he pays for a chattel and a chance for another unpaid for chattel, the ticket being the opportunity for fortuitous selection of a differentiated article. It is, so to speak, a lottery with trimmings, and one might observe that a lottery by any other name will smell as bad.

[*Sales to children*]

This selling by lottery seems to have prevailed largely where it least should have prevailed, namely, in the sale of penny candy to little children. The Federal Trade Commission's brief cites eighteen of these candy cases initiated by it and sustained by the Circuit Courts of Appeal and the United States Supreme Court since the rejection of the *Keppel* case above cited. These cases are collected in the notes to Section 45 of Title 15, U. S. C. A. on pages 66-75 of the Supplement, and see note 5 of 43 Yale Law Journal 1339. See also *In the matter of Boyd Houser Candy Company* and *In the matter of The Newton Products Company,* Vol. 4 Federal Register, No. 27, p. 607. It has not always been so limited. As long ago as 1918 we find the Federal Trade Commission prohibiting the sale of tea and coffee with coupons for prizes concealed in certain packages, *Buddha Tea Co.,* 1 F. T. C. 159 (1918), *Everybody Mercantile Co.,* 3 F. T. C. 60 (1920), and only recently the commission was sustained in its objection to the sale of silk stockings by punch cards, *Chicago Silk Co. v. Federal Trade Commission,* 90 F. (2d) 689 (C. C. A. 1937), cert. den. 302 U. S. 753 (1938). And see also as to the sale of gas and oil an injunction by competitor, *Jones v. Smith Oil & Refining Co.,* 15 N. E. (2d) 42 (1938), 29 Journal of Criminal Law and Criminology 598.

The petitioners and the other practitioners of this type of merchandising have followed that ancient precept of the sea, "women and children first", except that they pervert instead of protect weakness. Taking candy from children has never been highly regarded. Forcing it upon them through their possession of an instinct that the adult world recognizes and has always recognized as at the bottom of many of its troubles, seems to us shameful. We have rarely seen of a more unpleasant example of commercial cynicism than is disclosed by the testimony of the petitioners' president, Ira W. Minter:

"Q. In your opinion, Mr. Minter, is this form of advertising injurious to the public?

"A. The public benefits by it.

"Q. In what way would you say the public benefits by it?

"A. By getting additional value for the purchase of the particular goods that it is being offered with." Record, p. 148.

The "benefit" and "additional value" so euphemistically referred to, is our old friend "something for nothing," the consequences of too enthusiastic pursuit of which are known to judges in their official capacities.

[*Alleged distinctions from Keppel case*]

In view of the controlling decision of the Supreme Court in *Federal Trade Commission v. Keppel & Bro.,* above cited, any extended discussion of the law is inappropriate. Petitioners attempt three distinctions. Two of them touch upon the judicial history of its interpretation. They say, first, that the Federal Trade Commission has no statutory power because the whole candy manufacturing business is infected with the "break and take" virus. In the light of the sentiments we have just expressed, we should be loath to believe this of any body of business men. Happily we do not have to. First, the witnesses making this depressing assertion, Minter and Coughlin, the president and candy broker of the petitioners are somewhat interested. Second, it is flatly contradicted by two other candy manufacturers called by the Commission, Voneiff, p. 39 and Roskamm, p. 102. Although the latter's business reformation was not altogether voluntary (cease and desist order), he did not limit himself to his own business but referred to earlier and, to him, more Halcyon days in the trade generally, saying:

"In the days when break and take were so actively sold in a much larger volume than they are today, we used to receive constant requests from our salesmen, wanting to know why, if other firms could make these packages, we would not make them, and advised us that in many instances their customers were buying a general line of merchandise such as ours, from sources who could supply them with break and take, and vigorously demanded therefore that we also give them a similar assortment to do business with so that they can get their normal share of the distribution and earn their pro rata commission." Record, p. 102.

The Commission's finding, paragraph 6, Record pp. 200-201 is supported by evidence and is by well-settled law conclusive, *Federal Trade Commission v. Algoma Lumber Co.,* 291 U. S. 67, 73 (January 8, 1934), *Federal Trade Commission v. Standard Education Society,* 302 U. S. 112, 117 (November 8, 1937).

[*Trend toward protection of consumer*]

Even if this had not been so and if the entire penny candy trade, had indulged in the practice alleged to be obnoxious, we believe the present trend of decision under section 45, Title 15, U. S. C. A. supports the order. That trend is away from the requirement of injury to a particular competitor and toward the protection of the general consumer.

The direction of that judicial current depends, of course, upon the construction of a very general word "competition". The issue is whether it may be construed to include situations where the practices to be struck down are rife in an entire in-

dustry, Jurisdiction of Federal Trade Commission Over False Advertising, 31 Col. Law Rev. 527, or whether the Commission can only intervene when one honest competitor enters the field, Scope of the Jurisdiction of the Federal Trade Commission over False and Misleading Advertising, 40 Yale Law Journal 617 (comment), The Meaning of Methods of Competition in Commerce, 31 Michigan Law Review 808.

[*Congressional discussion*]

Light has, very properly, been sought in the halls of Congress. An entire article has been devoted to a collection of excerpts from the Debates in the Senate, Unfair Methods of Competition, 25 Yale Law Journal 20, and further references to the Congressional Debates are collected in note 18 on page 532 of Mr. Handler's (a leading authority on the subject) article in 31 Col. Law Review 534, above cited. A perusal of these debates leaves us with the impression that general words were employed to make possible the meeting of future contingencies. We say this although we recognize the danger voiced by Mr. Justice Cardozo in repeating the words of Professor Gray in his lectures on the Nature and Sources of the Law:

" 'that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present'." Cardozo, The Nature of the Judicial Process, p. 15.

[*Prevalence of unfair practice*]

Surely emasculation of the Commission in proportion to the prevalence of the roguery involved would be a failure to recognize such contingency. The contrary or strict construction by some of the courts arises, as we think, from too long judicial considerations of the technical difficulties in the enforcement of common law private and public sanctions against dishonest trade practices, Handler, False and Misleading Advertising, 39 Yale Law Journal 22, The Meaning of Methods of Competition in Commerce, 31 Michigan Law Review 808, above cited, Handler, Jurisdiction of Federal Trade Commission over False Advertising, 31 Col. Law Review 527, above cited, Scope of the Jurisdiction of the Federal Trade Commission over False and Misleading Advertising, 40 Yale Law Journal 617 (comment), above cited.

It is not unreasonable to suppose that the very purpose of the legislative body, here as often, was to stop the gaps of judge made law. If we can indulge in *a priori* reasoning, we might note the addition by Congress on June 23, 1938 of the phrase "unfair or deceptive acts in commerce" to the former "unfair methods of competition in commerce", 52 Stat. 1028.

[*Meaning of "unfair"*]

Petitioners' second ground for distinguishing the *Keppel* case opens up another vista of interpretation as to the meaning of another general word—this time the word "unfair". Here again and again naturally the effort is toward limitation. The rugged individual wishes to continue in his ruggedness and wishes to correspondingly narrow the scope of interference by a bureaucratic and possibly slightly more ethical government. The courts have not agreed with their rugged view, however, and have gradually widened that scope. They have brought their standard of fairness even closer to an ever, we think, higher conception of business ethics. That process of widening is discussed in the law review articles above cited, 39 Yale Law Journal 22, 31 Michigan Law Review 808, 31 Col. Law Review 527, 40 Yale Law Journal 617. See also The Legal Phases of Advertising by Francis Finkelhor, 1938.

[*Candy not of inferior quality*]

The distinction attempted is based on a difference of fact. In the *Keppel* case the candy of the break and take package was of inferior quality to that of the straight goods. Here it is not. The argument seems to be derived from the attempt of the dissenting opinion of this court, *Keppel & Bro. v. Federal Trade Commission,* 63 F. (2d) 81, 85, to bring the practice within the conception of "deception".

[*Lottery exploits consumers*]

The learned judge of this Court writing that opinion concludes that driving the non-gambling packages from the shelves forced cheating of the consuming children. This stretching of logic was, we surmise, occasioned by a desire to bring the case within the established precedents which stressed deception.

The Supreme Court, as is its special privilege, rejected this, shall we say, rather tortured construction of the practice and placed its decision of a more satisfactory legal and a more fundamental ethical ground. If you cheat people, you affect their pocketbook; if you encourage them to gamble, you affect their character. Mr. Justice Stone said:

"But here the competitive method is shown to exploit consumers, children, who are unable to protect themselves. It employs a device whereby the amount of the return they receive from the expenditure of money as made to depend upon chance. Such devices have met with condemnation throughout the community. Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of the states, it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy. For these reasons a large share of the industry holds out against the device, despite ensuing loss in trade, or bows reluctantly to what it brands unscrupulous. It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the method is not 'unfair'." *Federal Trade Commission v. Keppel & Bros.*, 291 U. S. 304, 313.

The writer of a note in the Yale Law Journal commented on this opinion, saying:

"Granting that those practices which business men 'should not adopt' constitute unfair methods of competition, the question still remains as to why, in the face of a diversion of trade which might otherwise be retained, they should refuse to use the method involved in the principal case. The reason is found in the injury which its use will entail to the public. In the advertising cases, that injury consists of deception with the resultant purchase of a different and usually inferior article than is represented. In the case under consideration, while the deception element was lacking, still the consumers of the product were induced by the gaming device to purchase a product inferior to that which they might otherwise procure for the same price. But in the eyes of the Court the financial injury was subordinate to the moral one, which consisted of a tendency to encourage gambling, a form of conduct that it deemed subversive of general morality and so contrary to public policy as frequently to have been an object of statutory prohibition." Powers of the Federal Trade Commission in Prohibiting Unfair Methods of Competition, 43 Yale Law Journal 1338, 1340 (note).

See also 10 N. Y. U. Law Quarterly Rev. 11, 82 U. Pa. Law Rev. 664, 665. It is interesting to record that the business men responsible for the publication of that most excellent book, Public Regulation of Competitive Practices, had anticipated the sentiments of the learned Justice and the learned author. We quote:

"As a method of sales promotion, lotteries are so unusual as to warrant but passing notice. They are unusual because they were well known to be opposed to public policy even prior to the enactment of the regulatory legislation of 1914, and in some states they have been made penal offenses by statute. The reasons for this general condemnation of lotteries are primarily ethical and not economic. It is regarded as contrary to sound morality that men should be encouraged to seek 'something for nothing'—or for a trifle. At the same time it is recognized that there are economic objections to a scheme which extracts small contributions from many, without compensation, for the benefit of the chance recipient of an unearned prize." P. 138-139.

"In other words an honest lottery as a method of promoting sales was held to constitute an unfair method of competition. This appears to be sound doctrine. If it is unfair competition to tempt buyers by misrepresentations of the quality of goods, it may be regarded as likewise unfair to tempt them to buy goods not upon their merits but upon the chance of securing something for nothing." P. 140.

[*Economics and ethics of gambling*]

As the United States Supreme Court in the *Keppel* case has rejected the petitioners' officers' tolerance toward children's lotteries, it is perhaps impertinent to indulge in any homily on the economics and ethics of gambling. The temptation and its cause have been eloquently described by Lecky in his Democracy and Liberty.

"The foregoing remarks will show the great difficulty and complexity of these questions about the connection between legislation and morals. Perhaps the most important and most difficult is the attitude the law should assume towards voluntary habits which are the cause of great and widespread misery in the community. One of the most conspicuous of these is gambling. . . . Yet no one will doubt that gambling may easily become a passion scarcely less irresistible and less injurious than drink, and it is a passion which is common to all latitudes and to all stages of civilization. Probably its chief root is that craving for excitement to which I have just referred as one of the deepest and strongest springs of human action. Man is so constituted that tranquil pleasure rarely suffices him. There are chords in his being which must be touched in another way, and he imperiously needs the thrill of intense emotion, even when that emotion is far from being exclusively pleasurable." P. 107, Vol. 2.

Hastings, Encyclopedia of Religion and Ethics, Vol. 3, p. 584, Encyclopedia of the Social Sciences, Vol. 6, p. 555, Keynes, Treatise on Probability, p. 20, p. 320.

The particular form of gambling in question here, the lottery, has come in for particular attention. Because of the ease of and profit in its operation, the lottery has had a long and international history and has been utilized for the support of the revenue and other beneficient purposes, Channing, History of the United States, Vol. 4, pp. 24-27, Vol. 5, pp. 197-200, the Reference Shelf, Muller, Lotteries, Vol. 10, No. 2. Its evil has been thus described:

"The real objection to lotteries is that most of their patrons are poor people, who can ill afford the sums they spend. Their dreams of success, of sudden unearned riches, are the unhealthy dreams of the escapist who finds the

burden of his normal existence almost insupportable. The lottery, in short, has the same weakness as the sales tax; it is a levy on those who can least afford it; it reduces the purchasing power of the poor, and the revenues that might be derived from it by the government would help reduce the tax burden on the rich." The Reference Shelf, Muller, Lotteries, Vol. 10, No. 2, p. 103-104.

and it is accurate, we think, to say that the number of lotteries and of those approving them in the world are on the decline. The Reference Shelf, Muller, Lotteries, Vol. 2, No. 2, Negative Discussion, p. 103.

However that may be, there is no doubt about the current attitude of our people, at least so far as it is reflected in their institutions, if not in their habits. Four states forbid all forms of gambling, Index Digest of State Constitutions, The New York State Constitutional Convention Commission, 1915, p. 702, and thirty-three states forbid it in the form of lotteries, Index Digest of State Constitutions, above cited, p. 977. All attempts to repeal these provisions have failed, Proceedings of the New York State Constitutional Convention, 1938, Vol. 6, p. 200. The United States (Sections 191, 336, 387, Title 18, U. S. C. A., Sections 135, 136, Title 19, U. S. C. A.) and all forty-eight states have signified their legislative abhorrence of gambling by lottery, 38 C. J. 303.

More germane to the principal case is the position of our courts. We say more germane because we cannot overlook (as some people did in 1919) the difficulties inherent in the enforcement of sumptuary legislation.

"It is necessary to lay the foundation of the public administration in the affections of the people." George Washington, Richardson, Messages and Papers of the Presidents (1789-1897) Vol. VI, p. 10.

and see Lecky, above cited, pp. 106, 107. There is no such difficulty in the negative act of failing to give effect to transactions deemed to be contrary to public policy. Although wagering contracts were valid at common law, in modern times, in both England and most of the states of the United States, gambling transactions are "unenforceable" and only the loser has recourse to the courts, 27 C. J. 1048, 1080.

In our opinion, the requirement that the trader cease and desist from making a profit out of a lottery is more analogous to this abstention of the courts than it is to positive punishment of the habits of a people. As a matter of fact, even a nation of adult bingo players (cf. testimony of petitioners' candy broker, Record p. 179) would acquiesce in the prevention of pandering to the same instinct in their young.

Such, at any rate, has been the attitude of the law makers from earliest times. So we find the Pandect providing:

"It is determined that no one that has given money on loan to a *filiusfamilias,* to be paid even after the death of the parent in whose power he is, shall be given any action or claim, that so these money-lenders of the worst sort may know that no *filiusfamilias* can contract a debt that will be good in the event of his father's death." D. 14, 6, 1.

This enactment "derived its name either from Macedo, a well-known usurer; or from Macedo, a young debauchee, whose crimes had drawn the attention of the Senate to the perils arising from spendthrift children", Tacitus, Ann. 11, 13, Suetonius, Vesp. 11. In England in 1541 an act prohibited lotteries because the young men spent their time gambling instead of practising archery, 29 Journal of Criminal Law and Criminology 598, above cited. Many states attach special criminal significance to the encouragement of gambling by minors, Cent. 21, Gaming 203, Cyc. 20, 909. This ancient and modern legislation is but the reflection of a general opinion. The editors of The School Review related it to the particular practices of the case at bar:

"Children as well as adults are today constantly being exposed to the lure of various types of gambling schemes. These are rapidly increasing in number. One can hardly drop into the corner store or stop on the road while driving without running into slot machines, punchboards, and pin-ball games. And how appealing to the eye and imagination the manufacturers have made these devices!

"The situation has reached such proportions that serious consideration must be given to an intelligent attack on the problem. The soundest protection of the individual against the gambling evil would seem to be found in an intelligent understanding of the truth. Children cannot be protected from the various gambling schemes so common today by merely allowing them to grow up in ignorance of the facts, in the hope that they will never come into contact with them. The truth of the matter is that they come into contact with them at an early age and learn about them through very undesirable experiences. Various gambling schemes are used at American Legion carnivals and even church bazaars. As if the end justified the means!

"In order to find out what proportion of our children had some experience with slot machines and punchboards, we checked the children in the eighth grade. We found that 93 pupils or 78 per cent of the class had played slot machines and 64 pupils or 52 per cent had played punchboards. With such proportions at the elementary-school level, what can we expect later on?

"The experiences of children with such devices are usually very inadequate and misleading. The unfortunate thing about gambling is the fact that people tend to forget their losses but always remember their 'winnings.' The thrill of winning makes a strong impression

on the individual, and it remains in his memory. Then too it inflates his 'ego' to win, and he constantly reminds others of his 'good judgment.' The losses are not as clearly appreciated because usually no account is kept of the nickels or quarters squandered on the machines from time to time. The 'winnings,' however, always come in one larger payment and greatly impress the individual. Have you ever heard people tell about their great losses? But you have heard them tell about their 'winnings.' As a result the impression grows that certain people are always lucky. Individuals themselves develop the attitude that they are just naturally lucky and can get something for nothing. This impression is particularly effective with children." An Instance of Realistic Civil Education, The School Review, February 1938, p. 92, 93.

See also Evans, Are We Teaching Our Children To Gamble?, Parents Magazine, March 1937, p. 24; Hauser, A Short Course in Gambling, Parents Magazine, June 1938, p. 31.

[*Penny candy sold to children*]

Petitioners seem to have had some realization of the reaction we have just been discussing. Their third ground of distinction from *Federal Trade Commission v. Keppel & Bro.* above cited, is the pretense that the candy does not reach the mouths of children. This assertion almost calls for the application of the Physical Facts Rule discussed in two recent opinions of this court. "The manufacturer puts up candy for sale to jobbers who sell to small neighborhood stores particularly those adjacent to schools", Witness, Roskamm, p. 98. Does petitioners' president envisage many of his grown-up friends and acquaintances gorging themselves on penny candy? If he does, we do not.

[*Petition for review dismissed*]

The petition for review is dismissed.

[¶ 55,208] Helen Ardelle, Incorporated, Brown & Haley, Canterbury Candy Makers, Incorporated, Imperial Candy Company, and Rogers Candy Company, v. Federal Trade Commission.

United States Circuit Court of Appeals for the 9th Circuit. No. 8842. Decided February 14, 1939.

On Petition for Review of Orders of the Federal Trade Commission.

An order of the Federal Trade Commission prohibiting the placing in the hands of dealers assortments of candy which "may be used" to conduct a lottery is modified to prohibit the placing in the hands of dealers assortments of candy whose contents "are arranged" to conduct a lottery.

Modifying Federal Trade Commission order in Dkt. 2775.

Before DENMAN, MATHEWS and HEALY, Circuit Judges.

[*Counsel*]

Flood, Lenihan & Ivers of Seattle, Washington for Petitioners.

W. T. Kelly, Chief Counsel, Federal Trade Commission. Martin A. Morrison, Asst. Chief Counsel, P. C. Kolinski, James W. Nichol and Daniel J. Murphy, Special Attorneys all of the Federal Trade Commission, Washington, D. C. for Respondent.

[*Petition to set aside Commission's order*]

MATHEWS, Circuit Judge: Five Washington corporations—Helen Ardelle, Incorporated, Brown & Haley, Canterbury Candy Makers, Incorporated, Imperial Candy Company and Rogers Candy Company—have petitioned this court to review and set aside orders of the Federal Trade Commission requiring them to cease and desist from certain practices which, the Commission holds, constitute an unfair method of competition in commerce, within the meaning of § 5 of the Federal Trade Commission Act, 38 Stat. 719, 15 U. S. C. A. § 45.

[*Facts*]

Facts found by the Commission and not disputed by petitioners are as follows:

Petitioners are engaged in the manufacture of candy in the State of Washington and in the sale and distribution thereof in interstate commerce. They have many competitors similarly engaged. Petitioners sell and distribute to retail dealers, and to wholesale dealers who sell and distribute to retail dealers, assortments of candy, called "draw" or "deal" assortments, each containing several boxes of candy, and, with each assortment, a device called a punchboard, by means of which the retail dealer sells and distributes such candy to the general public.

This punchboard is, as its name indicates, a board designed to be punched. For the privilege of punching it, the retail dealer receives from his customers five cents a punch. Each punch of the board discloses a number which, until then, is concealed.

The numbers are not arranged in numerical sequence. Thus, each customer punching the board "draws" a number. The customer purchasing the last punch on the board receives, regardless of the number drawn by him, one of the boxes of candy in the assortment accompanying the board. The other boxes of candy are awarded to customers drawing certain lucky numbers. These are designated on a legend or statement attached to the board. All other numbers are, in effect, blanks. Customers drawing them receive nothing. The blanks are many, the lucky numbers few. Each box of candy is worth more than five cents. Thus, an occasional customer gets, for five cents, a box of candy worth considerably more. Others get nothing except the privilege of punching the board.

This, obviously, is a lottery or gambling device.

[*Assembling for lottery and furnishing of punchboard*]

All sales of candy by petitioners, whether to wholesale or to retail dealers, are outright sales, petitioners retaining no control over such candy after delivering it to the dealer. Petitioners, however, in making such sales, know that the candy will be, and intend that it shall be, sold to the public by means of punchboards, as above described. They accordingly pack and assemble the candy in "draw" or "deal" assortments, so that it may be so sold without alteration or rearrangement. They also furnish with each assortment a punchboard and, attach to it, a legend or statement explaining its use. Thus, knowingly and purposely, petitioners cause and procure their candy to be sold and distributed to the public by means of a lottery or gambling device.

[*Competitors not using lottery*]

Petitioners have many competitors who will not and do not use, or cause or procure others to use, any lottery or gambling device. The Commission found, upon ample evidence, that such competitors are placed at a disadvantage in competing with petitioners, in that, because of the element of chance involved, many customers are attracted by the punchboard method of selling candy and are thereby induced to purchase petitioners', instead of their competitors' candy. Thus, by the use of a lottery or gambling device, petitioners are able to, and do, compete successfully with those who will not and do not use this method of competition.

[*Unfair competition*]

That such a method of competition is unfair, within the meaning of § 5 of the Federal Trade Commission Act, is well settled. *Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U. S. 304, 309; *Walter H. Johnson Candy Co. v. Federal Trade Commission*. 7 Cir., 78 F. 2d 717; *Hofeller v. Federal Trade Commission*, 7 Cir., 82 F. 2d 647, 649; *Federal Trade Commission v. Southern Premium Mfg. Co.*, 5 Cir., 83 F. 2d 1008; *Federal Trade Commission v. A. McLean & Son*, 7 Cir., 84 F. 2d 910; *Federal Trade Commission v. F. A. Martoccio Co.*, 8 Cir. 87 F. 2d 561, 563; *Federal Trade Commission v. George Ziegler Co.*, 2 Cir., 90 F. 2d 1007; *Federal Trade Commission v. Barager-Webster Co.*, 7 Cir., 95 F. 2d 1000; *Federal Trade Commission v. Charles N. Miller Co.*, 1 Cir., 97 F. 2d 563; *Federal Trade Commission v. American Candy Co.*, 7 Cir., 97 F. 2d 1001.

That petitioners are using this method, and using it as a method of competition in interstate commerce, is not disputed. They nevertheless ask us to set aside the Commission's orders, on the ground that its conclusion—which they call a finding—that the method is unfair is not supported by testimony. Petitioners' brief states:

"Petitioners contended before the Commission and now contend before this court that the record in these cases wholly fails to sustain the finding of the Commission that this 'punchboard' method of distribution is considered to be an unfair method of competition in the Pacific Northwest, the area in which these petitioners conduct their business. The Commission in these cases failed to produce a single witness who was actually or even potentially a competitor of these petitioners who did or would testify that the method of distribution used by the petitioners is considered to be an unfair method of competition."

Hence, it is argued, "the finding of the Commission that the 'punchboard' method of candy distribution in the Pacific Northwest constitutes an unfair method of competition within the meaning of § 5 of the Federal Trade Commission Act cannot be sustained."

[*Question of law*]

The argument assumes, erroneously, that whether petitioners' method of competition —which, admittedly, involves the use of a lottery or gambling device—is fair or unfair is a question of fact to be determined by testimony. Actually, it is a question of law to be determined by the courts. *Federal Trade Commission v. Gratz*, 253 U. S. 421, 427; *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441, 453; *Federal Trade Commission v. Curtis Publishing Co.*, 260 U. S. 568, 579; *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 648; *Federal Trade Commission v. R. F. Keppel & Bro.*, *supra*, p. 314. Testimony of witnesses as to how, in their opinion, the ques-

tion should be determined would be useless and improper. The Supreme Court has, in the *Keppel* case, declared the law on this subject, not for one State or one Circuit only, but for the entire United States, including the Pacific Northwest.

[*Packaged candy competes with unpackaged candy*]

As stated before, petitioners pack their candy in boxes. They call these boxes fancy packages. They also call their candy fancy package candy, and call their business the fancy package candy business. They say in their brief that there is no testimony that anyone engaged in the fancy package candy business is injured by their use of the punchboard method of selling and distributing candy. Hence, they contend, the Commission's finding that their use of this method injures their competitors is not supported by testimony. The contention is based on the false assumption that petitioners are in competition only with those who sell and distribute candy in fancy packages. There is abundant testimony that sales of petitioners' candy by the punchboard method are in competition with, and subtract from, "straight" sales of other candy. Whether such candy is sold in fancy packages, plain boxes, tinfoil wrappers or paper bags is quite immaterial.

[*Wholesalers and retailers affected*]

Sales of petitioners' candy by the punchboard method exceed, in the aggregate, $250,000—five million punches—a year. Here, as in the *Keppel* case, *supra* (p. 309), the practices complained of affect not only competing manufacturers, but the far greater number of wholesalers and retailers to whom the manufacturers sell, and the customers to whom the retailers sell. It is clear, therefore, that the present proceeding is not a mere private controversy, but is, as § 5 of the Act requires, "to the interest of the public."

[*Orders under review*]

Each of the five orders under review reads as follows:

"It is ordered that the [petitioner], its officers, representatives, agents, and employees, in connection with the offering for sale, sale and distribution in interstate commerce of candy, do forthwith cease and desist from:

"(1) Selling and distributing to jobbers and wholesale dealers for resale to retail dealers, or to retail dealers direct, candy so packed and assembled that sales of such candy to the general public are to be made, or may be made, by means of a lottery, gaming device, or gift enterprise.

"(2) Supplying to or placing in the hands of wholesale dealers and jobbers or retail dealers assortments of candy which are used, or which may be used, without alteration or rearrangement of the contents of such assortments, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy contained in said assortments to the public.

"(3) Packing or assembling in the same assortment of candy for sale to the public at retail boxes of candy, together with a device commonly called a 'punchboard,' which punchboard is for use, or which may be or is designed to be used, in distributing or selling said candy to the public at retail.

"(4) Furnishing to retail and wholesale dealers and jobbers a device commonly called a 'punchboard,' either with assortments of candy or separately, bearing a legend or legends or statements informing the purchasing public that the candy is being sold to the public by lot or chance or in accordance with a sales plan which constitutes a lottery, gaming device, or gift enterprise."

[*Petitioners' contention*]

Petitioners contend that paragraphs (1) and (2) of each order are too broad, in that they relate not only to sales which are to be made by means of a lottery, gaming device or gift enterprise, but to those which "may be" so made, and relate not only to assortments of candy which are to be used in conducting a lottery, gaming device or gift enterprise, but to those which "may be" so used. This point is well taken. The orders, as drawn, would prevent petitioners from selling any candy which any person might thereafter sell by means of a lottery, gaming device or gift enterprise, or might thereafter use in conducting a lottery, gaming device or gift enterprise, even though such sale or use was not designed, intended, caused, procured or consented to by petitioners. This, obviously, was not the intention of Congress. *Federal Trade Commission v. A. McLean & Son, supra,* p. 913; *Federal Trade Commission v. Charles N. Miller Co., supra,* p. 564.

[*Orders modified*]

The orders are modified by striking out the words "or may be made," in paragraph (1) of each order, and by amending paragraph (2) of each order to read as follows:

"(2) Supplying to or placing in the hands of wholesale dealers and jobbers or retail dealers assortments of candy whose contents are arranged to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy contained in said assortments to the public."

[*Orders affirmed*]

As thus modified, the orders are affirmed.

[¶ 55,209] **Associated Merchants of Montana et al. v. Harry H. Ormesher & Bernard Blodgett.**

Montana Supreme Court. No. 7885. Decided February 4, 1939.

The constitutionality of the Montana Unfair Practices Act is sustained, and a decree enjoining defendants from selling below cost in violation of the Act is affirmed.

Opinion by Mr. JUSTICE ANGSTMAN, concurred in by all the Justices.

[*Counsel*]

E. C. Kurtz, Fred W. Schilling, Jay M. Kurtz, Missoula, Attorneys for appellants.

Pope & Smith, Missoula, Attorneys for Respondents.

John Bonner, Helena, Amicus Curiae. Hon. Ralph J. Arnold, Judge Presiding.

[*Suit to enjoin sales below cost*]

This action was brought to enjoin the defendants from violating the provisions of Chapter 80, Laws of 1937, in their business of merchandising as grocers. To the complaint charging its violation, defendants first filed a demurrer. The demurrer being overruled, they filed an answer putting in issue the allegations of the complaint, and asserting by affirmative defenses that Chapter 80, and particularly section 3 thereof, is unconstitutional as in violation of certain specified sections of the state and federal Constitutions. The reply denied the affirmative allegations of the answer.

[*Trial below*]

The cause was tried to the court sitting without a jury. The court made findings of fact and conclusions of law favorable to plaintiffs, finding that defendants had violated sections 3 and 4 of the Act, and entered a decree restraining and enjoining defendants from "selling, offering for sale, or advertising for sale any such articles or products (covered by the findings) at less than the cost thereof to such defendants, unless with the exceptions allowed by law, and from further like violations of the provisions of sections 3 and 4 of Chapter 80 of the Session Laws of 1937." The appeal is from the judgment.

[*Validity of Unfair Practices Act*]

The record on appeal consists of the judgment roll only, without the evidence introduced at the trial; hence the only question for us to determine is whether Chapter 80 is valid. This we must determine from the Act itself without the aid of factual background save as appears from the findings of fact.

Section 3 of the Act provides:

"It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this state, to sell, offer for sale or advertise for sale any article or product or service or output of a service trade, at less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article or product, or service or output of a service trade for the purpose of injurying competitors and destroying competition, and he or it shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in section 11 of this Act for any such act.

"The term 'cost' as applied to production is hereby defined as including the cost of raw materials, labor and all overhead expenses of the producer; and as applied to distribution 'cost' shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

"The 'cost of doing business' or 'overhead expense' is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising."

Section 4 provides:

"In establishing the cost of a given article or product to the distributor and vendor, the invoice cost of said article or product purchased at a forced, bankrupt, closeout sale, or other sale outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost as of date of said sale of said article or product replaced through the ordinary channels of trade, unless said article or product is kept separate from goods purchased in the ordinary channels of trade and unless said article or product is advertised and sold as merchandise purchased at forced, bankrupt, closeout sale, or by means other than through the ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased, and the quantity of such merchandise to be sold or offered for sale."

Other provisions of the Act need not be referred to specifically except to say that in addition to declaring that violation of the prohibited acts shall constitute a misdemeanor, the Act authorizes injunction proceedings to enjoin a continuance of the prohibited acts. Also section 6 provides that the provision of sections 3, 4 and 5 have no application to sales made

"(a) in closing out in good faith, the owner's stock or any part thereof, for the purpose of

discontinuing his trade in any such stock or commodity, and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation, provided notice is given to the public thereof; (b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof; (c) By an officer acting under the orders of any court; (d) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product, or service or output of a service trade, in the same locality or trade area."

[*Constitutionality assailed*]

The Act is assailed as being contrary to section 1 of the 14th and to the 5th Amendment to the United States Constitution, and to sections 3 and 27 of Article III of the Montana Constitution, as a deprivation of liberty and property without due process of law.

[*Not a price-fixing statute*]

Defendants contend that Chapter 80 is a price-fixing statute, and, therefore, invalid under the holding of this court in *H. Earl Clack Co. v. Public Service Commission,* 94 Mont. 488, 22 Pac. (2d) 1056, and contrary to the decisions of the United States Supreme Court cited and relied on in the *H. Earl Clack Co.* case. The statute here considered is not a price-fixing statute. Its aim and object is to prevent unfair competition in business. As a means to that end the Act prohibits sales of commodities below cost when done "for the purpose of injuring competitors and destroying competition." It fixes a minimum price only, leaving in the seller the discretion to sell at whatever price above that he chooses. The minimum price is fixed not as end in itself, but to prevent ruinous price-cutting injuring or destroying competitors.

This contention, under an identical statute, was before the supreme court of California in *Wholesale Tobacco Dealers v. National Candy & T. Co.,* 11 Cal. (2d) 634, 82 Pac. (2d) 3, where the court in speaking on this point said:

"In its true sense it is not a price-fixing statute at all. It merely fixes a level below which the producer or distributor may not sell with intent to injure a competitor. In all other respects price is the result of untrammeled discretion."

Speaking of a very similar statute, the supreme court of Tennessee, in *Rust v. Griggs,* 172 Tenn. 565, 113 S. W. (2d) 733, said:

"In consideration of this statute we may first observe that it is not a price-fixing law. It is not therefore necessary to consider decisions of this court and the supreme court of the United States respecting statutes of that sort. As appears from section 2 of the statute, its object is to prevent deception of the public and to prevent practices which tend to injure competitors unfairly and thereby lessen competition or unreasonably restrain trade or create a monopoly. * * * Sales at less than cost therefore are not denounced by the Act of 1937 unless such sales are made with the intent or effect to deceive the public, to injure competitors, or to destroy competition."

Under an identical statute the supreme court of Wyoming, in *State v. Langley* — Wyo. —, 84 Pac. (2d) 767, in answering the same contention here made and after referring to the *Clack* case, *supra,* and decisions of the United States Supreme Court cited therein, said:

"In these cases the legislature sought to fix absolutely, the price of a commodity or labor. It was held that the subject sought to be regulated was not affected with a public interest and that the attempted regulation was unreasonable. These cases, of course, are clearly distinguishable from the case at bar. The legislature, by the statute here in question, sought, not to fix prices, but to prevent ruinous price-cutting, by which competitors might be injured and competition be destroyed. To do that, it was, of course, necessary to fix some limit. It might, perhaps, have set other limits than that which was fixed. The limit of 'not below cost' was only one of a number of others which might, perhaps, have been selected. The one actually selected was thought to be the most just under the circumstances. It was but the means to an end, not an end in itself. As was said in *Stephenson v. Binford,* 287 U. S. 251, 53 S. Ct. 181, 77 L. Ed. 288, 87 A. L. R. 721, speaking of the power of a commission to fix the minimum rate for private carriers (page 188): 'The authority is limited to the fixing of minimum rates. The contract carrier may not charge less than the rates so fixed, but is left free to charge as much more as he sees fit and can obtain. Undoubtedly, this interfers with the freedom of the parties to contract, but it is not such an interference as the 14th Amendment forbids.' (See, also, *State v. Drayton,* infra (82 Neb. 254, 117 N. W. 768, 23 L. R. A. (n. s.) 1287, 130 Am. St. Rep. 671.)"

See to the same general effect, *Public Service Commission v. Great Northern Utilities Co.,* 289 U. S. 130, 77 L. Ed. 1080, and *Old Dearborn D. Co. v. Seagram-Distillers Corp.,* 299 U. S. 183, 81 L. Ed. 109, 106 A. L. R. 1476.

The Supreme Court of the United States, in *Nebbia v. New York,* 291 U. S. 502, 78 L. Ed. 940, 89 A. L. R. 1469, had this to say:

"But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells. So far as the requirement of due process is concerned, and in the absence of other constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to promote public

welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discretionary, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' (*Northern Securities Co. v. United States*, 193 U. S. 197, 377-8.) And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

"The lawmaking bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process. Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the lawmaking body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public."

We recognize that there are differences between the statute involved in the *Nebbia* case and Chapter 80 here being considered, as well as differences in the kind of commodity there dealt with. In fact, the court in that case said:

"The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control."

However, the statute there considered went further than Chapter 80. It fixed a definite minimum price of milk, a sale below which was made a crime regardless of the intention of the seller. Under chapter 80 it is only unlawful to sell below the minimum when done for the purpose of injuring or destroying competition. (*Great Atlantic & Pac. Tea Co. v. Ervin*, 23 Fed. Supp. 70; *Balzer v. Caler*, 11 Cal. (2d) 663, 82 Pac. (2d) 19; *State v. Langley* (Wyo.), 84 Pac. (2d) 767.) We rely upon the *Nebbia* case only so far as it declares the broad police powers of the states. It is definite authority that a price-fixing statute may be valid if justification for it is found in a desire upon the part of the legislature to curb an evil affecting the public interest so as to fall within the police power of the state. The purpose of protecting the general public against monopolies is within the police power of the state.

[*Act within police power*]

The Act in question must be sustained as within the police power of the state if its provisions are reasonably designed to accomplish the purpose sought to be achieved, namely that of protecting the public against monopolies. (Compare *State v. Safeway Stores*, 106 Mont. 182, 76 Pac. (2d) 81.)

The Minnesota statute involved in *Great Atlantic & Pac. Tea Co. v. Ervin, supra* has the same effect as our Chapter 80, and the court in that case said:

"The object sought to be accomplished by the legislation with which we are concerned is the prevention of the sale of goods, wares and merchandise in the state of Minnesota at prices less than cost, with the intent and purpose on the part of the vendor of injuring his competitors and destroying or lessening competition. That the legislature of the state of Minnesota might reasonably believe that such sales, made for such a purpose, tend to injuriously affect fair competition and to encourage monopoly and are opposed to the general public welfare and should therefore be curbed, we think is not to be seriously doubted. While we have no reason to believe that there is a dearth of grocers or other merchants in the state of Minnesota or a lack of competition among them or a present threat of monopoly in the grocery business, we are of the opinion that the state of Minnesota was free to adopt the public policy declared by the legislature in this statute."

The court further said:

"We shall concern ourselves only with determining whether the means provided by the statute for the enforcement of the policy adopted are consistent with the requirements of due process, or are unreasonable, arbitrary, capricious, and without a real and substantial relation to the object sought to be attained, and therefore violative of the due process clause or the equal protection clause of the 14th Amendment."

The court then condemned certain portions of the statute, the first paragraph of section 2, part 2, which is identical with the first paragraph of our section 3, seems to have been sustained by the court, but since the other provisions of the Act were held unconstitutional, the court held there was

no method of enforcing it, and, hence, that the whole Act fell. The portions held unconstitutional in that case were so essentially different from our Chapter 80, that the case does not militate against our view that Chapter 80 is valid.

[*No conflict with Constitution*]

That the Act does not conflict with the federal or state Constitution, as a denial of due process of law, is so ably treated by the supreme court of Wyoming, in the case of *State v. Langley, supra,* and by the supreme court of California in *Wholesale Tobacco Dealers v. National Candy Co., supra,* that we shall not repeat what was there said. We are satisfied with the conclusion reached in those cases.

[*Means adapted to purpose*]

We cannot say that the means employed by the statute are not adapted to accomplish the purpose of the Act. The legislative determination on the point is conclusive upon the courts in the absence of a palpable abuse of power. (Compare *Old Dearborn D. Co. v. Seagram Distillers Corp., supra; State v. Safeway Stores, supra.*) By section 16 of the Act it is declared to be an urgency measure necessary for the immediate preservation of the public peace, health and safety, and the reasons why it was deemed necessary are specifically set out. Also by section 14 the legislature declared that the purpose of the Act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition. Furthermore, as was said by the supreme court of California in *Wholesale Tobacco Dealers v. National Candy Co., supra:*

"It should also be mentioned that some 14 states have passed similar legislation (unfair practices Acts.) This is entitled to some weight in determining whether the means provided in the statute will tend to accomplish the valid and expressed purpose of the legislature."

[*Cost survey*]

Complaint is made of section 5 of the Act, which provides in substance that where a particular trade or industry of which the person complained of is a member has an established cost survey for the locality in which the offense is committed, the cost survey shall be competent evidence against the person complained of. This statute, it should be noted, simply establishes the admissibility of such evidence. It does not purport to prescribe the weight or credibility to be given to the evidence, as did the statute which was condemned on this ground in *Great Atlantic & Pac. Tea Co. v. Ervin, supra.* Also, there were in the Minnesota statute other features, not in ours, upon which the court rested its conclusion as to the invalidity of the cost survey provisions. Rules of evidence are subject to legislative control so long as defendant is given a fair and impartial trial and so long as no constitutional limitation is violated. (*State v. Pippi,* 59 Mont. 116, 195 Pac. 556.) If a defendant's business is, because of peculiar circumstances, not fairly to be governed by the cost survey, he is privileged to so show. The statute cannot be condemned on this ground.

[*Definiteness of cost requirements*]

The only other contention made is that section 3 is so indefinite and uncertain in its provisions that it cannot be known when a person is, and when he is not, violating the law. The chief contention in this respect is that the cost of an article including, as the statute requires, the cost of doing business cannot be ascertained under the terms of the statute. Defendants rely upon the case of *H. Earl Clack Co. v. Public Service Com. supra.* As to the soundness of the rule there can be no doubt. The question here, however, is whether the rule is transgressed by the statute. The statute is no more indefinite than that held sufficiently definite in *Old Dearborn D. Co v. Seagram Distillers Corp. supra.* In that case the phrase "fair and open competition" was held by the United States Supreme Court to be sufficiently definite so that no one need be misled as to its meaning or suffer by reason of any uncertainty. On this point we agree with what the learned Justice who wrote the opinion in the case of *State v. Langley, supra,* said:

"Hence, in the absence of provisions to the contrary, we must presume that the legislature did not intend to prescribe that the cost must be absolutely exact, and that it must be based upon the precise method of accounting which any one merchant might adopt, but meant, by 'cost,' what business men generally mean, namely, the approximate cost arrived at by a reasonable rule. Hence, if a particular method adopted by a merchant cannot, under the facts disclosed, be said to be unreasonable, and does not disclose an intentional evasion of the law, the method so adopted should be accepted as correct. In other words, all that a man is required to do under the statute is to act in good faith. (*Hygrade Provision Co. v. Sherman,* 266 U. S. 497, 45 S. Ct. 141, 69 L. Ed. 403.) In that view of the case, the standard set by the legislature is virtually reduced to one of 'reasonableness.' And it is held that 'reasonableness' as 'the standard of an act, which can be determined objectively from circumstances, is a common, widely-used, and constitutionally valid standard in law.' (*People v. Curtiss,* 116 Cal. App. Supp. 771, 300 Pac. 801, 805, and cases cited.)"

[*Judgment affirmed*]

Finding defendants' contentions to be without merit, the judgment is affirmed.

[¶ 55,210] **Loft, Inc. v. Corn Products Refining Co., et al.**

United States Circuit Court of Appeals, Seventh Circuit. Decided March 14, 1939.

Appeal from the United States District Court, Southern District of Indiana, Indianapolis Division.

Interrogatories propounded in a bill of discovery in aid of an action under the Federal Anti-Trust Acts may seek knowledge of the defendants' operations prior to the date of the alleged combination where the background afforded by operations in the earlier competitive period may reveal any subsequent trend toward monopolistic control.

Answers to interrogatories may not be refused where the information sought, although not complete, direct, or decisive as to the issues involved in the Anti-Trust action, is competent and material.

Cost or burden incident to the preparation of answers to proper interrogatories afford no basis for objection to the furnishing of answers where the information sought to be elicited is obtainable only from the private records of the party to whom the interrogatories are directed.

Before EVANS, MAJOR and TREANOR, Circuit Judges.

[*Statement of the case*]

TREANOR, Circuit Judge. Plaintiff-appellee filed a bill of discovery in aid of its action at law to recover damages alleged to have been caused to the plaintiff by the defendants' violation of the Sherman Anti-Trust Act;[1] the action at law having been brought pursuant to the authorization of the Clayton Anti-Trust Act.[2] After the bill of discovery had been filed the District Court ordered certain amendments to be made to the complaint in the law action. The plaintiff thereupon filed an amended complaint but did not file an amended bill of discovery. No change in substance was caused by the amendment of the original complaint in the action at law, and the decree in the equity cause of discovery was based on the amended complaint.

[*Questions on appeal*]

The bill of discovery propounded 342 interrogatories of which the first 244 were addressed to all defendants except the "Foundation," the latter being requested to answer the remaining interrogatories. Many of the interrogatories were identical except that they covered different periods of time. Defendants' objections to answering many of the interrogatories were sustained but plaintiff assigns no cross-errors. This appeal is prosecuted from the order of the District Court requiring the defendants to answer the remaining interrogatories.

The appeal raises two questions: (1) the propriety of the interrogatories allowed, and (2) the jurisdiction of the District Court. As respects the first question defendants urge the impropriety of the interrogatories on the following grounds:

(1) All interrogatories directed to the conduct of defendants between the years 1920 and 1925 are irrelevant because the complaint proceeds upon a conspiracy and combination formed in 1925 and existing through 1935.

(2) The interrogatories seek a mass of detailed information respecting matters irrelevant to the issues raised by the complaint and general denial thereto.

(3) Answers to certain of the interrogatories will involve great accounting expense and plaintiff should pay such expense before obtaining the answers.

[*Relevancy of matter in interrogatories*]

The first two grounds involve the same test, that of relevancy. It seems clear that if conduct during the period 1920 to 1925 has a substantial bearing on the issues, then such conduct is a proper field for investigation by a fact finding body and the material facts of such conduct properly may be the subject of interrogatories.

To appraise defendants' grounds of objection to the interrogatories it is necessary to have in mind the substance of the principal issues as revealed by the pleadings. The complaint in the law action was met with a general denial which put in issue all material allegations of the complaint. The amended complaint, as stated above, was filed after the District Court had ordered the original complaint to be amended by striking out allegations that in 1916 a decree in favor of the United States was entered finding the present defendants guilty of violation of the Sherman Anti-Trust Act,[3] and that in 1932 a similar decree was entered by consent of parties

[1] 26 Stat. 209, 15 U. S. C. A. Secs. 1 and 2.
[2] 38 Stat. 731, 15 U. S. C. A. Sec. 15.
[3] *United States v. Corn Products Company*, 234 Fed. 964.

[*Alleged unfair practice*]

The amended complaint at law alleges that the defendants had organized the Corn Industries Research Foundation, Inc. under the laws of Indiana to act as a trade association; that defendant Corn Products Refining Company is the dominant member of the Foundation and dominates the glucose industry; that the defendants at various times since 1906 had monopolized the manufacture throughout the United States of glucose and other corn products; that plaintiff is a candy manufacturer and that glucose is required in the manufacture of candy to prevent crystalization and granulation, and for use as a cheap substitute for cane sugar. Plaintiff further alleged in its amended complaint that because of its dependence on the glucose industry, and because glucose was an adulterant, plaintiff had undertaken experiments whereby it developed a process in 1934 for the manufacture of candy in commercial and competitive quantities without the use of glucose; that defendants sought to suppress the use of plaintiff's process by the candy industry; and that, to accomplish this purpose, defendants induced newspapers to refuse advertisements thereof, deceiving said newspapers by purposely confusing glucose and dextrose and falsely attributing to glucose the same health qualities found in dextrose. Also it was alleged that the foregoing deception was practiced upon the public by the defendants and that defendants conspired and combined to restrain interstate trade and commerce in glucose candy and confection products and that defendants have combined and conspired to monopolize said commerce for the purpose and with the intent of:

"(a) suppressing competition in the manufacture and sale of glucose and other corn products in commerce as aforesaid;

(b) securing a monopoly in the manufacture and sale of glucose and other corn products;

(c) establishing and maintaining uniform, enhanced, oppressive, and non-competitive prices, terms, conditions, concessions, and transportation charges in connection with the sale of glucose and other corn products;

(d) enhancing the selling prices of glucose and other corn products to purchasers, including plaintiff;

(e) eliminating concessions and special terms in the sale of glucose and other corn products to purchasers, including plaintiff;

(f) retarding and preventing the lowering of said price to purchasers, including plaintiff;

(g) limiting production of glucose and other corn products;

(h) stifling competition so that large profits would be obtained and maintained; * * *

(k) stifling any activities which might have a tendency to decrease the profits of the members of the glucose industry;

(l) injuring the business and property of others who sought to take themselves from under the dominance of and to release themselves from dependence upon said members of the glucose industry;

* * * * * * * *

(n) restraining and preventing plaintiff from obtaining the natural profits which would flow from a widespread use of said process by other manufacturers of candy and kindred products."

[*Mechanics of alleged practices*]

In addition to the foregoing the complaint further alleges the mechanics of the plan whereby the above results were achieved. The complaint charges that the defendants adopted a "reporting plan" whereby they systematically interchanged intimate details of terms, concessions, transportation charges, etc.; that they allocated and limited the proportionate amount of corn ground by each member, and thus curtailed the aggregate production of glucose in other corn products; that defendants took reprisals against those who would not conform to the standards of prices, terms, production, etc. set by the combination and conspiracy; that virtually all price competition has been eliminated.

The above summarization of the amended complaint omits many material allegations but is sufficient to serve the needs of our discussion.

[*Comparison of periods of operation*]

As already stated defendants strongly urge the impropriety of interrogatories dealing with the period 1920 to 1925. Plaintiff contends that this was a period of competition and that the unlawful combination of defendants commenced in 1925. Consequently, plaintiff urges that information respecting the practices and conduct of defendants during a reasonable period prior to 1925 is relevant to the issues because it affords a standard of comparison for the practices and conduct of defendants for the period during which, it is alleged, they were guilty of unlawful practices and conduct.

[*Scope of interrogatories proper*]

A comparison of the periods will tend to reveal whether there was a change in the direction of monopolistic control and restriction of competition; and if such a change is revealed the comparison will throw light on the extent and character of the change. In view of the long period of time involved in the litigation and the magnitude of the activities under examination, we cannot say that the interrogatories cover an unreasonably long period of time prior to the alleged beginning of the wrongful activities of defendants. In general the interrogatories are directed to the existence or non-existence of facts, the existence or non-existence of which is relevant to the issues raised by the complaint and general denial

[*Liberal construction of relevancy*]

The objections to the relevancy of other interrogatories are too numerous to permit minute examination of each. Cases dealing with interrogatories filed under statutes or with bills of discovery reveal, in general, a liberal test of relevancy. To meet the test of relevancy evidence sought to be elicited by interrogatories need not be complete, direct or decisive of issues. In passing upon relevancy the District Court is not required to anticipate the weight of the evidence sought. If it is competent and material to the issues, that is sufficient. It has been stated that the "extent of inquiry is largely one of discretion of the District Court";[4] and the Supreme Court of the United States has stated that "it is all a matter of discretion."[5]

Defendants object to interrogatories numbered 57, 63, 64, 65, 66 and 67 (and 127, 128, 129, 130, 131 which are identical but cover the period from 1920 to 1925). These questions seek to determine the volume in pounds of total sales of glucose to candy manufacturers per year, the amount purchased by each purchaser per month, and the quoted price to such purchaser and the actual price paid, the name and address of the purchaser, the net delivered price by tank and by hundredweight of glucose to all other customers by months and what variations in price existed as to these customers. Apparently, such information will bear on the extent of defendants' control, domination and monopoly over the sale of glucose, which is one of the issues. It will bear on the question of uniformity of prices, non-competitive prices as between the different defendants, and unreasonable enhancement of selling price, all of which are material to the issues.

[*Relation of rebates to price-fixing*]

Defendants object to interrogatories numbered 75, 76, 77 (143-145 identical except for period), 157 and 170. These questions require defendants to state what rebates they have made on glucose, the information reported under the reporting plan respecting deductions made to customers, concessions made to customers, and the names of such customers. The complaint alleges that defendants acted in concert with regard to prices, and that the reporting plan was a means to accomplish the unlawful conspiracy and combination. The information sought by the foregoing questions falls directly and plainly within the allegation that prior to the conspiracy and combination defendants frequently allowed special concessions and terms and that net prices varied and that there was competition in the industry, but that all this terminated after the commencement of the conspiracy and combination. Defendants seek to make the relevancy of the anticipated evidence turn upon an assumption of what the answers will be. They suggest that if the answers show the absence of rebates and concessions then there would be no rebates to give. That would be true and defendants could so answer. But defendants further suggest that if they did make rebates and concessions then there would be details to give and the fact that there were rebates and concessions would disprove plaintiff's allegation of price uniformity. From the foregoing defendants conclude that the interrogatories show merely an attempt to "burrow" into defendants' case. The District Court could not anticipate the answers and, moreover, it is conceivable that special rebates and concessions, if there were any, are consistent with concerted activity with regard to prices and they may be merely cloaks to disguise combinations and conspiracies. What the information will tend to prove remains an open question.

[*Net profits relevant to issues*]

Another group of interrogatories asks defendants to state net profits on the sale of glucose and net profits on the sale of other corn products, to state the method by which cost of manufacture and distribution is determined, the manufacturing cost and total cost per pound of glucose sold. Defendants argue that in order to establish a conspiracy to fix prices it is not necessary to show that the prices fixed are unreasonable in relation to costs. This may be granted, but plaintiff has alleged the fact of unconscionable profits and it will undoubtedly base its alleged damages on such an allegation; and if the unconscionable profits are shown to have resulted from an unlawful combination and conspiracy and have resulted in injury to the plaintiff, the information sought is not irrelevant. Plaintiff alleges that it suffered damage in the sum of $500,000 by reason of excessive prices which it was compelled to pay from December 1925 to August 1934 as a result of the conspiracy and combination.

[*Operations of defendant in issue*]

Defendants object to certain interrogatories which seek disclosure of the states in which corn was purchased, the number of bushels purchased in each state, the number shipped yearly from each state to a defendant and the prices of glucose to customers by month as compared with the

[4] *Indianapolis Amusement Co. v. Metro-Goldwyn-Mayer Distributing Corp.*, 90 Fed. 2nd. 732.

[5] *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U. S. 689-697.

prices of corn for the same month. Defendants also object to certain other interrogatories which ask what proportion of the total annual grind of corn in the United States is ground by each defendant; what proportion of the total annual production of all glucose distributed in the United States was distributed by the defendants and what interest is held by defendants, if any, in the business of candy manufacturing. As to some of the matters defendants claim that they have no knowledge, and such an answer is sufficient unless as a matter of law they are required to have knowledge. The facts with reference to the purchase of corn and the states wherein it was purchased, the prices of glucose and the prices of corn for the same respective period, the proportions of all corn grown and all glucose distributed in the United States have a definite bearing upon many issues. They are material to the allegations respecting the magnitude of defendants' operations; their nation-wide scope and alleged monopoly. The complaint alleges corn was shipped from certain states to defendants' factories in certain states; that they charged freight rates and used the city of Chicago as a freight base point, although no factories were located in Chicago and only a part of the corn was purchased in or near Chicago; that defendants curtailed and allocated the amount of corn to be ground by each. The nation-wide purchases of corn plus the agreements with regard to the proportionate amounts to be ground by each defendant bear on the question of the alleged conspiracy and combination to control or restrict the interstate commerce in corn products. The prices of glucose charged by defendants and the prices they paid for corn with corresponding or non-corresponding fluctuations are material to the disclosure of costs, profits, and control exerted by defendants. It is true that the probative value of showing what the prices of glucose are for a particular month and the price of corn for the same month may not be great in the absence of a showing that the corn purchased during a particular month is processed into glucose during that month. This only amounts to saying that the answers to the interrogatories as framed will not bring out the complete picture from the standpoint of the defendants. But defendants are not precluded from producing evidence at the trial to complete the picture. The extent of the interest which may be held by any defendant in candy companies bears on the question of the control exerted by defendants over the glucose industry and sale of glucose. The pertinent interrogatories are not barred by the fact that plaintiff did not allege specifically that any defendant had such an interest since there is an issue to which the information is relevant.

[*Telephone calls*]

Defendants object to interrogatories which seek disclosure by each defendant of the dates of long distance telephone calls held with other defendants; and defendants urge that it is startling that such calls may be evidence of a conspiracy since there might be any number of proper reasons for the calls. It may well be that all long distance telephone conversations were entirely unrelated to the alleged conspiracy and combination; but on the other hand it was perfectly obvious that under modern conditions of communication long distance telephone calls could be used as a most effective instrumentality in accomplishing the purposes of such a combination and conspiracy as is alleged in the complaint to have existed. The relations of the defendants are at issue and the fact of long distance calls between normally competitive corporations is sufficiently material to justify the interrogatories.

[*Admissibility of consent decree*]

The last group to be considered consists of interrogatories 151-205 and 206-244. These interrogatories emphasize the date, April 6, 1932, by reason of the fact that they seek information about happenings before and after that date. The theory of the objection of defendants is that the plaintiff is enabled to get before the fact finding body the information that a consent decree was entered on such date against defendants. The District Court struck out of the original complaint the reference to the 1932 consent decree. The court's reasons do not appear of record and as far as the record reveals to us the ruling merely is that such an allegation is not a proper part of the complaint. There is no ruling as yet that evidence would be inadmissible to show the consent decree. Defendants contend that under 15 U.S.C.A. Sec. 16 the consent decree is inadmissible, while plaintiff contends that the consent decree is admissible as a written admission although it may not have the effect of prima facie proof given by 15 U.S.C.A. Sec. 16 to a contested decree. The interrogatories, however, make no mention of the consent decree. The date of the decree may in fact mark a line between competition and non-competition; and as stated above in reference to the years 1920-1925 what took place in a period of competition, when compared to what took place in a period of alleged non-competition, may be of great significance in determining whether non-competition did in fact exist in the latter period. Plaintiff's

case does not stand or fall upon the showing that there was continuous non-competition throughout the period 1925-1934. Plaintiff may show that before 1932 there was a condition of non-competition, that for a succeeding period competition among the defendants existed, and that thereafter there was a return to the former condition of non-competition. The District Court has not held that such periods are not a proper field of inquiry, but on the contrary its ruling on the objection necessarily constitutes a holding that such periods constitute a proper time division for the purpose of inquiry by interrogatories. The admissibility of the consent decree remains open; and if the District Court holds it inadmissible that court will exclude from the fact finding body any improper references thereto whether such references are found in answers to interrogatories or in other offered evidence. We express no opinion on the question of the admissibility of the decree because that question is not necessarily involved in the objection to the use of the date of April 6, 1932, since nowhere in any of the approved interrogatories is there any reference to the existence of any such decree.

[*Use of bills of discovery*]

The recent decisions of federal courts indicate a liberal attitude toward the use of bills of discovery in equity proceedings ancillary to suits at law. The reasons for this attitude are aptly stated by Judge Woolsey in *Zolla v. Grand Rapids Store Equipment Corporation:*[6]

> "The rationale of this attitude is, of course, not only that the court wants to know the truth, but also that it is good for both the parties to learn the truth far enough ahead of the trial, not only to enable them to prepare for trial, but also to enable them to decide whether or not it may be futile to proceed to trial."

Judge Woolsey suggested that the legitimate function of discovery is to furnish evidence, and pointed out that it is not a good ground of objection to interrogatories that the plaintiff is merely attempting to obtain evidence. In *Sinclair v. Jenkins, supra,* the Supreme Court stated that problems of discovery are not to be solved by "restrictive formulas" and added the following observation:

> "Procedure must have the capacity of flexible adjustment to changing groups of facts. The law of discovery has been invested at times with unnecessary mystery. There are few fields where considerations of practical convenience should play a larger role. The rationale of the remedy, when used as an auxiliary process in aid of trials at law, is simplicity itself. At times, cases will not be proved, or will be proved clumsily or wastefully, if the litigant is not permitted to gather his evidence in advance. When this necessity is made out with reasonable certainty, a bill in equity is maintainable to give him what he needs. * * * Today the remedy survives, chiefly, if not wholly, to give facility to proof. In the practice of many states there is a summary substitute by an order for examination before trial or for the inspection of books and papers. The substitute has never found its way into the procedure of the federal courts. * * * The remedy in those courts is still by bill in equity as in days before the codes. * * *"

[*Allocation of costs of discovery*]

As a further objection to answering certain interrogatories defendants urge that they will be compelled to incur a great burden and expense and contend that they should not be required to furnish answers to questions "unless plaintiff pays the cost of preparing them." This objection is directed especially to the disclosure of prices charged, volume of sales, special terms and concessions, yearly net profits, the prices of corn per month as compared with the price of glucose per month, etc. Various defendants filed affidavits of their officers and employees for the purpose of showing that the furnishing of the required information would require examination of all their invoices throughout the periods covered by the interrogatories.

The objection on the ground of great expense was accompanied by the demand that plaintiff pay the original huge expense regardless of the ultimate conclusion of the law case; the demand was not that the expense abide the event of the lawsuit. Further, there was no offer to allow plaintiff such an inspection before trial as would enable plaintiff to undertake the allegedly huge task of compilation. Defendants, both in argument and brief, stated that there was no authority for requiring the payment of expense by the interrogator as a condition to obtaining answers, and they assume that the point is one of first impression in this country. They urge the general proposition that equitable relief should be moulded so as to do equity and rely upon certain English authorities. English texts and decisions go further than any authorities in this country in recognizing liability of the interrogator for expenses incident to discovery; but we find no authority which would support defendants' position in the instant case. The following excerpt indicates the wide discretion of English courts in the matter of allocating costs incident to discovery:

> "* * * the costs of and incident to * * * discovery * * * are in the discretion of the court * * * The costs of interrogatories and answers thereto are usually treated * * * as part of the

[6] 46 Fed. 2nd. 319, 320.

costs in the cause which follow the event * * * The court may, however, * * * inquire into the propriety of exhibiting the interrogatories and if * * * such have been exhibited unreasonably, vexatiously or at improper length, the costs occasioned by the interrogatories and answers thereto are to be borne by the party at fault." [7]

[*Interrogatories reasonable*]

This Court cannot say that the interrogatories were exhibited unreasonably, vexatiously or at improper length. The mere fact that they are many and complex does not establish this. The tremendous scope of defendants' operations necessarily requires many and complex questions to disclose the information to which plaintiff is entitled.

The federal act authorizing investigation of books and papers has been limited to an inspection at or during the trial only, not before.[8] As stated in *Sinclair Refining Co. v. Jenkins, supra,* "In * * * many states there is a summary substitute (for bills of discovery) by an order for examination before trial or for the inspection of books and papers"; but this substitute has not found its way into the procedure of the federal courts. And as stated in the opinion in the foregoing case, the remedy in the federal courts is still by bill in equity as in days before the codes. We have no reason to doubt that the District Court would have sustained objections to many of plaintiff's interrogatories, or at least have required substantial modification of the same, if defendants had offered an inspection of books before trial with sufficient opportunity to plaintiff to obtain the information sought by the interrogatories. One well recognized limitation on the use of interrogatories is that they may not be used to obtain information "which is or should be known as well by the party who propounds the interrogatories as by the party to whom they are propounded."[9] An interrogated party is not required to assume any greater burden of effort or expense than is necessary to make information available to the interrogator. Even under the English authorities defendants in the instant case would be required to offer an inspection in order to take the benefit of an objection based on the expense of answering.[10]

We cannot disregard the merit of plaintiff's suggestion that if a gigantic combination may shift expense of answering interrogatories to a single company which seeks to obtain redress by exposure of the illegal combination, then the illegal combination has the power of defeating any action and any liability simply because through its own illegal acts the combination it has become so large that an injured party cannot obtain access to legal proof of the illegality of the combination.

We are of the opinion that when information sought by proper interrogatories is obtainable only from the private books and records of the interrogated party, costs or burden of preparing answers is not sufficient to sustain an objection to furnishing answers. And it does not change the merits of the situation for the objector to refuse to answer unless the interrogator bears the expense. No doubt in many cases an interrogated party can relieve itself of burden and expense by placing at the disposal of the interrogator the means of acquiring the information sought and thus assisting the trial court to mould the equitable relief "so as to do equity."

[*Contention of individual respondent corporation*]

Staley Sales Corporation, one of the defendants, has filed a separate brief on a ground peculiar to itself. The original complaint in the law action named A. E. Staley Manufacturing Company and Staley Sales Corporation as defendants. The amended complaint omitted Staley Mfg. Company from the list of defendants. The bill of discovery which was filed before the filing of the amended complaint prayed that defendants Staley Sales Corporation and A. E. Staley Mfg. Company answer certain interrogatories. Staley Sales Corporation is included in the list of defendants named in the amended complaint and the order of the District Court in the bill of discovery proceeding was that Staley Sales Corporation answer the interrogatories.

The substance of Staley's contention is that under the pleadings the bill of discovery was not ancillary to the amended complaint and that Staley is under no duty to accept the interrogatories for the reason that the amended complaint fails to bring it within the conspiracy.

It is not questioned that the bill of discovery was ancillary to the original complaint and the amended complaint took the place of the original one. It did not introduce a new cause of action and relates back to the time of the filing of the original pleading. The bill of discovery, though filed before the filing of the amended complaint, must be treated as ancillary to the

[7] Piele "The Law and Practice of Discovery," p. 182 (1883).

[8] *Carpenter v. Winn*, 221 U. S. 533.

[9] *Zolla v. Grand Rapids Store Equipment Corp. supra.*

[10] *White v. Williams*, 32 Eng. Rep. 327 (8 Ves. Jr. 193); *Christian v. Taylor*, 59 Eng. Rep. 928 (11 Sim. 401).

amended complaint. And the decree below refers to the amended complaint and is based thereon.

The amended complaint sufficiently alleges that Staley Sales Corporation was a member of the conspiracy. It is recited in the complaint that the action is brought "against the following corporations who are active members of the Corn Research Foundation," and Staley Sales Corporation is included in the list. It is alleged that the Foundation had been formed "by defendants and certain other members of the glucose industries"; and it is further alleged that "the defendants and said other members of the glucose industry who are represented in and by said Foundation, either directly or through a parent corporation, will be referred to as members of the glucose industry." The term "defendants" in the foregoing recitals clearly includes Staley Sales Corporation and designates Staley Sales Corporation as a defendant member of the glucose industry. Necessarily Staley Sales Corporation is included in the term "defendants" in paragraph 6 in which it is alleged, among other things, that "defendants and said other members of the glucose industry * * * have been and now are engaged in a combination and conspiracy, * * *."

Staley states that the questions "were evidently intended for the A. E. Staley Mfg. Company." That is true. Because of the close relationship existing between A. E. Staley Mfg. Company and Staley Sales Corporation, and since the bill of discovery was filed before plaintiff had dismissed the law action as to the Staley Mfg. Company, some of the interrogatories were directed appropriately to both companies. The Staley Mfg. Company is no longer a party to either the law action or the bill of discovery, but that does not relieve Staley Sales Corporation of its obligation to answer interrogatories which are addressed to it, whether addressed to it separately or to both organizations. Obviously, Staley Sales Corporation is under no obligation to answer questions calling for facts which are exclusively within the knowledge of Staley Mfg. Company.

[*Objections to jurisdiction*]

Ten of the defendants appeared specially and moved to dismiss plaintiff's bill of discovery on the ground that it appeared affirmatively on the face of the bill that it was not brought in the district of residence of either the plaintiff or of any of the moving defendants, as required by Section 51 of the Judicial Code as amended.[11] This motion was overruled and such ruling is claimed to have been erroneous.

Plaintiff contends that jurisdiction of the bill for discovery follows jurisdiction of the action at law in aid of which it is brought, and that since the District Court had jurisdiction in the law action it had jurisdiction of the bill which was ancillary thereto. This precise contention was upheld in *Baush Machine Tool Co. v. Aluminum Co. of America.*[12] In support of its ruling in that case the court made the following statement:

> "* * * we need not decide that section 12 of the Clayton Act offers jurisdiction for the bill of discovery independent of the action at law. It is sufficient for the purpose of this appeal to say that the bill is ancillary or auxiliary to the action at law and is thus supported by the undisputed jurisdiction of the action at law. If the bill is ancillary, the question of independent jurisdiction under section 12 of the Clayton Act is not important. * * * The bill of discovery is ancillary to the law action. Its very purpose is that of aiding the action at law."

[*Ancillary proceedings follow principal*]

In *Eichel v. United States Fidelity & Guaranty Co.*[13] an action was begun in the District Court which had jurisdiction because the action arose under a law of the United States. The defendant therein filed a bill in equity in the same court setting up certain partial equitable defenses not admissible at law. The bill disclosed that the parties were citizens of different states but the court was asked to entertain it as a dependent and ancillary bill in virtue of the jurisdiction already acquired. The Supreme Court stated that "plainly the bill was dependent and ancillary and the jurisdiction to entertain it was referable to that invoked and existing in the action at law out of which it arose." And it seems equally clear that the bill of discovery in the instant case has no independent existence but is dependent and ancillary to the law action and consequently that the jurisdiction to entertain it is referable to the jurisdiction in the law action. The general rule on this point has been well expressed as follows: "Principal jurisdiction involves and carries along with itself power over matters that can properly be regarded as accessorial. * * * As to such ancillary proceeding, accordingly, the amount of money concerned, the citizenship of the parties therein, * * * are quite immaterial. And by virtue of this principle the District Court has jurisdiction of many matters as ancillary over which there would be no jurisdiction, were these matters independent and standing alone."[14]

[11] 28 U. S. C. A. Sec. 112.

[12] 63 Fed. 2nd. 778, Certiorari denied 289 U. S. 739.

[13] 245 U. S. 102.

[14] Dobie on Federal Procedure, p. 323.

[*Conclusion*]

We are in accord with the reasoning and holding of the Circuit Court of Appeals for the Second Circuit in *Baush Machine Tool Co. v. Aluminum Co., supra,* and hold that the District Court did not err in overruling the motion to dismiss.

[*Decree affirmed*]

Since we conclude that the District Court did not err either in overruling the motions to dismiss or in overruling objections to the interrogatories, the decree of the District Court is affirmed.

[¶ 55,211] California Rice Industry (an association), Charles S. Morse, et al. v. Federal Trade Commission.

United States Circuit Court of Appeals, Ninth Circuit. Decided March 17, 1939.

Upon petition to review order of Federal Trade Commission.

An unfair trade practice within the purview of the Federal Trade Commission Act exists where a combination for the fixing of prices in interstate commerce effects the destruction of potential competition and works injury to the public interest and no showing of a detrimental effect upon competitors in the industry or upon parties to the unfair combination is required to afford basis for a restraining order of the Federal Trade Commission.

No authority exists for entry of an order by the Federal Trade Commission restraining the fixation or determination of quotas by rice millers where the operations involved do not constitute commerce and are intrastate in character, in the absence in the Federal Trade Commission Act of authorization for assumption of jurisdiction by the Commission over practices merely "affecting" commerce.

DENMAN and HEALY, C. J., concur; MATHEWS, C. J., dissents.

Affirming in part and reversing in part the order of the Federal Trade Commission of March 19. 1938, Dkt. 3090.

[*Counsel*]

For Respondent: W. T. Kelley, Chief Counsel; Martin A. Morrison, Asst. Chief Counsel; Daniel J. Murphy, James W. Nichol, Spec. Attorneys, Federal Trade Commission, Washington, D. C.

For Petitioner: Harry M. Creech, San Francisco, California.

[*Statement of the case*]

DENMAN, Circuit Judge: This is a petition to review and set aside an order of the Federal Trade Commission requiring petitioners to "cease and desist, in connection with offering for sale, sale and distribution of rice and rice products in commerce as defined in Section 4 of the Federal Trade Commission Act, from doing and performing by agreement, combination or conspiracy between or among any two or more of said respondents [petitioners here], or with others, the following acts and things:

"1. Fixing and maintaining uniform prices.

"2. Compiling, publishing and distributing any joint or uniform list or compilation of prices.

"3. Adopting any joint or uniform price list or other device which fixes prices.

"4. Discussing through the medium of meetings of the California Rice Industry or its Marketing and Crop Boards, or in any similar manner, uniform prices, terms, discounts, agreements upon prices, by resolution or otherwise, or employing any similar device which fixes or tends to fix prices, or which is designed to equalize or make uniform the selling prices, terms, discounts or policies of respondent millers.

"5. Fixing or determining the quotas or percentages of the rice crop that the miller respondents may mill or process which, thereby, unlawfully restricts or hinders the sale of rice or rice products in interstate commerce.

* * *."

[*Parties respondent*]

The California Rice Industry is a voluntary unincorporated association. It does not have officers or directors, neither does it have articles of organization, constitution or by-laws, except the Intrastate Marketing Agreement dated August 28, 1935, which created it. Organized within the association and controlling and administering its policies and activities are the Crop Board and the Marketing Board. The Agreement provides for a Crop Board composed of members selected by Rice Growers Association of California, Paddy Rice Growers of California, Independent Rice Growers, the latter being growers unorganized except for purposes of the Intrastate Marketing Agreement, and members selected by joint action of the first and last named organizations. Some of the rice growers who are members of the Crop Board were

made respondents by the Federal Trade Commission and all such respondents are petitioners here. The Marketing Board is composed of members selected by the Rice Growers Association of California, a grower and miller cooperative, and by those others signatory to the Intrastate Marketing Agreement engaged in the State of California in milling rice or marketing rice. Some of the individuals who have constituted the Marketing Board were made respondents by the Federal Trade Commission and all such respondents are petitioners here. Harry M. Creech, for many years counsel for the Rice Growers Association of California and later attorney in the drafting and execution of the Intrastate Marketing Agreement, is the neutral non-voting chairman of the Marketing Board, neutral non-voting member of the Crop Board and attorney for the California Rice Industry. The Federal Trade Commission included him as a respondent and he is a petitioner here. In addition to the above individuals, the Federal Trade Commission also included as respondents all but two of the various individuals, firms, corporations and cooperatives who signed the Intrastate Marketing Agreement. They are petitioners herein.

[*The product*]

Substantially all of the rice produced within the State of California is of a shorter and plumper grain than the medium and longer grained rices produced in other sections of the United States. This rice, as grown and milled in California, is known as California-Japan type and the petitioners include or represent substantially everyone in California so engaged.

[*Interstate shipments*]

The petitioners' brief admits that "Substantially all of such rice after milling is sold and delivered by those among petitioners engaged cooperatively or commercially in milling rice *and some part is shipped by such millers into other States and Territories.*" (Emphasis supplied.) About half the rice grown and milled in California is shipped to Hawaii, about a quarter of the remainder is shipped to Puerto Rico and the balance is sold in California and in various other states of the United States.

There is a long established preference for this type of rice in Hawaii, where but a relatively small amount of other rice is imported from Japan and the southern states. Also in Puerto Rico it is a preferred type, commanding a higher price than other types of rice sold there. The Commission properly may have inferred that its peculiarly plump characteristics have found consumers in other states who prefer it. It is obvious that the price of such a food, having such preferring consumers, will be affected if all competition of its suppliers is eliminated. Such evidence tends to support the Commission's finding of ultimate fact (though stated as a conclusion) that "2. As a result of the respondents entering into and making effective the agreement as above described, competition in the sale of rice and rice products in commerce as hereinabove referred to has been restricted and suppressed."

[*Sales contracts in interstate commerce*]

In addition to the admission of interstate shipments above italicized, the California-Japan type rice is sold by petitioners under sales contracts "fob cars" at the mill or "fob dock" at San Francisco, most of which is destined for points outside the state. The loading "on board" the cars or the car or truck movement from the rice mill to the dock, constitutes the beginning of the interstate or foreign transit. Thus there are sales contracts, in which it is found to be the practice of petitioners to charge uniform, fixed prices, which, as well as the delivery to the buyers, are "in" interstate or foreign commerce. *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282, 290, 291; *Addyston Pipe & Steel Co. v. U. S.,* 175 U. S. 211, 241; *U. S. v. Addyston Pipe and Steel Co.,* (CCA-6) 85 Fed. 271, 298; *U. S. v. United Shoe Machinery Co.,* (DC ED, Mo.) 234 Fed. 127, 144; *Santa Cruz Co. v. NLRB,* 303 U. S. 453, 463; *Pennsylvania R.R. Co. v. Clark Coal Co.,* 238 U. S. 456, 468. Cf. *Federal Trade Comm. v. Pacific Paper Co.,* 273 U. S. 52, 63, where intrastate price list was held a price factor in intrastate transactions.

These facts establish that the acts interdicted by paragraphs "1" to "4" inclusive of the Commission's order are "in" interstate commerce and hence satisfy that requirement of the Federal Trade Commission Act.

[*Applicable statutory provisions*]

The Commission's complaint was issued on March 26, 1937. The relevant portions of Section 5 of the Federal Trade Commission Act as it then read (Act of September 26, 1914, c. 311, 38 Stat. 717, 719-720; USC, 1934 ed., Title 15, § 45, are:

"Sec. 5 That unfair methods of competition in [interstate and foreign] commerce are hereby declared unlawful.

"The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from *using unfair methods of competition* in [interstate and foreign] commerce.

"Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is *using any unfair*

method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect *thereof would be to the interest of the public*, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect * * * ." (Italics supplied).

The questions remain whether the acts prohibited by paragraphs "1" to "4" inclusive of the Commission's order come within the class of "unfair methods of competition" in such commerce and whether their prevention "would be to the interest of the public," as these terms are used in Section 5 of the Act.

[*Price fixing*]

The Commission has found the sales are at a uniform fixed price, the same for each petitioner, and that the uniformity is attained by a price fixing agreement among the petitioners. It has been found that "At meetings held on Tuesday of each week the Marketing Board from time to time, and with the concurrence of the Crop Board, fixes an industry price for extra-fancy clean rice, and from this price, by use of a formula adopted by said Marketing Board, the base price, producer's price, and trade prices for all grades of processed rice are computed."

The price fixing clauses of the Agreement provide with relation to the "industry price," from which by use of a formula the price at which rice is to be offered for sale is computed, that "by vote of either the Marketing Board or the Crop Board in the manner hereinafter provided, Industry Prices fob dock San Francisco for Extra Fancy clean rice of types produced in California shall be the simple average of the price for Extra Fancy Blue Rose rice at New Orleans for the ten preceding weeks as reported by the Federal-State Marketing News Service in its official Rice Market Review, provided that if more than one price is reported for any week then the price used in the average shall be the midpoint between the high and low so reported, plus ten cents per bag in the case of California-Japan type or thirty-five cents per bag in the case of any other type, * * *."

The brief of petitioners admits the effectiveness of fixing the uniform prices above the arbitrarily set New Orleans market price of another rice, and compares the result with that of the prior free competition and emphasizes the benefit to the miller-vendors and, it claims, to the growers as well. The probability is that no such agreement would have been made to fix the price for the small remainder sold in California to California buyers.

[*Public interest involved*]

The total volume of the annual crop of rough or "paddy" California-Japan type rice grown in California is about 3,000,000 bags, which is equivalent to 1,500,000 bags of clean rice. We take judicial notice of the public interest involved in the elimination of all price competition by a group of sellers to the public of substantially the entire supply of such a volume of one of the preferred staple foods. Since Section 5 (c) of the Act (15 USCA § 45 (c)) empowers us to make final disposition of the case upon the "pleadings, evidence and proceedings"* no specific finding by the Commission is required of a fact so judicially known.

[*Scope of review*]

All the growers, processors and sellers in interstate and foreign commerce of the California-Japan type rice, here appearing, are satisfied with such a control of prices. There is no evidence of dissatisfaction by other growers. Hence this part of the review narrows itself to the question whether the agreed elimination of competition in price fixing is an "unfair method of competition" as that phrase is used in Section 5 of the Act.

[*Elimination of competition*]

Each of the petitioners is a potential competitor of each other in the sale of this food of the common people. This potential competition is prevented not only by the mutual promises of the millers but by the sanction of a substantial fine on any miller violating the agreement by selling his rice at a price less than that fixed by the Marketing Board. The fine is collected from a Millers' Trust Fund created by the Agreement.†

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* *Federal Trade Comm. v. Curtis Publishing Co.*, 260 U. S. 568, 580. *Cf. Hills Bros. v. Federal Trade Comm.* (CCA-9) 9 Fed. (2d) 481, 483, 484.

† "Article IV.

"Millers' Trust Fund

"1. Each Miller on or before the 10th of the first full calendar month next following the execution hereof and on or before the 10th day of each month thereafter, shall pay into the Millers' Trust Fund ten cents for each bag of paddy processed by it in the month preceding, plus ten cents for each bag of paddy processed by it during the said preceding month in excess of its quota. If any Miller fails to make the required payment by the 16th of the month in which such payment is due, he shall pay an additional five cents per bag for all paddy

It is obvious that the consumers of this food will be most unlikely to receive the benefit which, under competition, would flow to them in the form of lower prices charged by miller-vendors whose costs are less than those of competitors, because of improved mechanical processes, higher managerial or operating efficiency, or advantageous location with respect to transportation costs.

This deprivation of benefit to the consumer resulting from lower costs of the more efficient miller-vendors arises from the fact that no higher cost miller-vendor of rice would join in the combination to fix the price unless the price be one advantageous to it. That is to say, the strong tendency in any such combination is to fix a price making a profitable return on the rice to the particular miller-vendor which has the highest production cost at the point of sale. In addition is the pressure always present with a monopoly controlling the supply of a particular product preferred by consumers, to raise the price to a point which affords an unreasonable profit to all members composing the group of monopolizing suppliers. The success of the price as fixed by the Agreement may lead to a revision of its method of price fixing and a higher price agreed on. One of the purposes of the Act is "to stop in their incipiency those methods of competition which fall within the meaning of the word 'unfair'." *Federal Trade Comm. v. Raladam Co.,* 283 U. S. 643, 647.

Prior to the Agreement, the petitioners were competing with one another for food customers' patronage. This normal economic condition is what the Congress has created the Federal Trade Commission to aid in maintaining.

[*Protection of potential competition*]

The Agreement has destroyed the freedom to compete by the sanction of the fine on any one of the price fixers who may seek at any time a greater economic advantage because of his superior energy, ability and resources from acquiring more than his permitted quota of the crop of rice and making larger sales at smaller profits. Each petitioner is a potential competitor who, if freed, would renew the desired norm of free competition with the others. That is to say, each petitioner, through the price fixing Agreement, prevents each other from the free use of his economic power and ability. It is the "potential" as well as the immediate competitor whose competition the Act seeks to keep free. *Federal Trade Comm. v. Raladam Co.,* 283 U. S. 643, 651; *Federal Trade Comm. v. Klesner,* 280 U. S. 19. 28.

We take judicial notice that potentially there are many other competitors—persons not parties to the Agreement—who may acquire rice from California's existing and expanding rice fields. Against such outside competition, here again, each price-fixer, through the Agreement, hamstrings each other price-fixer in the free exercise of his energy and economic power. The single price as here fixed makes it impossible for him to meet the day to day changes of a free market. The acts interdicted by the Commission certainly are methods of competition, unfair both to the petitioners and the consumers of the food, if a "fair field and no favors" is the condition sought to be protected by the Federal Trade Commission Act.

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processed during said preceding month. In computing the amounts payable under this paragraph, there shall be deducted all amounts similarly payable in any other Marketing Agreement for the California Rice Industry to which the parties hereto are signatory.

"2. Expenses deemed necessary by the Marketing Board and incurred incident to the performance by the Marketing Board of its functions and duties hereunder shall be paid from the Millers' Trust Fund.

"3. On October 1, 1936, and on October 1 of each year thereafter, or upon any interim termination of this Agreement, the Millers' Trust Fund, after deducting accrued expenses in accord herewith, shall be distributed to the respective Millers in the same percentages as their normal volume percentages, except that a Miller who has exceeded his total quota for the preceding twelve months shall receive only one-half of his normal volume percentage of the amount contributed by him for such excess.

"4. By sixty percent affirmative vote presenting at least three members of the Marketing Board, partial distributions of the Millers' Trust Fund may be made not exceeding in the aggregate fifty percent of the total collections to any given date, nor more frequently than at monthly intervals.

* * * *

"Article XII.

"Enforcement

* * * * * *

"3. If at any time it is found by the Marketing Board, after due notice, hearing and determination under procedure as prescribed by the Marketing Board, that a Miller has failed or is failing to abide by, or has violated or is violating any provision of this Agreement, or any sales terms, rules, regulations or policies prescribed by the Marketing Board pursuant hereto, the Marketing Board shall cause to be deducted from such Miller's share in the Millers' Trust Fund as damages a sum or sums not exceeding four times the profit estimated by the Marketing Board, if any, realized by such Miller in the transaction in respect of which such default or violations occurred, and no such deduction for such default or violations shall in any event be less than five hundred dollars. All sums thus deducted shall be distributed to the other Millers in proportion of their respective normal volume percentages.

* * * * * *"

[*Contention of respondents*]

There is no question that a destruction by the use of economic power by one interstate vendor of the freedom of his competitor's trade, if not accomplished by a contract or other combination with the latter, would warrant the Commission's order to cease and desist. However, it is contended that since petitioners have by an agreement eliminated price competition in the California-Japan type rice, and it has proved profitable to them, and, since each is dealing with his own property, there is no "unfair method of competition" involved in each preventing the other from a free competition with one or more of the agreeing parties which would destroy any price fixing profit, or in preventing one or more of them from competing with an outsider whom the price-fixers are not able to persuade to join them.

[*Construction of Act*]

We do not so narrow the meaning of the phrase "unfair method of competition." We regard Congress to have used the preposition "of" in the broader sense stated in the dictionaries as meaning "associated with" or "connected with" or "pertaining to" and the word "competition" in a broad sense covering the whole field of competition. That is to say, we construe the phrase as meaning an "unfair method pertaining to the maintenance of competition."

This construction of the phrase accords with the purpose of the Act as repeated in identical language in several opinions of the Supreme Court. A method is "an unfair method of competition" if it does not leave to each actual or potential competitor a "fair opportunity" for the play of his contending force engendered by an honest desire for gain. "The great purpose of both statutes [Federal Trade Commission and Clayton Act] was to advance the public interest by securing *fair opportunity* for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs." (*Italics* supplied.) *Federal Trade Comm. v. Sinclair Co.,* 261 U. S. 463, 476. *Int. Shoe Co. v. Federal Trade Comm.,* 280 U. S. 291, 298; *Federal Trade Comm. v. Raladam Co.,* 283 U. S. 643, 647.

[*Determination of similar circumstances*]

The Supreme Court in *Federal Trade Commission v. Pacific States Paper Trade Assn.,* 273 U. S. 52, has so treated the phrase in sustaining the Commission's cease and desist order to associations of paper sellers in interstate commerce who, by agreement and understanding, had divided the Pacific Coast states into regional areas where they sold 75 per cent of the paper and paper products, other than newsprint, there consumed. Each local association distributed uniform price lists to its members to be observed in its territory within the state. The secretary of each was authorized to investigate complaints against members to determine whether they sold below the established prices; and three of the associations authorized the imposition of heavy fines on members for making such sales. These association lists were habitually carried and used by the salesmen of members in quoting prices and making sales outside the state. No association had any requirements that such price lists be observed outside the state; and the quoting of, or the making of sales at, lower or different prices in such territory was not deemed an infraction of rules or trade regulations by reason of which any jobber or wholesaler could complain. Referring to the prices fixed by the local associations, the Commission said the habitual carrying and use of such price lists by member jobbers in quoting prices and making sales outside the state, had a natural tendency to and did limit and lessen competition therein, and the result of such practice was fixed and uniform prices for such products within such territories.

Paragraph (b) of the Commission's order was to prevent the local associations, their officers and members, separately or in combination, from using any price list fixed by agreement between wholesalers in soliciting or selling in interstate commerce, and from making and distributing any such price list intended for use in making such sales.

This court held that the order to cease and desist the use of the common price list should be reversed because there was no showing that there was a "combination" of the dealers for such use. This court stated that such a combination would bring the price-fixing within the order of the Commission. *Pacific States Paper Trade Assn. v. Fed. Trade Comm.,* 4 Fed. (2d) 457, 460.

[*Conclusiveness of findings*]

In reversing this court and deciding to be valid the cease and desist order of the Commission because the facts justified a finding of such a price-fixing combination, the Supreme Court held:

"The weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them is for the commission. *Its conclusion that the habitual use of the established list lessens competition and fixes prices in interstate territory* cannot

be said to be without sufficient support. Paragraph (b) does not go beyond what is justified by the findings. It is valid." (Italics supplied)

Federal Trade Comm. v. Pacific States Paper Trade Assn., 273 U. S. 52, 63.

[*Injury to respondents not determinative*]

Here were no findings of a method of competition unfair or harmful to any competing paper-seller outside the combination. Neither the Supreme Court nor the Commission considered relevant the question whether the sellers of the 25 per cent outside the combination were damaged by its price-fixing. The reasoning of the opinion would apply *a fortiori* if 100 percent instead of 75 percent of the paper business had been controlled by the combination and it had changed the prior actual competitors into no more than potential competitors restrained by the agreement.

In the paper associations, as in the Rice Industry here, no member of the combination was found injured in his profits by the restraint of the combined members. It is obvious that it was the harm by destroying a "fair opportunity" for competition among themselves and to the public from the "fixed and uniform prices" established by the combination which made unfair this method of restraining competition. We hold paragraphs "1" to "4" inclusive of the Commission's order to be valid.

[*Governmental agencies offer no justification*]

It is suggested that construing the so-called Intrastate Agreement as controlling interstate shipments and prices, does no more for the rice industry than is permitted by the Agricultural Adjustment Act. There was a so-called Interstate Marketing Agreement of which the Secretary of Agriculture was a signatory, made prior to the agreement here involved, but the Secretary of Agriculture subsequently withdrew his approval. Congress has created in the Agricultural Adjustment Act a mechanism permitting the elimination of certain competitive factors in interstate commerce in agricultural products but, in the absence of a government control of such a regulated economy, competition cannot be impaired by such an agreement as that of petitioners.

[*Rice milling intrastate*]

With regard to paragraph "5" of the Commission's order directed against the fixing or determining of quotas of the petitioners in rice milling,* this enterprise, like mining in the *Carter Coal* case, is not commerce and is intrastate in character. *Carter v. Carter Coal Co.*, 298 U. S. 238, 299, 317.

[*Scope of Commission's jurisdiction*]

Undoubtedly the fixing of such quotas "affects" the volume of rice which *after* milling is sold and delivered into interstate commerce, but unlike the National Labor Relations Act † the Federal Trade Commission Act does not create a control in the Commission of practices both "affecting" interstate commerce and "in" interstate commerce. Since the Commission's authority is confined to transactions "in" interstate commerce, paragraph "5" of its order to cease and desist from "fixing or determining the quotas or percentages of the rice crop that the Miller respondents may mill or process * * *" is beyond its jurisdiction and void.

[*Conclusion*]

The Commission's order is affirmed as to paragraph "1" to "4" inclusive and reversed as to paragraph "5" thereof.

After the issuance of the complaint on March 26, 1937, the Act was amended prescribing as a remedial measure that to the extent that the order of the Commission is affirmed, this court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. (15 USCA § 45 (c)). Such an order of this court will be issued.

[Dissenting Opinion]

MATHEWS, Circuit Judge (dissenting): This is a petition to review and set aside an

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* The so-called Intrastate Marketing Agreement provides:

"Article III.

"Processing Quotas.

"1. The Marketing Board shall promptly determine from all available statistical information and state in terms of percentages of the total annual shipment, the proportionate shipment of California rice by calendar months. These percentages will hereinafter be referred to as 'normal monthly demand percentages'.

"2. The Marketing Board shall on October 1, 1935, and on October 1, of each year thereafter, so long as this Agreement shall be in effect, estimate the total available supply of rice for the ensuing year and apply it to the 'normal monthly demand percentages' to determine the estimated monthly volume for the ensuing year.

"3. Each month the Marketing Board shall determine a processing quota for each Miller of the estimated monthly volume for the succeeding month by applying each Miller's normal volume percentage to the estimated volume for said succeeding month, and adding such Miller's unused volume, if any, of the two months next preceding. A quota shall include and apply to all rice milled whether on toll or otherwise.

* * * * * *

† 49 Stats. 449, 450, 453, Sec. 2(6) and (7) and Sec. 10(a); 29 U. S. C. A. § 152 (6) and (7) and § 160(a).

order issued by the Federal Trade Commission. Petitioners are California Rice Industry (an unincorporated association), members of the association (hereafter called the millers),[1] members of the association's marketing board[2] and members of its crop board.[3] The order requires petitioners to "cease and desist, in connection with offering for sale, sale and distribution of rice and rice products in commerce as defined in Section 4 of the Federal Trade Commission Act,[4] from doing and performing by agreement, combination or conspiracy between or among any two or more of [petitioners], or with others, the following acts and things:

"1. Fixing and maintaining uniform prices.

"2. Compiling, publishing and distributing any joint or uniform list or compilation of prices.

"3. Adopting any joint or uniform price list or other device which fixes prices

"4. Discussing through the medium of meetings of the [association] or its Marketing and Crop Boards, or in any similar manner, uniform prices, terms, discounts, agreements upon prices, by resolution or otherwise, or employing any similar device which fixes or tends to fix prices, or which is designed to equalize or make uniform the selling prices, terms, discounts or policies of [the] millers.

"5. Fixing or determining the quotas or percentages of the rice crop that the [millers] may mill or process which, thereby, unlawfully restricts or hinders the sale of rice or rice products in interstate commerce."

The order was issued on March 26, 1938, in a proceeding under § 5 of the Federal Trade Commission Act.[5] Hence, the Commission's authority to issue the order must be found, if at all, in § 5, as it existed on that date.[6] Section 5, as it then existed, declared that unfair methods of competition in commerce[7] were unlawful. It empowered and directed the Commission to prevent persons, partnerships or corporations, except banks and common carriers subject to the Interstate Commerce Act, from using such methods of competition. To that end, it provided:

"Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. . . . If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership or corporation to cease and desist from using such method of competition. . . ."

Then, as now, § 5 empowered this court, upon petition of either party, to review and affirm, modify or set aside any such order, and provided that, upon such review, the Commission's findings as to the facts, if supported by testimony, should be conclusive.

Section 5, as it then existed, did not empower the Commission to prevent, or to require anyone to cease or desist from, any act or thing except the use of an unfair method of competition in commerce. The order here under review does not purport to be an order preventing, or requiring petitioners to cease or desist from using, any such method of competition. It says nothing about competition or methods of competition.

There is no finding, nor any evidence which would warrant a finding, that petitioners have any competitors, actual or potential. On the contrary, it appears from the findings that the millers—who, so far as shown, are the only petitioners engaged in any business—are engaged in the business of milling, in the State of California, a particular type of California-grown rice and in the business of selling and distributing such California-grown, California-milled rice in interstate commerce and in commerce between the State of California and the Territories of Hawaii and Puerto Rico, and that no one else is similarly engaged. Whether anyone else desires to, or could under any circumstances, engage in either of these businesses, the record does not show. Since, from the record, petitioners do not appear to have any competitors, actual or potential, they cannot. I

[1] Charles S. Morse, Allen A. Morse, Nelson B. Morse, Clarence G. Morse and Gertrude Morse, trading as Capital Rice Mills; Ellen S. Grosjean and Eileen Callaghan, trading as C. E. Grosjean Rice Milling Company; Growers Rice Milling Company, a corporation; Pacific Trading Company, a corporation; Phillips Milling Company, a corporation; Rice Growers Association of California, a corporation; Rosenberg Brothers & Company, a corporation; and William Crawford, trading as Woodland Rice Milling Company.

[2] George W. Brewer, William Crawford, Harry M. Creech, Florence M. Douglas, Charles S. Morse, J. S. Ritterband, W. T. Welisch, I. Yamakawa and O. F. Zebal.

[3] Hugh Baber, Leon Brink, Harry M. Creech, N. F. Dougherty, Ernest Grell, Lewis Manor, R. A. Renaud and A. E. Scarlett.

[4] 38 Stat. 719, 15 U. S. C. A. § 44. By this section, "commerce" is defined as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation."

[5] 38 Stat. 719, 15 U. S. C. A. § 45.

[6] With the amendment of June 23, 1938 (52 Stat. 1028), we are not here concerned.

[7] See footnote 4.

think, be said to be using any unfair method of competition. *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 646-654.

The conclusion just stated is not inconsistent with *Federal Trade Commission v. Pacific States Paper Trade Ass'n*, 273 U. S. 52.[8] The respondents in that case were wholesale paper dealers and trade associations of which they were members. The respondent dealers constituted a majority, but not all, of the wholesale paper dealers in the Pacific Coast States and had 75%, but not all, of the wholesale paper business in that region.[9] In their business, the respondent dealers had actual as well as potential competitors. They had, as actual competitors, wholesale dealers who were not members of the association, paper manufacturers who sold direct to the retail trade, and paper brokers who negotiated such sales.[10] In that competition, the respondents used methods which the Supreme Court held were unfair methods of competition.

If, in the *Pacific States* case, the respondents had had no competitors, actual or potential, the Supreme Court, undoubtedly, would have applied in that case the doctrine which, subsequently, it applied in the *Raladam* case—that one who has no competitors cannot be said to be using an unfair method of competition.

The order should be set aside.

[¶ 55,212] Oliver Brothers, Inc., a corporation; W. D. Allen Mfg. Co., a corporation; Black Hardware Co., a corporation; Jacobi Hardware Co., a corporation; Matthews & Boucher, a co-partnership composed of William G. Fisher and William S. Johnson; Charlotte Supply Co., a corporation; Virginia-Carolina Hardware Company, a corporation; Globe Crayon Co., Inc., a corporation; E. V. Crandall Oil & Putty Mfg. Co., Inc., a corporation; Charles F. Baker & Co., Inc., a corporation; Keystone Emery Mills, a corporation, and James Corner & Sons, a sole proprietorship, James A. Reilly, sole proprietor, Petitioners, v. Federal Trade Commission, Respondent.

United States Circuit Court of Appeals, Fourth Circuit. Decided March 25, 1939.

On petition for review of order of the Federal Trade Commission.

The crediting by the buyers' purchasing agent of brokerage commissions received from sellers to the buyers' accounts constitutes an unfair trade practice within the prohibition of the Robinson-Patman Act where the buyers perform no services to afford a basis for their acceptance of the sums, and neither the incidental benefits rendered to sellers by the agent nor the compensation received by the agent from the buyers for advisory services performed for them under subscription contracts serves to justify the receipt of commissions at the seller's expense.

Sec. 2 (c) of the Robinson-Patman Act prohibiting the payment of brokerage commissions to the other party to a sales transaction or to his agent, considered alone and as not subject to the limitations imposed in the regulation of price discrimination under Sec. 2 (a) of the Act, is held to be constitutional as a prohibition of the specific unfair practice which effects no violation of the "due process" clause of the Fifth Amendment.

Affirming Federal Trade Commission Order No. 3088.

Before Parker and Soper, C. J., and Wyche, D. J.

T. Russel Cather and Felix H. Levy (John D. Swartz on brief), for petitioners.

Allen C. Phelps, Special Attorney, Federal Trade Commission, (W. T. Kelley, Chief Counsel, Federal Trade Commission, on brief) for respondent.

Raymond N. Beebe, Adrien F. Busick, Seth W. Richardson, and Davies, Richberg, Beebe, Busick and Richardson on brief as *amici curiae*.

[*Statement of the case*]

Parker, Circuit Judge: This is a petition to review an order of the Federal Trade Commission directing petitioners to cease and desist from payment or receipt of fees or commissions in violation of section 2 (c) of the Robinson-Patman Act, 49 Stat. 1426, 15 USCA 13 (c). The order was entered in a proceeding instituted against Oliver Brothers, Inc., hereafter referred to as Oliver, a purchasing agent for wholesale distributors, certain of the buyers whom it represented in making purchases and certain of the manufacturers or sellers from whom purchases were made. The charge was that, while acting as agent for the buyers, Oliver received brokerage commissions from the sellers which it credited or passed on to the buyers. The case was heard on a

[8] Reversing, in part, *Pacific States Paper Trade Ass'n v. Federal Trade Commission*, 9 Cir., 4 F. 2d 457.

[9] 273 U. S. 59.

[10] 4 F. 2d 460.

stipulation that the record made in the proceeding of the Commission against the Biddle Purchasing Company *et al.* should be adopted as the record correctly describing the business practices of Oliver; and the order in the *Oliver* case followed, in substance, the findings and order in the *Biddle* case. The *Biddle* order was reviewed by the Circuit Court of Appeals of the Second Circuit and petition to set it aside was denied in *Biddle Purchasing Co. v. Federal Trade Commission,* 2 Cir. 96 F. 2d 689, and certiorari was denied by the Supreme Court. 59 S. Ct. 101. To the petition that we review and set aside the order in the *Oliver* case, the Commission has filed a cross petition asking a decree for the enforcement of the order.

[*Scope of operations*]

There is, in reality, no dispute as to the facts, but only as to the inferences to be drawn from admitted facts and constituting mixed questions of law and fact. All of the petitioners are engaged in interstate commerce. Oliver furnishes a purchasing service to over 300 distributing concerns scattered over the United States, who are principally wholesalers of automobile, electrical, radio, mill, machine, plumbing, steam and hardware supplies. It has an office in New York and a branch office in Chicago. It has several salesmen who travel throughout the United States to solicit distributing concerns to purchase its market information and purchasing services and who, at times, contact manufacturers and processors. It has also a number of buyers and assistant buyers who place orders for its subscribers and deal with manufacturers, processors and producers in their behalf. It examines and tests the wares of such manufacturers and producers and obtains from them prices and descriptions of goods which it sends to its subscribers. It furnishes the subscribers a loose leaf price book, showing the prices and sources of supply of the merchandise in which they are interested, and keeps this book current by the issuance of price sheets and bulletins from time to time, as prices and sources of supply change. It also makes purchases for its subscribers of the goods described in its information service and gives them the benefit of the brokerage commissions which it collects from the sellers upon such purchasers. The Commission found that these brokerage commissions were passed on to the buyers with the knowledge of the sellers. Petitioners challenge this finding in so far as it relates to knowledge of the sellers; but an examination of the record shows that it is amply sustained by the testimony and that the matter was one of common knowledge in the trade. (See *Biddle* transcript of record pages 165, 193, 283-284, 314, 321, 327, 347, 372, 379-380, 387, 490, 544, 582, 596, 608, 615, 635, 645, 656, 675, 688, 741).

For the informational and purchasing services thus rendered its subscribers, Oliver receives a stipulated monthly compensation of $25.00 and upward. The brokerage commissions received by 86% of the subscribers on their purchases amount to less than the amount paid Oliver. Those received by the remaining 14% are in excess of the amount so paid.

[*Subscription contract*]

A written contract is entered into between Oliver and each of its subscribers. This contract is on stationery describing Oliver as "Resident buyers for wholesalers of hardware, iron, steel, metals etc." The following provisions thereof are pertinent and illuminating:

"We hereby agree to act as your New York, Chicago and Pittsburgh Resident Representatives in the capacity of Purchasing Agents.

"We agree to furnish you our loose leaf Price Book and send you our General Service covering lines as per the subject hereof; also to send you Oliver Brothers' Comment Letters, letters on Market Conditions, lists of special offerings, and submit to you other information in the way of prices and market information which we may consider to be of interest to you.

"We will use our best efforts to secure the lowest possible prices on your inquiries or orders. We will forward to the manufacturers or parties with whom we have favorable arrangement such orders for merchandise as you may send to us.

"Orders which we may receive from you or letters which we may receive are to be regarded as authority to act as your Agents in connection with any transaction which may transpire between us. While we will use our best efforts in acting as your Agent it is understood that we will not be liable for the failure of any manufacturer of supplies to perform his agreements or promises in connection with quotations or shipments.

"It is mutually agreed that all communications between us in the way of correspondence, Comment Letters, letters on Market Conditions or Confidential Price Sheets, shall be treated as strictly confidential and used solely in connection with your own business and shall not be divulged to other parties nor procured for the use of other parties."

The facts with respect to the purchases made by Oliver are thus stated by the Commission:

"Oliver receives daily from its subscribers approximately one hundred orders. When a subscriber forwards an order to Oliver, usually at a specified price, Oliver transmits the order to the seller. The seller ships the product direct to the buyer, in most cases billing the buyer at the price specified in the order. The buyer in most

cases makes payment direct to the seller. The seller then sends a commission or brokerage on the transaction and Oliver pays this to the buyer or credits it to his account. If a buyer fails to name the purchase price, he expects to get the last price quoted by Oliver in its bulletins, or a lower price. If Oliver finds that the market has advanced he communicates with the buyer and confirms the order at the new price before transmitting it to the seller. The buyer in some cases names the seller whose products are wanted, but in some cases he relies upon Oliver to transmit the order to some producer who will supply goods of the quality and standard required."

And the whole course of business between Oliver and its subscribers is summed up in paragraph eleven of the Commission's findings as follows:

"The contract between respondent Oliver Brothers, Inc., and its subscribers is construed by the parties thereto as being a contract for the sale and purchase of the Oliver market information service with a privilege extended to the buyers of using the Oliver purchasing services at their option. The buyers pay the monthly fee stipulated in the contract for the market information service. The buyers exercise their option to use the purchasing services of Oliver Brothers, Inc., in order to secure a discount in price from the current market price and the buyers when purchasing commodities through Oliver compute the net price at which the purchase is made as being the quoted price less the fee or commission paid by the seller as brokerage to Oliver and by Oliver transmitted to them. The buyers, in their bookkeeping, do not treat the brokerage fees and commission received from respondent Oliver Brothers, Inc., as being an offset to the monthly fee paid by them to Oliver. The amount of the monthly fee paid by the buyers to Oliver is fixed at the time the contract is made, but the amount of the brokerage fees and commissions which may be received by a given buyer from the utilization of the Oliver purchasing service is unknown and incapable of ascertainment at the time the contract is entered into."

[*Agency determined by Commission*]

In its tenth finding the Commission states its conclusions with respect to the agency of Oliver and the services rendered by it. as follows:

"In all of the purchasing transactions which the respondent Oliver Brothers, Inc., executes for its buyers, Oliver Brothers, Inc., is the agent and representative of the buyer, and acts in fact for such buyer and in his behalf, and is subject to his control, insofar as such purchasing transaction is concerned. Said respondent Oliver Brothers, Inc., in such purchasing transaction is neither the agent nor representative of the seller nor does it act for or in behalf or is it under the control of such seller. Such services as respondent Oliver Brothers, Inc., may render to the seller in selling his commodities are incidental to the particular purchase and sale transaction, and if any services are so rendered by Oliver in connection with the sale or purchase of such commodities, such services are donated by Oliver Brothers, Inc., to the seller. There is not, in fact, any payment of brokerage commissions made by any of respondent sellers to respondent Oliver Brothers, Inc., which is not intended for the buyer and which does not reach the buyer. Such brokerage commissions, being intended for the buyers, are not in fact paid in satisfaction of any contractual or other indebtedness due from the seller to respondent Oliver Brothers, Inc., for services rendered, or otherwise. These payments, in effect are actually made from the seller to the buyer and the buyer receives a discount in price equivalent to the brokerage fee paid to him. Respondent buyers render no service to respondent sellers in connection with the purchase of commodities through respondent Oliver Brothers, Inc. Respondent buyers render no service to respondent Oliver Brothers, Inc., in connection with the purchase of goods, wares and merchandise made for them by said respondent Oliver Brothers, Inc."

[*Contentions of petitioners*]

Complaint is made of this finding that it ignores evidence of certain sellers as to the benefit derived by them from dealings with Oliver. Briefly stated, this evidence is to the effect that these sellers furnish Oliver lists and prices of what they have to sell; that, in sending out circulars to its subscribers, Oliver brings about a sale of the goods more satisfactorily than a broker would do; and that for this reason brokerage commissions are allowed Oliver on sales resulting from the Oliver service. On the basis of this evidence, petitioners contend that the Commission should have found that Oliver renders a service to the sellers which justifies the commissions paid, and that the contrary finding by the Commission in its tenth finding of fact is unsupported by the evidence. As heretofore indicated, we think that the controversy here is over conclusions to be deduced from the facts rather than over the facts themselves; but as we shall hereafter point out we are in accord with the conclusions of the Commission.

[*Benefits rendered primarily to buyers*]

On the whole record, there can be no doubt that the following is the truth with respect to the matters in controversy: Oliver is the agent of the buyers and not of the sellers and is paid by the buyers for the service rendered them. It collects brokerage commissions from the sellers on purchases made for the buyers which it credits to the accounts of the buyers or otherwise passes on to them. In furnishing the service which it has contracted to furnish the buyers, it affords to the sellers facilities for placing their goods before the buyers and obviates the necessity of

their employing brokers to reach these customers; but this is a service rendered the buyers which Oliver has bound itself to render them under their subscription contracts. The benefit to the sellers is incidental to this service rendered the buyers and is not the result of a service undertaken for the benefit of the sellers.

[*Constitutional issues*]

No showing was made as to whether the effect of this practice of Oliver "may be substantially to lessen competition, or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit" of the brokerage commissions allowed, as required by section 2 (a) of the Robinson-Patman Act, since the proceeding before the Commission was not had under that section but under section 2 (c). The argument is made that the provisions of 2 (a) with respect to limitation of competition or tendency to create monopoly must be read into 2 (c), and that, unless this is done, 2 (c) is unconstitutional because violative of the due process clause of the Fifth Amendment. These contentions of the petitioners, together with their contentions as to the applicability of the Act to the trade practices which we have outlined, present three questions for our consideration: (1) Must the Robinson-Patman Act be so construed as to read the limitations of section 2 (a) into section 2 (c) as limitations upon the latter section? (2) If not, is section 2 (c) invalid when tested by the due process clause of the Fifth Amendment? And (3) does the case as presented fall within the exception contained in section 2 (c)? We think that all of these questions must be answered in the negative.

[*Statutory provisions*]

The Robinson-Patman Act of June 19, 1936, 49 Stat. 1526, was an amendment of the Clayton Anti Trust Act of October 15, 1914, 38 Stat. 730. Section 2 of the Clayton Act, which was the section amended, merely forbade discrimination in price when the effect of such discrimination was to substantially lessen competition or tend to create monopoly. The Robinson-Patman Act broadened the scope of this provision, conferred upon the Federal Trade Commission power to establish quantity differentials for the purpose of determining discrimination, and cast the burden of proof upon one charged with discrimination to justify any discrimination shown. Receipt of price discrimination was made unlawful for the first time, 2 (f); and three specific matters were forbidden as unfair trade practices by subsections (c), (d) and (e), viz.: the granting of commission or brokerage, or any allowance in lieu thereof, to the other party to the transaction or his agent, the making of discriminatory payments by seller to buyer for services rendered by the latter and discrimination by the seller in the rendering of services to the buyer. It is perfectly clear that all three of these practices were forbidden because of their tendency to lessen competition and create monopoly, without regard to their effect in a particular case; and there is no reason to read into the sections forbidding them the limitations contained in 2(a) having relation to price discrimination, which is an extremely difficult matter to deal with and is condemned as unfair only in those cases where it has an effect in suppressing competition or in tending to create monopoly. The forbidding of specific practices because of their tendency toward a general result, also forbidden, is familiar legislative practice; and no reason suggests itself why the limitations and provisions relating to one should be read into those relating to the other. The subsection immediately applicable is 2 (c), which is as follows:

"(c) That is shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

[*Committee reports*]

The language of this section is so clear that there is no occasion to resort to the reports of Congress to ascertain what was intended. It may not be amiss to note, however, that House Rep. 2687, 74th Cong., 2d Sess., has this to say with regard to it (it was then section (b)):

"Section (b) deals with the abuse of the brokerage function for purposes of oppressive discrimination. The true broker serves either as representative of the seller to find him market outlets, or as representative of the buyer to find him sources of supply. In either case he discharges functions which must otherwise be performed by the parties themselves through their own selling or buying departments, with their respective attendant costs. Which method is chosen depends presumptively upon which is found more economical in the particular case;

but whichever method is chosen, its cost is the necessary and natural cost of a business function which cannot be escaped. It is for this reason that, when free of the coercive influence of mass buying power, discounts in lieu of brokerage are not usually accorded to buyers who deal with the seller direct, since such sales must bear instead their appropriate share of the seller's own selling cost.

"Among the prevalent modes of discrimination at which this bill is directed is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made. But the positions of buyer and seller are by nature adverse, and it is a contradiction in terms incompatible with his natural function for an intermediary to claim to be rendering services for the seller when he is acting in fact for or under the control of the buyer, and no seller can be expected to pay such an intermediary so controlled for such services unless compelled to do so by coercive influences in compromise of his natural interest. Whether employed by the buyer in good faith to find a source of supply, or by the seller to find a market, the broker so employed discharges a sound economic function and is entitled to appropriate compensation by the one in whose interest he so serves. But to permit its payment or allowance where no such service is rendered, where in fact, if a 'broker', so labeled, enters the picture at all it is one whom the buyer points out to the seller rather than one who brings the buyer to the seller, would render the section a nullity. The relation of the broker to his client is a fiduciary one. To collect from a client for service rendered in the interest of a party adverse to him, is a violation of that relationship; and to protect those who deal in the streams of commerce against breaches of faith in its relations of trust, is to foster confidence in its processes and promote its wholesomeness and volume."

And the Report of the House and Senate Conference Committee, House Rep. 2951, 74th Cong., 2d Sess., interprets the section as follows:

"This subsection permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other."

[*"Due process" not violated*]

And we are not impressed with the argument that when construed without the limitation prescribed by 2 (a) section 2 (c) is violative of the due process clause of the Fifth Amendment. It is addressed to a definite evil in interstate trade and commerce which Congress has full power to regulate. It is uniform in operation and applies to all persons alike. It is not arbitrary or unreasonable, but is directed toward the elimination of hidden discriminations in price which are thought to be injurious to the proper operation of a free competitive system of trade and commerce and to have a tendency to promote unreasonable restraints and monopolization. As said by the Circuit Court of Appeals of the Second Circuit in the *Biddle* case, *supra:* "Congress may have had in mind that one of the principal evils inherent in the payment of brokerage fees by the seller to the buyer directly or through an intermediary, is the fact that this practice makes it possible for the seller to discriminate in price without seeming to do so. If a price discount is given as a brokerage payment to a controlled intermediary, it may be and often is concealed from other customers of the seller. One of the main objectives of section 2 (c) was to force price discriminations out into the open where they would be subject to the scrutiny of those interested, particularly competing buyers."

Counsel for appellants rely upon *Fairmont Creamery Co. v. Minnesota,* 274 U. S. 1, which held invalid, under the due process clause of the Fourteenth Amendment, a state statute which forbade the purchase of milk in one locality of the state at a higher price than paid in another locality. That statute was held unconstitutional because it was thought that its inhibition had "no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition" The same cannot be said of the practice forbidden by the section here under consideration, as shown in the reports of the Committee of Congress from which we have quoted, *supra.* Of such a practice, what was said by the Supreme Court in *Booth v. Illinois,* 184 U. S. 425, with respect to the prohibition of option contracts to sell or buy grain at a future time is apropos. The court said:

"The argument then is, that the statute directly forbids the citizen from pursuing a calling which, in itself, involves no element of immorality, and therefore by such prohibition it invades his liberty as guaranteed by the supreme law of the land. Does this conclusion follow from the premise stated? Is it true that the legislature is without power to forbid or suppress a particular kind of business, where such business, properly and honestly conducted, may not, in itself be immoral? We think not. A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or

pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

[*Contractual freedom not unlimited*]

Any contention that this section of the statute constitutes an interference with freedom of contract is answered by what was said by the Supreme Court in *West Coast Hotel Co. v. Parrish,* 300 U. S. 379 as follows:

"The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

"This essential limitation of liberty in general governs freedom of contract in particular. More than twenty-five years ago we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the Fourteenth Amendment had been broadly described:

" 'But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.' *Chicago, B. & Q. R. Co. v. McGuire,* 219 U. S. 549, 567."

[*Act reasonably related to purpose*]

There is no ground for the contention that, in prohibiting practices because of their harmful tendency, Congress must limit its prohibition to cases in which those practices have actually resulted in the evil which it was the purpose of the statute to prevent. "If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio." *Nebbia v. New York,* 291 U. S. 502, 537.

[*Receipt of commissions unfair*]

We come then to the final question in the case, *viz.,* whether the brokerage commissions here involved come within the exception contained in section 2 (c), *i. e.* are they paid for services rendered to the sellers? A sufficient answer to the question is found in the fact that the commissions are received by the buyers and not by Oliver, and that there can be no contention that any services are rendered by the buyers to justify the payment of compensation to them. The fact that the commissions pass through the hands of Oliver is immaterial; for it is understood on all sides that they are paid for the benefit of and go to the buyers under the contract which Oliver has with them. The statute forbids the receiving of such commissions except for services rendered. The buyers receive them and they admittedly render no service to earn them. It is idle to contend that they are merely being reimbursed for what they have paid to Oliver by way of subscription. They are receiving brokerage commissions on their purchases; and the fact that they may have paid the purchasing agent for services rendered them and that they receive the commissions because of this does not alter the fact that they are receiving the commissions on their purchases.

[*Benefit to sellers no justification*]

And even if it were true that Oliver rendered services to the sellers, we do not think that this would change the situation. No one would contend that, without violating this section, a broker representing the seller could give his commissions to the buyer; for in such case the action of the broker would be the action of his principal, the seller, and would amount to the allowance of commissions by the seller to the other party to the transaction in direct violation of the statutory provision. As we have seen, it constitutes a clear violation of the section for the buyer to receive commissions allowed an agent who represents him alone. If, therefore, the buyer may not receive commissions allowed either his own agent or the agent of the seller, it would seem to follow necessarily that he may not receive commissions allowed a broker who is the agent of both. We may assume that under the section it is

permissible for a broker to render services to both buyer and seller and to receive from both compensation for the services rendered; but this is a very different thing from the buyer himself receiving the compensation.

And we think that the Commission was correct in holding upon the facts that the services rendered by Oliver were rendered to the buyers and not to the sellers. Oliver is the agent of the buyers, not of the sellers. The services rendered in advising the buyers as to the character and prices of sellers' merchandise are services rendered the buyers under their contracts, and are services rendered in the purchase and not in the sale of the goods. While such services resulting in sales by the sellers and obviating, no doubt, the adoption of other sales devices, are of undoubted benefit to them, this benefit is incidental and is an entirely different thing from the rendering of services by an agent responsible to the seller as principal. If it were a sufficient basis to bring the allowance of brokerage commissions within the exception of the section, every purchasing agent for a chain of stores might lawfully receive such commissions; for he does for the stores of his chain precisely what is done by Oliver for the subscribers to its service and benefits the sellers in making sales in precisely the same way. We have no doubt that it was just this sort of thing that it was the purpose of the act to prevent.

[*Analogous holding*]

The case presented is not unlike that before the Supreme Court in *Lehigh Valley R. R. Co. v. United States,* 243 U. S. 444, in which a carrier made payments to a shipper, who was a mere importer and forwarder, for services rendered in bringing business to its road. In holding this a violation of the provisions of the Elkins Act as amended, the Supreme Court, speaking through Mr. Justice Holmes, said:

"It is true no doubt that George W. Sheldon and Company in the performance of the services for which it is paid maintains offices here and abroad, advertises the Railroad, solicits traffic for it, does various other useful things, and, in short, we assume, benefits the road and earns its money, if it were allowable to earn money in that way. It is true also that in *Interstate Commerce Commission v. F. H. Peavey & Co.,* 222 U. S. 42, an owner of property transported was held entitled under section 15 of the Act to Regulate Commerce to an allowance for furnishing a part of the transportation that the carrier was bound to furnish. (So *Union Pacific R. R. Co. v. Updike Grain Co.,* 222 U. S. 215, and *United States v. Baltimore & Ohio R. R. Co.,* 231 U. S. 274.) But that case goes to the verge of what is permitted by the act. The services rendered by George W. Sheldon and Company, although in a practical sense 'connected with such transportation,' were not connected with it as a necessary part of the carriage—were not 'transportation service,' in the language of *Union Pacific R. R. Co. v. Updike Grain Co.,* 222 U. S. 215, 220—and in our opinion were not such services as were contemplated in the Act of June 29, 1906, c. 3591, sec. 4, 34 Stat. 589, amending section 15 of the original act. On the other hand the allowance for them falls within the plain meaning of section 2 of the Act of 1906, to which we referred above."

Just as the services performed by Sheldon & Co. in that case were not a part of what the carrier was paid for, although undoubtedly resulting in benefit to the carrier, so the services performed by Oliver here, although beneficial to sellers, are no part of what the sellers are paid for, but on the contrary are services rendered the buyers for which they have already paid Oliver. For the sellers to pay for them is for them to pay Oliver for services which Oliver was bound to render the buyers and which the sellers were under no duty to perform in connection with the sales made. Such payment falls, therefore, within the condemnation of the language used by the Supreme Court in *Mitchell Coal & Coke Co. v. P. R. R. Co.,* 230 U. S. 247, 263, wherein it was said, "To pay shippers for doing their own work would have been a mere gratuity, and if here the carrier was not bound to haul from the mine it had no more right to pay these companies for bringing their coal over the spur track to the junction than it would have had to pay a merchant for hauling his goods in a wagon to the railroad depot." See also *Merchants Warehouse Co. v. United States,* 283 U. S. 501, 511. For compensation received by a buyer for services rendered by him or his agent to come within the excepting clause of 2 (c) of the statute, we think that such services must be such as the seller was bound to render in connection with the sale, not such as were performed by the buyer in connection with the purchase or such as were rendered to him by his agent to enable him to purchase.

[*Extent of operations not controlling*]

It is argued that the act was directed at the practices of chain stores in using the force of great buying power to obtain these concessions from the seller. It is sufficient answer that the Act makes no distinction as to size and shows no intention to give the small any more than the great the right to receive brokerage commissions on their purchases. Because of the buying power possessed by purchasing agents, whether representing chains or independent dealers, sellers may be willing to allow them brokerage commissions and may consider such commissions earned in the sense that the

sellers are thus enable to sell goods without resorting to other sales devices; but the fact remains that the buyer who receives the brokerage allowed his purchasing agent receives an advantage, and a concealed advantage, which the buyer who purchases directly from the dealer does not receive. It was this sort of discrimination, we think, which it was the purpose of this section of the Act to forbid.

[*Type of control over broker immaterial*]

Much argument has been directed to the question as to whether the control exercised by buyers over Oliver is the kind of control contemplated by the statute. This discussion is wholly irrelevant in view of the fact that the commissions are paid to an agent "acting in fact for and in behalf of" the buyers and are actually received by the buyers themselves. The clause of the statute, "or is subject to the direct or indirect control" is in the alternative and need not be considered when the payment is made to an agent acting "for or in behalf" of the other party, or to the other party himself. Of course, an agent acting for and in behalf of another is under his control; and it was to reach other intermediaries, such as were dealt with in *Trunz Pork Stores v. Wallace*, 2 Cir. 70 F. 2d 688, that Congress inserted the broad alternative provision.

[*Conclusion*]

For the reasons stated, the petition to set aside the order of the Commission will be denied, the prayer of the cross-petition will be allowed and decree will be entered enforcing the Commission's order.

Order Enforced.

[¶ 55,213] Startup Candy Company, a corporation, v. Federal Trade Commission.

United States Circuit Court of Appeals, Tenth Circuit. Decided March 31, 1939.

On petition to review and set aside order of Federal Trade Commission.

Dismissal of a petition to review and set aside a cease and desist order of the Federal Trade Commission is granted, on petitioner's motion, where cessation of the Company's operations and the institution of a receivership are advanced in support of the motion to withdraw.

Dismissing the petition to review the order of the Federal Trade Commission, Dkt. No. 2705.

Before Lewis and Phillips, Circuit Judges.

Mr. H. Hartland Halliday, Salt Lake City, Utah, for petitioner.

Mr. W. T. Kelley, Chief Counsel, Federal Trade Commission, Washington, D. C., for respondent.

[*Dismissal of petition for review*]

The following order dismissing the petition to review was entered March 31, 1939:

"This cause came on to be heard on the motion of petitioner to withdraw the petition for review herein and was submitted to the court.

"On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that the petition to review in this cause be and the same is hereby dismissed out of this court at the costs of petitioner."

[Last paragraph of order directs issuance of certified copy thereof to Commission.]

[*Grounds for withdrawal*]

In submitting the motion to withdraw the petition for review counsel for petitioner stated said petitioner had "gone into receivership and ceased to do business."

[*Nature of the proceedings*]

This cause was Docket No. 2705 before the Federal Trade Commission and was entitled: *In the Matter of Startup Candy Company.*

[*Cease and desist order*]

The Commission caused its complaint to be issued against the Startup Candy Company wherein it was alleged the candy company had used unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of an Act of Congress, approved September 26, 1914, entitled "An Act to Create a Federal Trade Commission, * * *."

Pursuant to its report and findings of fact and conclusions of law, the Commission issued an order requiring the candy company to cease and desist from the practices and acts complained of.

[*Application for review*]

The candy company petitioned the circuit court of appeals to review and set aside said order to cease and desist.

[¶ 55,214] **Thomas et al. v. Belcher et al.**

Oklahoma Supreme Court. Decided March 7, 1939. 89 Okla. App. Ct. Rep. 361.

An agreement between a wholesaler and a retailer confining the latter's operations to a definite territory is held not to be in restraint of trade.

An agreement between a wholesaler and a retailer permitting the former to fix the resale prices is held insufficient to constitute a monopolistic scheme in restraint of commerce under the Federal or Oklahoma anti-trust laws.

James W. Rodgers, and C. M. Gordon, for plaintiff in error.

C. H. Baskin, for defendants in error.

[*Nature of action*]

GIBSON, J. This is an action by a wholesaler against a retailer and his sureties to recover the purchase price of certain commodities delivered pursuant to a written contract of purchase and an alleged guaranty.

[*Defense*]

As a defense it was alleged, first, that the contract between plaintiff and the principal defendant, Belcher, was in restraint of trade and void under the provisions of the Sherman Antitrust Laws (15 U. S. C. A. 1, et seq.), and the statutes of this state (sec. 12790, O. S. 1931, et seq., 79 Okla. Stat. Ann. sec. 1, et seq.; sec. 9492, O. S. 1931, 15 Okla. Stat. Ann. sec. 217). In this connection it is asserted that the contract between plaintiff and the defendant Belcher was later supplemented by an oral agreement between said parties whereby Belcher was confined to a definite territory as retailer of the goods aforesaid, and was required to sell at a price fixed by the plaintiff.

[*Judgment below*]

The cause was tried to the court, and judgment for defendants was based upon a general finding.

[*Contract as to territory*]

Assuming that the alleged oral agreement confined Belcher's operations to a definite territory, that circumstance would not invalidate a contract of this character as one in restraint of trade. Defendants offer no authorities to support their argument in this behalf. If it can be said that the arrangement hints of monopoly, it still is not that character of monopoly that is said to be in unreasonable restraint of commerce. A motor car dealer's contract limiting him to a definite and exclusive territory does not restrain trade or competition in violation of the federal antitrust laws. *Cole Motor Car Co. v. Hurst*, 228 Fed. (C. C. A.) 280, and we therefore see no reason why a wholesaler or distributor of ordinary commodities may not so restrict his retailers. The illegality of contracts in restraint of commerce is a product of public policy. If such contracts are not contrary to public policy, they violate neither the federal nor the state antitrust laws. Until a commercial arrangement between parties reaches a stage where commodities needful to the public welfare are restricted commercially to the point where the public is exposed to the evils of monopoly, such arrangement is not in restraint of trade within the meaning of the antitrust laws.

The merchandise in the instant case was probably of a standard class and in general public use, but it was sold on a competitive market with other similar products in the particular territory. To restrict the sale of plaintiff's merchandise to one retailer therein holds no suggestion of monopoly.

[*Authority to fix resale prices*]

Assuming that the alleged subsequent agreement between plaintiff and the defendant Belcher actually permitted plaintiff to fix the resale prices, that circumstance alone is insufficient to constitute a monopolistic scheme in restraint of commerce under the federal or state antitrust laws, and therefore not sufficient to invalidate the alleged agreement or the original contract. Though this statement may be contrary to our earlier decisions, it is in accord with our most recent pronouncement on the subject. *Furst v. Lucas*, 177 Okla. 513, 61 P. 2d 214. In that case, referring to our previous decisions, we said:

"The declarations of law as contained in the decisions of this court previously mentioned rested upon consideration of the then existing expressions of the federal courts upon the subject. There have been, however, some important treatments of this subject by the United States Supreme Court which have not been taken into consideration in our previous opinions. * * *"

The cases there referred to were *Stewart v. W. T. Rawleigh Medical Co.*, 58 Okla. 344, 159 P. 1187; *Brooks v. J. R. Watkins Medical Co.*, 81 Okla. 82, 196 P. 956; *Hunt v. W. T. Rawleigh Medical Co.*, 71 Okla. 193, 176 P. 410; *Gordon v. W. T. Rawleigh Co.*, 117 Okla. 235, 245 P. 825; *Long v. Furst*, 171 Okla. 489, 44 P. 2d 74.

In *Furst v. Lucas*, above, we discussed the decisions of the Supreme Court of the United States as there cited, and concluded as follows:

"For the purpose of the case at bar the important feature of federal decisions upon the subject is the underlying principle of monopoly. It is to be observed that a single isolated transaction by which a wholesaler or manufacturer attempts to control the price of goods is not necessarily condemned by law. But if such a contract or agreement, express or implied, is a part of a general scheme which has a tendency towards monopoly, it comes within the condemnation of the legislation. * * *"

The discussion of the question is in that case full and comprehensive. It need not be further dealt with here, except to say that in the absence of a showing that the alleged price-fixing agreement was one of a number of like agreements in use between plaintiff and his retailers throughout plaintiff's trade territory, there is not sufficient evidence to warrant a finding that a monopoly existed or was intended in violation of the antitrust laws. A single transaction whereby a wholesaler attempts to control the resale price of goods is not condemned in law. We are not here discussing the legal effect upon the buyer's title arising from a stipulation between the seller and buyer of chattels fixing the resale price thereof. That question is not presented in the instant case; Belcher's title is not questioned.

The record discloses no evidence to warrant a conclusion that the alleged agreement was part of a general monopolistic scheme throughout plaintiff's trade territory.

[*Claim as to fraud*]

For further defense it is charged by the guarantors that they were induced to sign the guaranty contract through the fraud and misrepresentation of the plaintiff's agents, in that they were led to believe that Belcher would sell for cash only, whereas he was later required by plaintiff to sell on credit. Defendants say that in the absence of that assurance they would not have signed.

The testimony of guarantors Neese and Eastep is to the effect that no representative of the plaintiff induced them to sign the contract under promises of any kind. Defendant Campbell testified, over plaintiff's objection, that some unnamed alleged agent of plaintiff promised him that Belcher would sell only for cash. The court later ordered this testimony stricken for the reason that no proper proof of agency had been offered. The court was correct in its order. Thus there was no evidence of inducement on the part of plaintiff, at least the briefs cite us to no such evidence, and we are unable to locate any in the record. Therefore this particular defense is not sustained by the proof.

[*Re-assignment of territory*]

Next, the defendant guarantors say they have been discharged from liability for the reason that Belcher was assigned a territory other than the one to which he was first assigned, all without their consent. It has been held that such a circumstance will discharge sureties from further liability. 28 C. J. 957, sec. 105; *Furst v. Bury*, (N. D.) 249 N. W. 732; 89 A. L. R. 649. But here there was no proof that Belcher had been assigned a territory and then later re-assigned to another. One, or more, of the guarantors testified that he would not have signed the bond had he known that Belcher was to be sent to Okfuskee county instead of Hughes county, where the bond was signed. Our attention is called to no further evidence on this particular question. The defense fails for want of proof that Belcher was to be assigned, or was actually assigned first, to Hughes county. As to what formed the basis of the defendants' understanding in this regard, we are not informed.

[*Other defenses*]

As an additional defense the guarantors charge that the partnership of Furst & Thomas, of which the plaintiff is survivor, did not comply with section 11662, O. S. 1931, 54 Okla. Stat. Ann. sec. 81, by filing the information therein required with the clerk of the district court, and for that reason could not maintain this action. Section 11664, O. S. 1931, 54 Okla. Stat. Ann. sec. 83. In this connection it is charged that said partnership was transacting business here under a fictitious name. Furst & Thomas, a title including the names of the partners, is not considered a fictitious name. *Patterson v. Byers*, 17 Okla. 633, 89 P. 1114. See, also, *Bolen v. Ligett*, 49 Okla. 788, 154 P. 547. Defendants' argument that the partnership was doing business under a fictitious name because of the fact that it was engaged exclusively in selling McNees Sanitary Products is without merit.

[*Judgment reversed*]

There is not sufficient evidence to support the judgment of the trial court on any of the defenses interposed. It is therefore necessary to reverse the judgment in its entirety.

It appears that no judgment was rendered against defendant Belcher, though the court found against him. Instead, judgment was rendered in his favor. No doubt this was done through inadvertence, for attorneys for defendants concede that plaintiff was entitled to judgment against defendant Belcher.

The judgment is accordingly reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

BAYLESS, C. J., WELCH, V. C. J., and OSBORN and DANNER, JJ., concur.

[¶ 55,215] Belmont Laboratories, Inc. v. Federal Trade Commission.

United States Circuit Court of Appeals, Third Circuit. Decided and filed March 29, 1939.

On petition for review from the order of Federal Trade Commission.

Advertising of therapeutic products constitutes unfair competion within the prohibition of the Federal Trade Commission Act where the eliminative rather than the alleviative character of the product is falsely represented and no basis exists for the qualities of originality and exclusiveness of use attributed to the product.

Affirming as modified the order of the Federal Trade Commission of January 6, 1938, Dkt. No. 2869.

Before BIGGS, MARIS and CLARK, Circuit Judges.

Montgomery & McCracken, Philadelphia, Pennsylvania; for petitioner.

W. T. Kelley, Washington, D. C.; for respondent.

[*Dangers of therapeutic advertising*]

CLARK, Circuit Judge. The Federal Trade Commission had before it here a rather mild instance from a black chapter of American business history. The *emptor* who is greedy (mail fraud) or gluttonous (food) or vain (cosmetics) may be getting more protection that he deserves; so he perchance should be forced to *"carvere"*. Around the *emptor* whose sole desire is relief from the ills to which our mortal flesh is heir, the law has thrown too transparent and tardy a cloak. That, at least, is the opinion of those who should know.

A distinguished Senator of the United States:

"They are the people, who for the sake of a few dirty dollars, are willing to imperil the comfort, the wealth, and the lives of millions of people who cannot protect themselves." From a speech by Senator McCumber sponsoring the original Pure Food and Drugs Act (1906), 40 Cong. Rec., Part 3, p. 2653.

A leading medical authority:

"In the field of medicine human credulity earns little from experience. In the purchase of any kind of merchandise, except that sold for the alleged alleviation or cure of disease, the buyer has a chance of learning eventually whether or not he has been swindled. In the purchase of an automobile, a piano, or a suit of clothes, time will prove whether it was a good or a bad bargain; nature, through its agencies of wear and tear, makes clear whether one has been cheated. But when we go into the market to buy medicament or medical service, we are at sea for here we have nature not as an assistant to aid our judgment but as an opponent to confuse it. In from 80 per cent to 85 per cent of all cases of human ailments, it is probable that the individual will get well whether he does something for his indisposition or does nothing for it. The healing power of nature—*vis medicatrix naturae*—fortunately for biologic perpetuity, works that way. The seller of medicaments, then, obviously starts with at least an eighty per cent chance in his favor.

"The pills and panaceas of today are colloquially, but incorrectly, called 'patent medicines'; incorrectly, because among the thousands of remedies offered to the public for the self-treatment of disease there are probably not half a dozen that are really patented. The reasons are not far to seek. The United States Patent Office is not supposed to grant a patent on a product unless it can be shown that the article on which protection is sought is a new and useful invention. This simple requirement is sufficient in itself to prevent practically all so-called 'patent medicines' from being patentable." From the Introduction (p. *vii*) of Dr. Arthur J. Cramp's 3rd volume of Nostrums and Quackery and Pseudo-Medicine.

A leading legal scholar:

"The seriousness of the problem of false advertising, both sociologically and financially, requires no demonstration. The toll which is assessed upon the consumer runs into the millions; the effects upon the health and well-being

of the community are incapable of estimation." Handler, The Jurisdiction of the Federal Trade Commission Over False Advertising, 31 Columbia Law Review, 527, 551.

A leading journalist:

"In the patent-medicine business, the essential art was not medicine, nor chemistry. The fundamental genius for it was psychological. It consisted of skill in playing on the credulity of the simple-minded and the trusting.

* * * * * *

"The patent-medicine manufacturers made an art of describing the symptoms of diseases in such a way as to terrorize the reader of their pamphlets and advertisements into believing he had one or more of the ailments they pretended to cure; and in describing their cure-alls in terms to convey the conviction of hope." Mark Sullivan, Our Times, Vol. II, America Finding Herself, p. 511.

A distinguished former President and Chief Justice of the United States:

"Fraudulent misrepresentations of the curative value of nostrums not only operate to defraud purchasers but are a distinct menace to the public health. There are none so credulous as sufferers from disease. The need is urgent for legislation which will prevent the raising of false hopes of speedy cures of serious ailments by misstatements of facts as to worthless mixtures on which the sick will rely while their diseases progress unchecked." President Taft, Message to Congress June 21, 1911, see 48 Cong. Rec., Part 12, p. 675.

The present distinguished Chief Justice of the United States:

"* * * we find no ground for saying that Congress may not condemn the interstate transportation of swindling preparations designed to cheat credulous sufferers and make such preparations, accompanied by false and fraudulent statements, illicit with respect to interstate commerce, as well as, for example, lottery tickets."

In sustaining the Sherley Amendment (U. S. C. A. Title 21, sec. 10) to the original Pure Food and Drugs Act, an amendment made necessary by the failure of the majority of the Court in the case of *U. S. v. Johnson,* 221 U. S. 488, to agree with his views. *Seven Cases v. United States,* 239 U. S. 510, 516-517.

It is thus appparent that our "mild" is not in characterization of ethics but in description of harm. The products advertised (Mazon), a soap and an ointment, are germane only to the treatment of certain diseases of the skin. These diseases, always irritating and sometimes painful, may work from the inside out. As the reverse is not true, they affect the case and not the wheels of our human watch. They cannot, therefore, make it cease ticking. So the false therapeutic claims of the petitioner company may disappoint. The disappointment will not, however, be fatal.

[*Contents of advertisements*]

The advertisements objected to are curative, not paliative in tenor. They assert the "elimination" rather than the alleviation of the conditions treated. They are listed as Federal Trade Commission Exhibits 4, 3, and 2B and read:

[*Professional audience*]

In circulars addressed to members of the medical profession:

"*Mazon*—an ethical preparation compounded under the personal supervision of its originator —is the original treatment of its character for:

Eczema	Athlete's Foot
Psoriasis	Barber's Itch
Head Scalds	And Other Skin Disorders
Ivy Poison	
Ring Worm	

The colloidal nature of the base of Mazon and its strong penetrating characteristics, together with its healing and soothing ingredients, afford quick and permanent elimination of Eczema and other skin disorders."

Federal Trade Commission's Exhibit 4.

" 'No other treatment for permanent cure has ever been discovered * * * Some of the best-known skin specialists in the City (of Philadelphia) are using it exclusively and praise it highly.' "

Federal Trade Commission's Exhibit 4.

In a profesional journal having wide circulation among graduate nurses:

"Thousands of physicians have clinically proved the effectiveness of Mazon treatment, and are prescribing it daily to permanently eliminate:" (diseases substantially similar to those listed above).

Federal Trade Commission's Exhibit 3.

[*General advertisements*]

In leaflets (somewhat less boastful) contained in each individual package of its product:

"The therapeutic value and distinctive characteristics of Mazon were immediately recognized by physicians, who by personal clinical tests and observations, proved to their own satisfaction the unusual effectiveness of Mazon in the treatment and elimination of symptoms associated with certain types of:

ECZEMA, PSORIASIS, ALOPECIA, DANDRUFF, RING WORM, IVY POISON, ATHLETE'S FOOT, and other skin irritations."

Federal Trade Commission's Exhibit 2B.

"DO NOT ATTEMPT TO DIAGNOSE YOUR OWN SKIN CONDITION
Consult your physician and be guided by his advice."

Federal Trade Commission's Exhibit 2B.

[*Falsity of representations*]

Such a claim is medically untrue. It fails to recognize the scientific necessity for the application of internal remedies to diseases, which, by their etiology (the science of causes), proceed from internal disorders. Ring worm, head scalds (favus), athlete's foot, barber's itch, and ivy poison are ex-

cluded from this necessity. They are due to external causes, ring worm, favus and athlete's foot being parasitic or fungoid in character, and ivy poison being an irritant reaction from a vegetable fibre. In eczema, psoriasis, alopecia (falling hair) and dandruff (seborrhea, a cause of alopecia) on the other hand, the outward manifestation is, in part at least, the result of an inward disturbance. There is something amiss in the interaction of the body's chemical elements (metabolism). As both the physcians called by the petitioner company are, with one possible exception, in agreement as to what we have just said, we do not have to corroborate their testimony by resort to any principle of judicial notice, *Illinois Cudahy Packing Co. v. Kansas City Soap Co.,* 247 F. 556; 23 C. J. 168. It is nevertheless comforting to find the medical works in complete accord, Knowles, Diseases of the Skin, as to: ringworm, p. 394, favus, p. 384, athlete's foot, p. 389, barber's itch, p. 392 ivy poison, p. 167; as to: eczema, p. 119, alopecia (there are four kinds), p. 475 *et sequitur,* seborrhea, p. 452. The exception spoken of is psoriasis. The medical witnesses differ on its etiology and we find the same difference in the text book, Knowles, above cited, p. 102. All, however, agree upon the necessity for internal remedies, Knowles, above cited, p. 104.

The Commission might well have stopped with this question of etiology. Once the internal cause of the disease is established, it does not take a doctor to point out the futility of an outward application to an interior evil. Such application can do no more than alleviate by modifying the exterior symptoms. Accordingly, petitioner's advertisements, in their assertion of elimination, are bad in medicine and, fortunately for the public, bad also in law.

[*Claim of originality*]

The advertising complained of uses two other words of, to be conservative, exaggeration—"original" and "exclusively". Dr. Saul testified, Record p. 138, that the components of the compound (Commission's Exhibit 6, record p. 159) are all "common drugs used in the practice of medicine". An examination of the medical authority already cited amply supports his view. The principal drugs indicated, sodium salicylate, resorcinol, and phenol are prescribed in the paragraphs covering external treatment of the diseases mentioned, Knowles, above cited, pp. 105, 128, 399, 451, 483. One might add that the formulae there set out are more complete.

Here "original" appears to be used in the two senses of "novel" and "not otherwise obtainable". Strictly speaking, therefore, it has no bearing on efficacy and so no relation to false hopes. But it has, it seems to us, a harmful cannotation appropriate to each sense. The implication of newness is well recognized. In law what is old may be good, but in science progress is prized. One has a vision of thousands of doctors and druggists working in thousands of hospitals and laboratories and emerging with—Mazon. In the second sense it may, like the apple, keep the doctor away. It carries a suggestion of mystery and of secret sources. The fact is that, as we have seen, its ingredients can be obtained by resort to the prescription blank of the family physician.

[*Claim of exclusive use*]

It seems even less necessary to dwell upon the claim of exclusiveness. That, one need hardly observe, is by definition a rare attribute. What we have just said shows, we think, that there is no semblance of rarity. The "leading specialists", both those called to the witness stand and in the profession generally, may prescribe Mazon (one medical witness did and the other did not), but they do not pretend that their treatment has only that one facet.

[*Review limited by Commission's determination*]

We cannot, because the Federal Trade Commission did not, question either the reference in the advertising to "other" skin diseases, the claim that the ointment was prepared in collaboration with the University of Pennsylvania Medical School, or the implication that some special quality in the accompanying and high priced soap makes it indispensable to an advantageous use of the ointment. Any rule of *euisdem generis* does not seem appropriate to a unilateral effect on the consumer's mind. They cannot be expected to add the limiting "like". Fisher, The Proposed Food and Drugs Act, A Legal Critique, 1 Law & Contemporary Problems, 74, 82. We imagine that the University of Pennsylvania medical authorities may be surprised at the generous assistance furnished to their former pharmacist by their staff. The nature of the chemical cooperation of soap and ointment, if any, is not developed.

[*Regulation of therapeutic advertising*]

As might be expected from the words of the Act, *i. e.* "unfair" and "competition", the stock attempts to escape its incidence stress the entire absence of the first and the indefiniteness of the second. In the field of therapeutic claims, precedents are scarce. This is due, in part at least, to the discouraging history of the legislative efforts to extirpate an admitted and shocking evil.

The best account of that struggle is to be found in books by those who took part in it. We refer to Chapter 27, Volume II, of Our Times, by Mr. Mark Sullivan, from which we have already quoted, and the autobiography of the famous Dr. Wiley. See also, Reiger, The Struggle for Federal Food & Drugs Legislation, 1 Law & Contemporary Problems 3; Weber, The Food, Drug & Insecticide Administration, Its History and Organization; Kallet and Schlink, 100,000,000 Guinea Pigs; Kallet, Counterfeit; and, Lamb, American Chamber of Horrors (one chapter of which is entitled, Blood Money). That history, not yet as we think ended, shows the proprietary medicine lobby fighting a successful read-guard action against anything and everything calculated to enlighten the sick and suffering public. They fought, of course, in the courts as well as in the Congress, one of their notable victories coming strangely enough from the mouth of the son of the Autocrat of the Breakfast Table, *U. S. v. Johnson,* above cited, and requiring the passage of the Sherley Amendment, above cited, to restore the legislative intent. The Consumer's Protection Under the Federal Pure Food and Drugs Act, 32 Columbia Law Review 720; Shearer, The National Government and False Advertising, 19 Iowa Law Review 28. A comparison of the terms of the so-called Tugwell Bill (introduced by Senator Copeland as S. 1944, 73rd Cong., 1st Session) with those of the two companion and mayhap overlapping statutes which eventually became law, the Copeland Act (U. S. C. A. Title 21, sec. 321) and the Wheeler-Lea Amendment (U. S. C. A. Title 15, sec. 55) leads to the belief that the lobby is still going strong. Fisher, The Proposed Food and Drugs Act, A Legal Critique, above cited; A Proposed Revision of the Food and Drug Laws, 22 Georgetown Law Journal 306; Woodward, Its an Art, Chapter 25, Congress Says "Boo"; Lamb, American Chamber of Horrors, above cited.

[*Administrative agency*]

So we find the government department technically equipped to ascertain the truth about drugs prevented from exercising jurisdiction where the greatest damage is done, and the government department with no such facilities constrained to act lest the people perish. The author of a legislative note in a recent issue of the Virginia Law Review writes:

"The Federal Trade Commission, on the other hand, has handled cases involving false advertising for a number of years with some success, despite the limitations on its jurisdiction. * * * The proceedings of the Commission in which orders are issued only after full hearings, have established an enviable reputation for their impartiality so that appeals from them are relatively infrequent. It does not appear, however, that the Commission has at present adequate means of obtaining the necessary scientific evidence to fully cope with false advertising in this field." 22 Virginia Law Review 812, 820.

We may say that the examination of witnesses gives the impression that the Federal Trade Commission's legal staff did not equip itself with even the elementary medical books we borrowed from a local physician.

[*Precedents*]

We come now to a consideration of such precedents as exist. In *Minter v. Federal Trade Commission,* — F. (2d — (decided February 14, 1939), we had recent occasion to discuss what we deemed a judicial tendency to broaden the meaning of competition in the interests of consumer protection. Even without such liberal construction, we think the "procedural restriction" of *Federal Trade Commission v. Raladam,* 283 U. S. 643 (criticized in Handler, Jurisdiction of the Federal Trade Commission Over False Advertising, 31 Columbia Law Review 527, 549, 551; Federal Trade Commission and False and Misleading Advertising, 31 Michigan Law Review 804), has been fully met by the proof here. In fact, one of the offending circulars was distributed in explanation of some litigation with that most exasperating of all competitors, the former employee who has departed with a trade secret. For the most recent discussion of *Federal Trade Commission v. Raladam* and the later case of *Hughes Inc. v. Federal Trade Commission,* 77 F. (2d) 886, cert. den. 296 U. S. 617, see an interesting note in the February number of the Columbia Law Review, 39 Columbia Law Review 259, 261.

The only other case we have been able to find in the therapeutic field seems to have escaped the attention of the counsel for the Commission. It is reported *sub nomine, Fairyfoot Products Co. v. Federal Trade Commission,* 80 F. (2d) 684. It deals with a bunion cure in contrast with the obesity cures (Marmola, Bad-Em Salts) of the two cases previously cited. The opinion, by Judge Alschuler of the Seventh Circuit, expresses a point of view which seems to us more in accord with a suppression of the actual evil legislated against than that of some of the earlier cases. We quote:

"That petitioner's plaster has virtue may, for the purposes hereof, be conceded. Indeed, it would be quite unreasonable to assume that one putting out a purported remedy for an affliction would not employ some ingredients or means calculated to benefit some cases at some stage. But this would not justify such sweeping claims as the condemned items of this advertising matter disclose, which were evidently intended to

induce in the public mind the belief that here was an absolute and unfailing panacea for bunions of all kinds and degrees.

"Just where lies the line between 'puffing,' which is not unlawful and unwarranted, and misleading representations in advertising, is often very difficult of ascertainment. But in our judgment this case does not present such embarrassment, since the advertising here condemned is well beyond any 'puffing' indulgence." *Fairyfoot Products Co. v. Federal Trade Commission*, 80 F. (2d) 684, 686.

As the writer of an article to which we have several times referred (Fisher, The Proposed Food and Drugs Act, A Legal Critique, above cited, p. 82) points out:

"In the field of therapeutic representation a fine line between 'remedy' and 'cure' has been drawn, although as often as not the gullible purchaser has been deceived in both instances. * * * Some courts seem entirely too content with a 'commercial' standard of truth, piously hoping that the purchaser will not be so gullible as to be deceived by the depicted panaceas."

We are not pious and we are not content with the advertisements in the case at bar.

[*Advertisements not in compliance with standards*]

The suggested comparison between what was sought and what was had would have emphasized this very point. To check the obscurantism about puffing, the draftsmen offered two provisions. First, in order to discourage self-medication in the case of thirty-six named diseases, falsity was attributed to any representation made to laymen as to the effect of any drug in their treatment, A Proposed Revision of Food and Drug Laws, 22 Georgetown Law Journal 306; Fisher, The Proposed Food and Drugs Act, A Legal Critique, above cited, p. 98. The petitioner, in the less blatant of its two advertisements, makes a gesture in obeisance to this same principle. But it cobines this lip service with a therapeutic claim—so the sufferer is left with a choice of reliances. Second, the test of truth was made the "general agreement of medical opinion", Fisher, The Proposed Food and Drugs Act, A Legal Critique, above cited, p. 95.

[*Contentions of petitioner*]

Petitioner addresses some argument to the especial character of its circulation. It says that one putative audience will not read and the other will not heed. In other words, the contention is made that physicians and readers of profesional journals are too smart to be deceived and that lay purchasers buy blind because the leaflet is inside the carton containing the ointment. We think that one position is untrue legally and the other factually.

[*Contributory negligence no defense in deceit*]

Conceding the somewhat violent assumption that prospective patients never read medical and nursing journals, we do not concede either the ethics or the law of a proposition which puts a premium on a failure in wickedness. In the closely analogous field of common law deceit, the courts have long since refused to sanction the application of some idea of contributory negligence as a defense. Both deceit (apart from negligent misrepresentation), the *genus*, and false advertising, the *species*, are intentional torts and the "should have known or acted more wisely" of the injured are inappropriate in both cases, Green, Deceit, 16 Virginia Law Review 763; Bohlen, Misrepresentation as Deceit, Negligence, or Warranty, 42 Harvard Law Review 732, 739; 49 Harvard Law Review 830 (Note); Harper and McNeely, A Synthesis of the Law of Misrepresentation, 22 Minnesota Law Review 939, 957. We believe that Congress might well have given some thought to this before enacting paragraph (a) of Section 55, Title 15, U. S. C. A. If they had, they would have recognized the confusion in using the proviso of the proposed self-medication section and leaving out the section itself.

We find an equal inadequacy in the petitioner's reasoning about the casual inferences properly to be drawn from the enclosure of the leaflet. In the first place, the retailer is obviously interested in familiarizing himself with the goods he offers for sale. Recommendation will follow upon knowledge whether or not it is accompanied by belief. In the second place, the self-medicator's convincement is not dependent upon one use. He may and often must be influenced to a further purchase before success or failure is finally apparent, or he may and often must be influenced to a further purchase for treatment of some subsequent one of the other skin diseases mentioned or implied.

[*Propriety of stipulation*]

We are constrained also to ignore petitioner's plea of *locus paenitentiae*. Experience has compelled the Commission to insist upon the letter of its bond. So the Courts have upheld it in demanding a stipulation, *Federal Trade Commission v. A. McLean & Son*, 84 F. (2d) 910, *Federal Trade Commission v. Morrissey*, 47 F. (2d) 101, and in requiring that such stipulation be unconditional, *Fairyfoot Products v. Federal Trade Commission*, above cited, 686.

[*Modifications of order*]

We come therefore to this conclusion.

We are satisfied with the Commission's cease and desist order entered January 6, 1938, except in two particulars. We think that sub-paragraphs b and d of paragraph 1 should be omitted because they apply to the diseases curable through external application, and paragraph 3 should be omitted because it improperly attempts to extend the jurisdiction of the Commission to Canada. We leave untouched sub-paragraph a of paragraph 1. The words used therein are "competent remedy or cure". Our quotation from Fisher's The Proposed Food and Drugs Act, A Legal Critique (pages 11-12 of this opinion) contains an implied criticism of the judicial effort to draw a "fine line" between remedy and cure. We agree with that criticism and in support of it cite an excerpt from an opinion of the Circuit Court of Appeals for the Sixth Circuit:

"There was still room for a conclusion that substantial mischief resided in the claim of a universally efficacious remedy for the numerous and widely prevalent maladies in question; for the term 'remedy' must at least imply a curative tendency, although not of course guaranteeing a cure." *Simpson v. U. S.*, 241 Fed. 841, 845.

It is hardly necessary to comment upon the synonymity of "efficacious" in the passage above quoted and "competent" in the Commission's order or to call attention to the *a fortiori* character of a civil proceeding. The contrary holding of *United States v. Natura Co.*, 250 Fed. (D. C.) 925, is an example of the judicial line drawing animadverted on above.

[*Conclusion*]

The order of the Federal Trade Commission is modified in accordance with this opinion and is in all other respects affirmed.

[¶ 55,216] Eastern States Petroleum Co., Inc. v. Asiatic Petroleum Corporation, Harold Wilkinson and Anglo-Mexican Petroleum Corporation and Boyce Coppinger and Shell Union Oil Corporation.

United States Circuit Court of Appeals, Second Circuit.

Appeal from the United States District Court, Southern District of New York.

Expression of an intention to pursue the enforcement of legal rights believed in good faith to inure to the respondent does not constitute any actionable slander of title and affords no basis for injunctive relief in proceedings instituted under the Federal Anti-Trust Acts for alleged unreasonable restraint of foreign trade.

A. Hand and Chase, C. J., concur; L. Hand, dissents.

Root, Clark, Buckner & Ballantine, Attorneys for appellees; John M. Harlan, Leslie H. Arps, of counsel.

Cravath, De Gersdorff, Swaine & Wood, Attorneys for defendants-appellants, Asiatic Petroleum Corp., Harold Wilkinson and Anglo-Mexican Petroleum Corp.

[*Statement of the case*]

Chase, Circuit Judge: This appeal is from an order granting a motion for an injunction *pendente lite* in an action to recover treble damages for the alleged violation of the Sherman Anti-Trust Act and the Clayton Act. The injunction, which was sought and granted under the provisions of 15 U. S. C. A. Sec. 26, prohibited the appellants from interfering with the performance of contracts made by the plaintiff respecting the sale, transportation or delivery of products dealt in by the plaintiff and from using threats, commands, force or coercion to prevent others from purchasing plaintiff's products. The breadth of the general restraining language of the injunction was narrowed, however, so as to permit "(1) the bringing of suit bv Mexican Eagle Oil Company or any assignee to recover the oil, or the value thereof or damages for the retention thereof, heretofore or hereafter shipped to the plaintiff from the Republic of Mexico, or (2) to advertise the fact of the pendency of such litigation, or (3) bring such fact to the attention of the trade in general or any person in it, or (4) to appeal for assistance or redress to governmental bodies".

[*Parties*]

The plaintiff is a Delaware corporation engaged in the purchase and sale of refined petroleum products and also in refining those products from crude oil at its refinery in Houston, Texas. Its principal office is in the Southern District of New York. Appellant Wilkinson is the presi-

dent of appellant Asiatic Petroleum Corporation, a Delaware corporation, and of Anglo-Mexican Petroleum Corporation, a New York corporation. The principal office of each of these corporations is in the Southern District of New York. Both of these corporations form part of a large number of corporations which are controlled directly or indirectly by what will here be called the Shell Group the control of which is traceable to what is known as the Royal Dutch Company, a corporation organized under the laws of the Kingdom of the Netherlands and Shell Transport & Trading Co., Ltd., a British corporation. The defendants who were not enjoined and have not appealed are the Shell Union Oil Corporation, a member of the Shell Group, and Boyce Coppinger of the Asiatic Petroleum Corporation. The Shell Group is engaged extensively, both in this country and abroad, in business which includes the purchase, sale and refining of crude petroleum and the purchase and sale of various products refined and manufactured from crude petroleum in competition with the business of the plaintiff.

This controversy has grown out of the situation in the above mentioned business which has been created by the seizure by the Republic of Mexico, on March 18, 1938, of various oil wells in Mexico which were then owned by the Mexican Eagle Oil Company Ltd., a corporation also a member of the Shell Group which will be herein called Mexican Eagle.

[*Governmental seizure of wells*]

It is undisputed that on the above date the President of Mexico issued a decree, without action by the Mexican Congress, under which the property of Mexican Eagle was expropriated without compensation and seized by the government. The property of Mexican Eagle so seized which is of present concern consisted of fourteen out of a total of eighteen oil wells in the Poza Rica oil field and pipe lines from that field to the Mexican port of Tuxpam. The other four wells then were, and since have been, owned by Petromex Corporation which is owned by the Mexican Government. Since the seizure under the decree of expropriation, the wells in the Poza Rica field have all been producing. The crude oil from all the wells in the field has been commingled and piped to Tuxpam through the seized pipe lines to be shipped from that port.

[*Purchases from governmental subsidiary*]

The plaintiff, finding it difficult to secure an adequate supply of domestic crude oil at favorable prices for its refinery at Houston, made a contract on August 11, 1938, with a corporation wholly owned by the Mexican Government, here called Distribuidora, for a supply of crude oil. This crude oil has been shipped from Tuxpam out of oil from the Poza Rica field produced from all the wells there and commingled. The total amount shipped under the contract to the plaintiff has not exceeded the amount produced by the wells owned by Petromex before March 18, 1938, and the plaintiff therefore claims that none of the oil from the expropriated wells of Mexican Eagle has been delivered to it but it is doubtful whether such a position is tenable because of the indiscriminate commingling of all of the oil from all of the wells in the field.

[*Transaction complained of*]

The plaintiff has refined the crude oil thus obtained and used the refined products in its export trade. Among the contracts which have been filled in part, at least, out of such refined products is one made by the plaintiff on November 18, 1937, with Harris & Dixon, Ltd., a British corporation, for the sale of some 120,000 tons of refined products to be delivered in installments between February 1, 1938, and January 31, 1940. The conduct of the defendants in respect to the Harris & Dixon contract is what the district judge relied on as sufficient to entitle the plaintiff to the temporary injuncion. This was brought about in the following manner.

[*Background of the transaction*]

It was generally known that Mexican Eagle claimed that its property had been unlawfully seized in Mexico and that the so-called Shell Group objected to the purchase of oil from expropriated wells. In October 1938, a Mr. van Zonneveld, a director of Harris & Dixon, Ltd., learned in London that the "Stigstad", the steamer which had been chartered to make deliveries of the products under the plaintiff's contract with Harris & Dixon, Ltd., was being watched and that Mexican Eagle might cause her cargo to be seized upon arrival in England. He communicated at once with the British Ministry of Mines and was informed that there were threats by "other quarters" to seize any refined products produced from Mexican oil. He was also told that it was not contrary to British law to import such products and the suggestion was made that he confer with representatives of the Shell Group. By this time Mr. van Zonneveld knew that the British Government did not view with favor the importation of products refined from Mexican oil but that it would not prevent importation. He adopted the suggestion of the Ministry of Mines and

had a conference with Mr. Godber of Mexican Eagle on November 4, 1938. He was then told that Mexican Eagle claimed that its crude oil was being used for refining to make the products being delivered to Harris & Dixon, Ltd. under the contract it had with the plaintiff and that the Shell Group intended to seize such cargoes. Mr. van Zonneveld then told Mr. Godber that he was going to New York to find a solution if possible and Mr. Godber replied that if he had occasion "to talk with the Mexican Eagle to go and see Mr. Wilkinson" in New York and gave him Mr. Wilkinson's address there.

Mr. van Zonneveld did go to New York arriving there on November 10, 1938 and consulted a Mr. Leach of the New York British Consulate who advised him to see Mr. Wilkinson. He later consulted with representatives of the plaintiff and told them that Mr. Leach had been to Washington "to put before the Embassy our very unhappy and very unpleasant situation, and that he could only bring back the answer that the British Government did not like Mexican oil to enter Great Britain and I was asked if I could possibly find a solution so that no more of that oil was going to come in." He also told representatives of the plaintiff that Mr. Leach had suggested that information as to the amount for which the plaintiff would cancel the contract should be obtained. In response to that he was told that it would be $500,000.00 plus release from their charter. He then reported back to Mr. Leach who arranged an appointment for him with Mr. Wilkinson for the morning of November 16th.

He then reluctantly called upon Mr. Wilkinson and was informed by him that he was absolutely certain that the plaintiff was handling Mexican Eagle oil, "that it was physically impossible for the Mexican Government to deliver oil in the quantities that they did from their own wells and from their own property, and that the whole world knew quite well that the Eastern States were taking expropriated oils." Mr. van Zonneveld inquired whether "if we defaulted would they pay the piper, or pay the damages, to which he said definitely no." He told Mr. Wilkinson the amount of probable damages if Harris & Dixon defaulted and Wilkinson said he was not interested but did say that "they could not fight all the battles in the world and that we, as a British firm, should be on the same side of the fence as they were, even from a moral point of view". After asking why the Shell Group would wait to seize the products in Great Britain instead of doing so in the United States and being told that British laws were considered more favorable, Mr. van Zonneveld left.

During the interview, the position of Mr. Wilkinson was one of insistence that the plaintiff was shipping under the Harris & Dixon contract products made from crude oil owned by Mexican Eagle; that such cargoes would be seized; that Harris & Dixon ought not to be a party to such business; but that the latter could not expect to be indemnified if it defaulted on its contract and was left to do as it thought best in view of the attitude of the Shell Group and the British Government.

The next interview Mr. van Zonneveld had with one who spoke for the defendants was in New York on November 24th. It was with Mr. Boyle who was the head of the legal department of the Shell Group in London. Mr. van Zonneveld then went to the office of the Mexican Eagle to tell Mr. Wilkinson "that we were just going ahead, that we had decided to open up credits and take the cargo". As Mr. Wilkinson was away he saw Mr. Boyle instead. He had in the meanwhile consulted again with Mr. Leach; with representatives of the plaintiff; and had communicated with his own firm in London. As that was the first time Mr. van Zonneveld had seen Mr. Boyle, he explained the situation fully to him and expressed concern about the possibility of the seizure of cargoes and asked if there was any way to protect Harris & Dixon "because they really had nothing to do with the whole issue". Mr. Boyle said it certainly was unfortunate but that they would take no steps so far as Harris & Dixon were concerned. Then Mr. van Zonneveld urged Boyle to consider the innocent party position of Harris & Dixon who had made the contract before any Mexican trouble had arisen and asked him to look at the contract "and confirm to me that that is a legal binding contract signed by a British firm that has to be lived up to". At that he left a copy of the contract with Boyle upon the understanding that they would meet again the next day.

They did meet as agreed in the office of the Mexican Eagle and this time Mr. Wilkinson was present. Mr. van Zonneveld asked Mr. Boyle what he thought of the Harris & Dixon position under the contract and was told "that it was a contract we had to live up to, there might be one or two or three very meagre possibilities of our getting out of the contract and defaulting if he wanted to, but I think he admitted they were very, very weak". Mr. Boyle also then said he was "sorry he could not possibly give us any advice because it was not for him to make any suggestions, but if he were in our position the cheapest thing might be to default". The consequences of a default were discussed and though no amount of damages was

stated Mr. van Zonneveld requested indemnity if his firm defaulted "but the answer was the same—certainly they could not or would not consider or even listen to that, that was our burden and we had to lose our own money". Mr. van Zonneveld was told either by Mr. Boyle or Mr. Wilkinson that the plaintiff was getting such a poor grade of crude oil from Mexico that it would sooner or later be unable to "produce the gasoline as per our contract specifications". In the afternoon of the same day the three met again with a Mr. Houston, an attorney representing Harris & Dixon, Ltd. and the matter was discussed again to about the same effect with emphasis being placed by Mr. Boyle on "how unpleasant it must be for us to carry on a contract or do any business with us (sic) against the wishes of the British Government and that we certainly did not want to handle any material to which there was a stigma attached". Mr. Wilkinson also stated that "if the oil got in and even if there was no injunction we should not be able to sell it to our customers". Asked by Mr. van Zonneveld, "Is the Mexican Eagle going to do it?" Mr. Wilkinson replied, "No, not the Mexican Eagle but the British Government". Mr. Boyle also said, "that we certainly as a British firm would not like to incur the displeasure of the British Government or the enmity of the major oil companies", meaning those in Great Britain.

Following this interview Mr. van Zonneveld did not see representatives of the plaintiff again but talked with Mr. Leach telling him and later notifying the plaintiff that Harris & Dixon Ltd. "were going to live up to the contract". The only interruption of performance under the contract was a delay of a few days in loading the "Stigstad" and there has since been continued performance by Harris & Dixon, Ltd.

The plaintiff relied somewhat in the District Court upon a falling off of its business which was not, however, proved to have been the result of conduct of the defendants and was, we think rightly, disregarded. Also, a point was made of the refusal of the Asiatic Petroleum Corporation to make a new contract with the plaintiff but that was only an exercise of its right to decline to deal with the plaintiff if it should see fit to do so. *Federal Trade Commission v. Raymond Co.* 263 U. S. 565. The same is true of the refusal of brokers to renew contracts or enter into new ones with the plaintiff. Likewise, what was done wholy abroad unaided by acts in this country must be counted out. *American Banana Co. v. United Fruit Co.* 213 U. S. 347. And whatever has been shown to have been done in this country in aid of any combination abroad, see *United States v. Sisal Sales Corporation* 274 U. S. 268, relates to the Harris & Dixon matter.

[*Issue involved*]

The real issue now is whether the claimed attempt to induce Harris & Dixon Ltd., to break its contract with the plaintiff gives adequate support for the preliminary injunction. There can be no fair doubt but that the defendants wanted to stop the sale of crude oil claimed to belong to Mexican Eagle and consequently to stop the performance of that contract is so far as it was being performed by the shipment of products refined from such crude oil and, because they were convinced that performance through the use of any Mexican oil the plaintiff was getting from Distribuidora would of necessity be in part oil they claimed to belong to Mexican Eagle, they thought there could be no such performance without violating the rights of Mexican Eagle.

[*Contentions of defendants*]

In the district court the defendants took the position, as they do here, that they need not prove that Distribuidora did not have a good title to the crude oil it sold the plaintiff in order to prevent the issuance of an injunction *pendente lite* and that it is enough to give them the privilege to do all they did to show that they believed in good faith that Mexican Eagle did own the oil despite the claims of Distribuidora under the Mexican decrees. The district judge misconceived the position of the defendants as to this in that he took it to amount to a concession for present purposes "that title to the oil was acquired by the Mexican Government and passed to the plaintiff, whether or not the oil is from confiscated property". On this assumption, there was no justifiable basis for any interference with the performance of the plaintiff's contract and the injunction was accordingly issued.

Rightly understood, however, the position the defendants have taken does leave them free to contest with great force the issuance of an injunction *pendente lite*. They are charged in the bill of complaint with unreasonable restraint of the foreign commerce of the plaintiff in violation of the anti-trust laws. That boils down to whether or not, within the purview of those laws, what was done in respect to the Harris & Dixon contract amounts to actual, or threatened, unreasonable restraint. That, in turn, comes down to whether or not the defendants, upon being asked what their attitude was concerning performance of

that contract, and believing reasonably that it was being performed by means of products they claimed were made from crude oil belonging to Mexican Eagle, overstepped the bounds of their privilege to reply as they did.

[*Reasonableness of defendants' theory*]

We do not now undertake to decide whether or not the defendants can successfully maintain their claim that Mexican Eagle owned the oil taken from the expropriated wells it formerly did own. That may be left for decision after trial. It is plain that they did believe they could successfully seize products abroad when the opportunity presented itself whenever they could prove that those products were refined from crude oil which came from the expropriated Mexican Eagle wells. The Shell Group had secured a favorable decision in an action brought after seizure of such products in France and also in one of like nature in Holland which would give fair ground for such a belief. Thus it was sufficiently established that the defendants had reasonable cause to believe that in such jurisdictions at least seizures could be successfully made.

Having then the reasonable belief that they would be entitled to maintain their claim that Mexican Eagle owned such products whenever they could thus be seized, the defendants were by the inquiries made of them by Harris & Dixon, Ltd. placed where they might assert their claims. The alternative would have been a concession which might have been an estoppel had any of the products shipped under the contract later been seized. It should be remembered that defendants did not seek out Harris & Dixon to induce a breach of contract. On the contrary Harris & Dixon, clearly disturbed by a more or less general rumor, not traced in origin to the defendants, that their cargoes would be seized sought out the defendants as suggested by the British Ministry of Mines.

[*Presence of actionable slander determinative*]

Had the defendants, in reply to such inquiries as Mr. van Zonneveld made, done no more than assert in good faith their claim that Mexican Eagle's crude oil was being used unlawfully by the plaintiff coupled with the assurance that whatever legal rights Mexican Eagle had by way of seizure would be enforced, there could be no doubt that they would have exercised only their privilege so to do. If what the defendants did amounted to actionable slander of the plaintiff's title to the products it was shipping and intended to ship under the Harris & Dixon contract there was an unlawful interference with the contractual relations existing between the plaintiff and a third person by way of inducement to a breach. See *Second Nat. Bank v. M. Samuel & Sons*, 12 F (2) 963. So decision upon this phase of the matter should depend upon whether or not there was an actionable slander of plaintiff's title. As to that the decisive factor is the reasonable belief of the defendants that Mexican Eagle had an interest in the products being shipped by the plaintiff which could be, and would be, supported by lawful seizure as occasions for that arose. An honest and reasonable belief to this effect would justify an expression of it even though the belief were a mistaken one. *Hopkins v. Drowne*, 21 R. I. 20. The privilege of one to make known his intent to assert legal rights he believes in good faith that he has in property, even though he may be mistaken, is well illustrated in patent cases. *Warren Featherbone Co. v. Landauer*, 151 Fed. 130; *A. B. Farquhar Co. v. National Harrow Co.* 102 Fed. 714.

[*Restraint of foreign commerce essential*]

But further than this, the basis of the bill in this suit is wholly the claimed unreasonable restraint of the foreign commerce of the plaintiff. It is only the kind of restraint of such trade which is unreasonable that is forbidden by the anti-trust laws. *Standard Oil Co. v. United States*, 221 U. S. 1. And to determine whether there is, or is threatened, an unreasonable restraint the particular conditions of each case must be considered with care in the light of the circumstances shown and effect be given to realities. *Appalachian Coals Inc. v. United States*, 288 U. S. 344, 360.

[*No restraint shown*]

In applying this principle to the present case, we find that Harris & Dixon, Ltd. was led by general report in London to believe that cargoes shipped to it by the plaintiff under its contract would be seized under the claim that they were made from confiscated crude oil owned by Mexican Eagle; that Harris & Dixon became aware that the British Government was unfriendly to the importation of such products as was the trade in general and that Harris & Dixon, at the suggestion of the British Ministry of Mines and the British authorities in this country, sought out the defendants for the purpose of being informed as to what Mexican Eagle intended to do in respect to its claim that Harris & Dixon was receiving under its contract products made from Mexican Eagle's crude oil and to obtain indemnity if it could in the event that it decided to default. Placed in this situation, it was not unreasonable for the

defendants to state in good faith to the representative of Harris & Dixon just what the attitude of Mexican Eagle was and would be; leaving Harris & Dixon to decide without any expectation of indemnity what its conduct should be. Nor does the fact that there was some expression of what was known to be the attitude of the British Government and of the major oil companies toward traffic in confiscated oil justify an injunction *pendente lite*. There was no threat to do more than attempt to enforce legal rights thought in good faith to be possessed by Mexican Eagle. Pressed as they were to agree to indemnify Harris & Dixon and to advise that firm as to the course it should take, we do not find that the defendants brought about, or did anything which threatened to bring about, an unreasonable restraint of plaintiff's foreign trade in respect to the Harris & Dixon contract. On the contrary, the rather cautious replies made to inquiries show the intent to insist upon the claim that Mexican Eagle's crude oil was being unlawfully taken and used in the performance of the contract together with the assertion that legal steps would be taken whenever possible to prevent that; leaving Harris & Dixon, Ltd. to its own resources and the exercise of its own judgment in an admittedly difficult position which was primarily due to the fact that the plaintiff was buying crude oil that Mexican Eagle honestly claimed to own and was selling to Harris & Dixon, Ltd. products refined from that oil.

A majority of the court is of the opinion that when van Zonneveld came to this country to ascertain what attitude the defendants would adopt with respect to the contract between the plaintiff and Harris & Dixon, Ltd. Wilkinson, representing the other defendants, could inform him that attachments would be levied in foreign countries without assuming the duty of attaching the oil in this country. The privilege of the defendants to state their position regarding action abroad was not dependent upon the adoption of, and the attempt to enforce, the same position in this country. In other words, the defendants were not bound, in order to make their good faith manifest, to follow up such information or threats, if they be regarded as such, by instituting suits promptly to try title in the courts of the United States. In saying this we do not imply that there would be no duty to begin suits promptly in our courts if there was no likelihood of an opportunity to sue in foreign courts within a reasonable time.

[*Statements based upon good faith*]

When such information was given in good faith to a representative of those who sought it in order to protect their own interests, it could be safely given. The only threats were of attachments in foreign countries. There seems to be no basis in the record for holding that these were not made in good faith or that the defendants failed to act promptly in pursuing the remedies they told Harris & Dixon Ltd. they proposed to seek. The first threats of attachment traceable to the defendants occurred on November 4, 1938. The next shipment was not due to leave Texas until after November 25th. In fact the oil was not loaded until December 16, 1938, and would not reach England until January 1939.

[*Absence of unreasonable delay*]

Moreover, there seems to be no proof of unreasonable delay even in our own courts. The last conversation between van Zonneveld and representatives of the defendants in New York was on November 25, 1938 and the plaintiff brought this suit on December 9, 1938. The defendants appear to have counter-claimed for the oil shortly after February 3, 1939. Even if it were necessary to bring suit in this country in support of the assertions that Mexican Eagle owned the oil and would seize abroad the products refined from it, the failure to sue for slightly more than two months ought not to be held an undue delay. And under Rule 41 the District Court has the power in its discretion to refuse to permit the defendants to dismiss the counterclaim for conversion if such action would be likely to prejudice the plaintiff's rights.

[*Conclusion*]

On the record now made we accordingly fail to find adequate support for an injunction *pendente lite*.

[*Injunction dissolved*]

Order reversed and injunction *pendente lite* dissolved.

[Dissent]

L. HAND, Circuit Judge (dissenting):

Upon an application like this all doubts must, of course, be taken against the plaintiff; but—quite aside from the contract with Harris & Dixon, Ld.—it is clear that the defendants are threatening its customers in a way that is damaging, and may be ruinous. They are doing this by challenging its title to the oil, which they declare generally they may attach as their own, if others buy it. This they assert a privilege to do, because they say that they honestly believe the oil to be theirs: that is, that the expropriation of it by the Mexican Government will not be recognized by the courts of other countries. I shall assume arguendo that a person is privileged to assert an honest claim

of title to property in the possession of another, even to the extent of diverting his customers. Huxley v. Hunt, 191 Fed. Rep. 943; aff'd 201 Fed. Rep. 899 (C. C. A. 3). Restatement of Torts § 647. It seems to me strange that such a privilege should exist, if the claim be unwarranted, and I should try to reach an opposite conclusion, if the point were necessary to decide. It is not. The putative privilege must in any event be ancillary to the protection of the claimant's own title; it is accorded him only in order to prevent dispersion of the property before he can secure an adjudication. Certainly I can see no other legitimate interest he can have, which justifies the damage inflicted. If so, obivously the claimant may not avail himself of it, and yet refuse to resort to courts able and competent to judge the dispute. This is well brought out in those cases which enjoin a patentee who will not sue on his patent, from badgering the trade by threats he refuses to push home. *Adriance Platt & Co. v. National Harrow Co.*, 121 Fed. Rep. 827, (C. C. A. 2); *Virtue v. Creamery P. M. Co.*, 179 Fed. Rep. 155 (C. C. A. 8); *Oil Conservation Eng. Co. v. Brooks Eng. Co.*, 52 Fed. (2) 783 (C. C. A. 6); *Art Metal Works v. Abraham & Straus*, 62 Fed. (2) 79, (C. C. A. 2); *American Ball Co. v. Feaeral Cartridge Co.*, 70 Fed. (2) 579 (C. C. A. 8). It is often said in these cases that the privilege depends upon the honesty of the claim, and that the refusal to sue is merely evidence of bad faith; and that may not be practically objectionable. But it veils the proper theory, for a man might honestly believe in his title and yet refuse to assert it, in which event his privilege would certainly not survive.

I am not clear that my brothers disagree with the statement of law I have just made: in any case, as I understand it, they rely, at least in part, upon the fact that the defendants have filed a counterclaim in this suit alleging a conversion of the oil. That was after the order had been entered, and we cannot consider it on this appeal; and as the record stands, the defendants have refused to test their title in our courts. That, to my mind (full opportunity to do so having existed for many months) tolled their privilege to divert the plaintiff's customers. I do not of course mean that the courts of other countries are not as competent as our own, but it seems to me axiomatic that we should not excuse what would otherwise be a wrong upon the assumption that the putative wrongdoer cannot obtain justice here. I would therefore affirm the order, with leave, however, to the defendants to move in the district court to vacate the injunction because of the pendency of the counterclaim.

So far I have been speaking only of diverting prospective customers, not of inducing buyers to break their contracts. As my views are not to prevail, it hardly seems worth while to go into that difference here; except to notice it, and to say that in my judgment the privilege to induce a breach is, and should be, much narrower than to divert customers, who are still fair game for both competitors. I doubt that an honest, but unwarranted, belief in the validity of one's title will excuse such an injury; but I must own that I know of no authority on the question.

[¶ 55,217] Bristol-Myers Company, a corporation organized and existing under the laws of the State of New Jersey, v. Webb's Cut Rate Drug Co., Inc., a corporation organized and existing under the laws of the State of Florida.

Florida Supreme Court. Filed April 14, 1939.

Appeal from the Circuit Court, Pinellas County.

The Florida Fair Trade Act is held unconstitutional as to non-contracting parties. Application of the provisions of the Act, prohibiting sales of trade-marked products below the minimum resale prices established by fair trade contracts concluded under the Act, to retailers who are not parties to the contracts, is held unwarranted where the title of the statute, by its failure to express this inclusive purpose, is misleading within the prohibition of the State Constitution.

Robert H. Givens, Jr., for Appellant.

Bussey, Mann & Barton, for Appellee.

TERRELL, C. J., BROWN, WHITFIELD, BUFORD, CHAPMAN and THOMAS, J. J., concur.

[*Statement of the case*]

BROWN, J. This is an appeal from an order granting a motion to dismiss the bill of complaint which was filed in the lower court by the appellant here. The case turns upon the validity of Sec. 6 of Chapter 18,395, Acts of 1937; that is, whether said section comes within the scope of the title, under Sec. 16 of Art. III of the Constitution.

The appellant exhibited its bill of complaint against the appellee, Webb's Cut Rate Drug Co., Inc., seeking to enjoin appellee from further alleged violations of a

certain so-called "fair trade contract" executed by the appellant and certain retailers of drugs in the State of Florida, other than the appellee, the release sought being based upon certain provisions of Chapter 18,395 of the Acts of 1937, the title of which reads:

"AN ACT to Protect Trade-Mark Owners, Producers, Distributors and the General Public Against Injurious and Uneconomic Practices in the Distribution of Competitive Commodities Bearing a Distinguishing Trade-Mark, Brand or Name, Through the Use of Voluntary Contracts Establishing Minimum Resale Prices and Providing For Refusal To Sell Unless Such Minimum Resale Prices Are Observed."

[*Minimum resale price contracts*]

It was alleged that the appellant, a manufacturer of drugs, pursuant to the provisions of said Act, entered into retail sales contracts with a large majority of the retailers in the State of Florida who handled the products of appellant which bear appellant's trade-marks; that in and by said contracts the retailers agreed they would not, directly or indirectly, advertise, offer for sale or sell, within the State of Florida, certain products of the appellant bearing appellant's trade-marks, at prices less than those specified in said contracts, all of which were uniform.

[*Knowing violation of contracts*]

It was further alleged that while the appellee, a retailer, had never entered into nor executed any of such contracts, the appellee nevertheless was informed of the existence and of the terms and provisions of such contracts, and particularly the provision relating to minimum retail prices, but that notwithstanding said contract and the repeated protests of appellant against violation of same, the appellee advertised and offered for sale certain of said commodities at prices less than the minimum prices specified in said contracts, said certain commodities, being, Ipana Tooth Paste and Sal Hepatica.

The bill further alleged that continuance of such violations was producing great and irreparable injury to the appellant and the retailers in the State of Florida upon whom the appellant must depend for the distribution and sale of its products in this State, and was damaging to the goodwill of the commodities in question and was causing the appellant the loss of sales. The bill ended with a prayer for an injunction against further violations by the appellee, basing such prayer upon Sec. 6 of said Act, which reads:

"Section 6. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

[*Determination of lower court*]

In his order dismissing the bill, Circuit Judge Hobson held that the inclusion in the title of the expression "through the use of voluntary contracts establishing minimum resale prices and providing for refusal to sell unless such minimum resale prices are observed," restricts the subject of the act and implies that its provisions will be applicable only to retailers who voluntarily enter into such contracts, and not to retailers who refrain from doing so; that because of this implication the title is misleading and that Sec. 6 is therefore invalid and not within the scope of the title of the Act under Section 16 of Article III of our State Constitution.

[*Title misleading*]

We concur in this holding of the Chancellor, on this, the only constitutional question raised in the case. None other is considered.

That portion of Section 6, Chapter 18,395, which reads, "whether the person so advertising, offering for sale or selling is or is not a party to such contract," is invalid, because there is nothing in the title of the act, nor the subject thereof as expressed in the title, which put the members of the legislature or the public on notice that such a novel provision, and one contrary to the common law, (19 R. C. L. 136-7) was embraced in the act; nor can such provision be regarded as "matter properly connected" with the subject of the act as expressed in the title when we consider the restriction placed on the subject of the act by embracing in the title the clause reading: "through the use of voluntary contracts, establishing minimum resale prices and providing for refusal to sell unless such minimum resale prices are observed." Furthermore, this quoted portion of the title was clearly misleading in so far as Section 6 is concerned, because it indicated that the limitations with reference to minimum resale prices would be applicable to and enforceable against only those retailers who voluntarily entered into contracts providing for such minimum resale prices.

[*Conclusion*]

The first part of the title states that it is for the purpose of protecting trade-mark owners, producers, distributors and the public. The next portion states that these persons are to be protected against in-

jurious and uneconomic practices in the distribution of competitive commodities bearing a distinguishing trade-mark, brand or name. Then it proceeds to say how this protection is to be enforced, and the method is stated thus: "Through the use of voluntary contracts establishing minimum resale prices and providing for refusal to sell unless such minimum resale prices are observed." Appellant contends that the clause just quoted means that *resale prices,* which shall be binding on *all* retailers, those who do not contract as well as those who do, are to be thus *established* by the resale prices set forth in the contracts which may be voluntarily entered into by those retailers who see fit to execute such contracts. But this is not, to our minds, the plain and obvious meaning of the language used; quite the contrary. The meaning contended for by the appellant may have been that which was in the mind of the draftsman of the act, but the actual language used would convey an entirely different meaning to the ordinary mind. The significance of the word "voluntary" is well understood by the average man, be he legislator or plain citizen. Such a person, reading the title to this act, would conclude that it applied only to those retailers who entered into voluntary contracts with trade-mark owners.

[*Supporting authorities*]

The conclusion reached by the court below, and by this Court, is supported by *State v. Palmes,* 23 Fla. 620, 3 So. 171; *Webster v. Powell,* 36 Fla. 703, 18 So. 441; *State v. Burnes,* 39 Fla. 367, 21 So. 290; *Wade v. Atlantic Lumber Co.* 51 Fla. 628, 41 So. 72; *Ex parte Knight et al,* 52 Fla. 144, 41 So. 786; *State ex rel Davis v. Fowler,* 94 Fla. 752, 114 So. 435; *Colonial Inv. Co. v. Nolan,* 100 Fla. 1349, 131 So. 178; *State v. Howell,* 112 Fla. 852, 151 So. 299; *State ex rel Grodin v. Barnes,* 119 Fla. 405, 161 So. 568; *State ex rel Landis v. Ault,* 129 Fla. 686, 176 So. 789, and many other cases which might be cited if necessary.

[*Order affirmed*]

The order appealed from is accordingly affirmed.

Affirmed.

[¶ 55,218] California Lumbermen's Council, Coast Counties Lumbermen's Club, Central Valley Lumbermen's Club, Northern Counties Lumbermen's Club, Peninsular Lumbermen's Club, San Joaquin Lumbermen's Club, and the officers, councilmen and members of said organizations and associations, v. Federal Trade Commission.

United States Circuit Court of Appeals, Ninth Circuit. Filed April 14, 1939.

Upon motions to strike transcript of record from the files, to require filing of proper record, or to vacate cease and desist order.

The validity of a cease and desist order of the Federal Trade Commission is not subject to attack by a motion to strike the transcript of record filed with the court of review, on the ground that fair hearing was not afforded by the examiner, where the cause is not before the court upon the merits.

Denying motion to vacate the order of the Federal Trade Commission of July 23, 1938, Dkt. No. 2898.

Morgan J. Doyle of San Francisco, California, for petitioner.

W. T. Kelly, Chief Counsel, Federal Trade Commission, and Martin A. Morrison, Assistant Chief Counsel, and Daniel J. Murphy and James W. Nichol, Special Attorneys, all of Washington, D. C., for respondent.

Before GARRECHT, HANEY and STEPHENS, Circuit Judges.

[*Nature of the proceedings*]

STEPHENS, Circuit Judge: Petitioners present two motions. One is to strike the transcript of the record heretofore filed in this court, and the other (premised upon the granting of the first) is to require respondent to file a proper transcript of the record or to vacate the cease and desist order made by respondent. Both motions must be denied.

[*Conduct of hearing attacked*]

The basis of the motion to strike is that the record as it is before us is not the true record of the proceedings had before the trial examiner. An examination of the petition and supporting affidavits reveals that such record is a true record of the evidence received, but that the real complaint is that the hearing was so conducted by the ex-

aminer as not to allow petitioners to make of record matters properly included in the record.

[*Requirement of fair hearing*]

It is clear that administrative agencies must grant a fair trial. *Chamber of Commerce v. Federal Trade Commission* (CCA 8, 1926) 13 Fed. (2d) 673, 683, 684; *Morgan v. United States,* 304 U. S. 1, 14, 15; *Shields v. Utah Idaho Central R. R. Co.,* — U. S. —, —, December 5, 1938; *Ohio Bell Tel. Co. v. Commissioner,* 301 U. S. 292, 302, 304.

[*Procedure improper*]

If, then, petitioners have been deprived of a tair trial the order made by the Commission is invalid as violative of due process. A motion to strike the transcript is not, however, the manner in which to bring such a question before us, for its determination requires an examination of the merits of the case that we may know the pertinency of the excluded matter in its relationship to the case as a whole. The case is not now before us on the merits.

[*Conclusion*]

We shall not herein attempt to advise petitioners as to the course they should pursue, but we are constrained to remark that since § 5 (c) of the Federal Trade Commission Act and § 10 (e) (f) of the National Labor Relations Act are similar, the case of *Consolidated Edison Co. of New York v. N. L. R. B.,* — U. S. —, December 5, 1938, may be found helpful.

[¶ 55,219] Opinion of the Attorney-General, State of Wisconsin.

Addressed to the Honorable F. X. Ritger, Director of Purchases. March 28, 1939.

State administrative agencies purchasing goods from jobbers who are parties to maximum discount agreements under the Wisconsin Fair Trade Act are entitled to no discounts larger than those prescribed by the agreements where no exception is afforded to the State by the terms of the statute.

Dear Sirs: You state that a certain manufacturing company has entered into a maximum discount agreement with jobbers handling its products and that the discounts fixed in such contract are not as large as those the state has received in the past. The contract excepts from its terms sales made to the United States Government. You ask whether the state may demand similar exemption. It is assumed that your inquiry is directed only to the question whether the state can, through its administrative agencies, demand such an exemption under the present law, and not whether the legislature can change the law to require manufacturers to exempt the state from the provisions of such a contract. So restricted, your question may be restated as follows: Is such a contract valid in so far as it purports to include sales of said manufacturer's products to the State of Wisconsin?

Prior to the enactment of sec. 133.25 Wisconsin Statutes, contracts fixing minimum resale prices were unlawful under the provisions of sec. 133.01 prohibiting contracts in restraint of trade and, if they affected interstate transactions, under sec. 5 of the Sherman Anti-Trust Act. By sec. 133.25 Wisconsin Statutes and the Miller-Tydings amendment to the Sherman Act, sec. 1 title 15 U. S. C. A., such contracts were expressly sanctioned in so far as anti-monopoly laws are concerned. While the Wisconsin statute provides that every contract of such a nature shall include certain exceptions which are set forth, it does not require that sales made to the state shall be excepted. No objection can therefore be raised to the validity of the contract on the ground that it is in restraint of trade. However, if it be found that a contract fixing the price at which a jobber may sell a certain product to the state is objectionable for any other reason, sec. 133.25 will not protect it since that section merely declares that such a contract shall not be deemed in restraint of trade. The only ground upon which it might be held void is that it constitutes an attempt to stifle competition for a public contract under the rule of those cases denouncing contracts tending to restrict bidding for public contracts. See 13 C. J. 436. Analysis of the agreement in question, however, reveals that its purpose and effect is not to destroy competition between producers of like commodities, but to eliminate unwholesome and economically unsound price cutting upon a single product produced by the same manufacturer. The contract is therefore restricted to a very narrow field and the state still receives the benefit of unlimited competition between the producers of similar commodities. Furthermore, should the price fixed by the contract prove to be unreasonably high, subsec. (7) of sec. 133.25 provides that the contract may be set aside. The interests of the state are consequently amply protected and in view of the legislative

declaration of a policy in favor of the elimination of unreasonable price cutting, the agreement can hardly be said to be contrary to public policy even though it fails to exempt sales to the State of Wisconsin. If then the agreement is valid, it follows that a manufacturer may freely enter into such a contract and the state certainly has no power to prevent him from doing so or to force him to make any exceptions therein other than those provided in sec. 133.25 Stats.

If selling below the price agreed upon is an unfair trade practice, as applied to Farmer Jones or Merchant Smith, it is difficult to see why it is not equally an unfair trade practice as applied to the state. Presumably, the state has as much purchasing power as Farmer Jones or Merchant Smith. The state is simply getting a taste of its own medicine and declared public policy of encouraging price fixing between manufacturer or producer and his jobber. If such is a sound public policy, the state cannot complain when the policy is put into effect against the state, at least until the legislature creates exceptions in favor of the state. The legislature thus far has created no exceptions in favor of the state. It must follow, therefore, that administrative officers may not create such an exception; that administrative officers may not insist upon the jobber breaching his contract with the manufacturer when dealing with the state.

Yours very truly,
JOHN E. MARTIN,
Attorney General.

[¶ 55,220] United States of America v. National Peanut Cleaners and Shellers Association, et al.

United States District Court, Eastern District of Virginia, Norfolk Division. Filed January 16, 1939.

Dissolution of an injunction decree restraining acts in violation of the Sherman Anti-Trust Acts is warranted where the situation which necessitated imposition of the restraint, fourteen years previously, is no longer in existence, thereby precluding any recurrence of the prohibited monopoly, and the activities enjoined do not, in the absence of an unlawful conspiracy, constitute violations of the statute.

Before WAY, District Judge.

Petition for the Dissolution of the Consent Decree Entered June 15, 1925 as Amended

[*Statement of the case*]

WAY, D. J.: The above styled suit was instituted in January, 1925, by the United States against National Peanut Cleaners and Shellers Association and about 50 members of said association, charging said defendants with violation of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies." 15 USCA 1.

On June 15, 1925, the Court entered a consent decree, which decree, after reciting that certain of the purposes and objects of the defendants, as set out in the constitution and by-laws of said Association and in the rules and regulations thereof, if carried into effect by agreement among the members of the association would operate as a combination and conspiracy in restraint of interstate trade and commerce in violation of said Act of Congress, and that certain of the defendants had been operating under the rules, regulations, agreements, contracts, understanding and practices adopted by said association, perpetually enjoined 43 defendants and

"their officers, agents, servants, and employees, and all persons acting under, by or in behalf of them or any of them, or claiming so to act, be and they are hereby perpetually enjoined, restrained and prohibited from directly or indirectly entering into, engaging in, or carrying into effect said combination and conspiracy, or any act, rule, regulation, resolution, agreement, contract, understanding or practice constituting a part thereof, or any similar combination or conspiracy having the same purpose or effect of restraining interstate trade and commerce in peanuts.

(II) That the defendants, their officers, agents, servants, and employees, and all persons acting under, through or in behalf of them or any of them, or claiming so to act, be and they are hereby perpetually enjoined restrained and prohibited from combining, conspiring or agreeing, expressly or impliedly, directly or indirectly, except as hereinafter provided, to do any of the following acts:

(a) To adopt or use a uniform sales contract, and/or acceptance or confirmation blank.

(b) To adopt or observe a uniform or maximum rate of commission allowed brokers or jobbers.

(c) To establish, use, or maintain rules, regulations, practices, or conditions of any character concerning the acceptance of orders, or sale by defendants of peanuts of any description, the effect of which may lessen competition between any of the defendants, and specifically the following, or any similar thereto:

1. That sales of peanuts shall be made on terms of net cash ten days (no discount) from date of invoice, which shall be the actual date

of shipment; or, on terms of net cash demand draft with bill of lading attached.

2. That the purchase and sale shall be positive and not subject to countermand and that all prices shall be f.o.b. shipping point and not delivered at destination.

3. That prices shall not be guaranteed against declines of any character.

4. That prices shall not be guaranteed against inclines of any character.

5. That orders for future shipments shall not be booked for shipment later than sixty days from date of booking and that all bookings shall be made at the actual time of sale, whether made by home office or through representatives, brokers, or traveling salesmen.

(d) To sell peanuts f.o.b. factory with freight equalized with other factories by making rebates or allowances of differentials to purchasers, or otherwise.

(e) To refuse to sell to, or to discriminate in making terms and/or conditions to, any persons, co-partnerships, or corporations for any reason whatsoever.

(f) To address intimidating letters to purchasers for the purpose and/or effect of inducing said purchasers to submit to their demands.

(g) To establish, maintain or circulate a name or list of names, or other description, of a purchaser or purchasers with whom any of the defendants have had a dispute or disputes, who for any reason has or have not fulfilled his or their contract or contracts, or against whom discriminations of any character whatsoever are practiced.

(h) To adopt, establish, or maintain any rule or practice in relation to the arbitration of disputes between them and purchasers from them.

(i) To report to any person, or collective agency, the condition, including quantity and quality, of their respective stocks on hand for the purpose and effect of bringing any of the defendants together to buy from and sell to each other, or to sell for the account of another, and/or of equalizing the stocks of any of the defendants.

(j) To interfere in any manner whatsoever with the free operation and conduct of the business of any individual, co-partnership, corporation, or association of individuals, engaged in the business of buying, cleaning and shelling, and selling, or marketing, peanuts such as refusing to clean and shell peanuts on contract for any such individual, co-partnership, corporation or association.

(k) To refuse to sell, to, or discriminate against in any manner, any person, co-partnership, or corporation which has sold or whose purpose it is to sell peanuts at auction; or to incite, persuade or obligate others to refuse to sell to or to discriminate against in any manner any such person, co-partnership, or corporation.

(III) That the defendants and their officers, agents, servants, and employees, and all persons acting under, by or in behalf of them or any of them, or claiming so to act, be and they are hereby perpetually enjoined, restrained and prohibited, except as hereinafter provided, from committing any of the following acts:

(a) To issue or circulate so-called credit warnings, or blacklists, or maintain or circulate so-called "cash in advance" lists, concerning purchasers who, because of past transactions with defendants, have been, or are, considered illegitimate dealers, or dealers against whom discrimination should be made.

(b) To give to each other in any manner information concerning, or to discuss with each other, by telephone or in person, by correspondence or by telegraph (a) the condition and quantities of crops or farmers' stocks on hand, quantities of farmers' stocks sold, prevailing prices for farmers' stocks, past or prospective prices for farmers' stock, past, present, or prospective supplies of farmers' stocks, and (b) the quality of cleaned and shelled stocks, the quantities of cleaned and shelled stocks on hand, actual sales, the demand, price lists, prices actually obtained, prevailing prices, past and/or prospective prices, or analyses of future conditions.

(c) To make statements or arguments to each other, written or oral, directly or indirectly, inciting or having the effect of inciting, the defendants to maintain or decrease their rice offerings for farmers' stocks, or to maintain or increase their prices for cleaned and/or shelled goods.

(IV) That the defendant association may.

1. Maintain an office under control and direction of its officers or board of directors, with a Secretary, and keep a record of all proceedings of any and all meetings, which record shall be open to the inspection of any of the departments, or their agents, of the United States Government, and to the inspection of any and all members of the Association.

2. Maintain a tariff bureau or committee and a traffic bureau or committee for the purpose of appearing before and communicating with any Federal body, legislative, executive or administrative, to assist or protect the American industry from disadvantages by foreign importations, and assisting the peanut industry in transportation and tariff matters before Federal, state and other bodies concerned in questions of tariff and transportation and furnishing upon request of any member any information relating to rates upon peanuts and regulations of transportation that may be contained in any public schedule or tariff.

3. Adopt and use a common insignia.

4. Advance or promote the use of peanuts by research, publicity, advertisement and similar activities.

5. Handle the insurance of its members, including fire, industrial, indemnity or group insurance.

6. Maintain a credit bureau for the sole purpose of furnishing upon specific request information as to the financial standing and the credit rating of persons and corporations purchasing or attempting to purchase peanuts, but not to create directly or by inference a list or class of so-called legitimate or preferred dealers or purchasers, or illegitimate or undesirable dealers or purchasers. The gathering of information, solely for the purpose of providing credit information on special request, shall not be considered a violation of any part of this decree.

7. Provide for the adjustment and arbitration of disputes of any character between sellers and purchasers by reference to a board of arbitration empowered to promulgate rules

of procedure and to render final awards one of said arbitrators to be selected by the seller and one by the purchaser, and the third, or umpire, to be selected by the two so selected, the decision of the said arbitrators, or the majority of them, to be binding upon the parties to said arbitration, provided that any such provision, if made, shall not obligate any purchaser, in any manner, to refer any such dispute to arbitration, unless at the time said dispute arises such purchasers willingly agree so to do.

8. Openly and fairly gather and disseminate information as to costs, volume of past production, prices in past transactions, stocks on hand, and freight rates; and to meet and discuss such information and statistics so long as no attempt is made to reach any agreement or any concerted action with respect to prices or production or restraining competition.

9. Adopt, establish and maintain specifications defining the minimum sizes and minimum degree of quality that shall constitute the various grades of peanuts, provided such specifications do not result in the lessening of competition among defendants.

(V) That nothing contained in this decree shall be construed as prohibiting any defendant from doing or performing any of the acts prohibited by Part II hereof if done individually and without combining, conspiring or agreeing with any other cleaner and sheller of peanuts."

[*Retention of jurisdiction*]

Jurisdiction of the cause was expressly retained by the Court for the purpose of enforcing the decree and for the purpose of enabling the United States to apply to the court for a modification or enlargement of its provisions on the ground that they were inadequate, and the defendants or either of them to apply for its modification

"on the ground that its provisions have become inappropriate or unnecessary, or by reason of changed conditions, of law or fact, or by reason of any new or different activities other than those hereby enjoined or authorized to be maintained and deemed necessary or desirable by the defendants for the welfare of the peanut industry, or if for any other reason the injunction hereby signed has become inadequate or its provisions inappropriate or unnecessary to maintain competitive conditions in interstate trade and commerce in peanuts, or unduly oppressive to the defendants."

First Modification of Decree

On June 2, 1933, upon the application of some of the defendants and with at least the implied consent of the United States, the decree was modified. The pertinent portion of the modifying decree of June 2, 1933, read as follows:

"And it appearing to the Court that the petition of the petitioning defendants and the exhibits filed therewith do not disclose sufficient grounds or alleged sufficient facts for the annulment or revocation of said Consent Decree of June 15, 1925, the Court doth refuse to annul or revoke the same. But the Court taking judicial knowledge of the changed conditions of the peanut industry, as alleged in said petition, and being of the opinion that certain of the provisions of the said Consent Decree are unduly oppressive to the defendants and are at this time inappropriate and unnecessary to maintain competitive conditions in interstate trade and commerce in peanuts, and that it is desirable for the welfare of the peanut industry that the Consent Decree entered herein on June 15, 1925, should be modified in certain respects, the Court doth overrule the motion, filed by the United States of America, to dismiss the petition, filed by certain defendants for the annulment or modification of said Consent Decree of June 15, 1925, should be granted.

IT IS THEREFORE ORDERED AND DECREED that the said Decree entered herein by consent on June 15, 1925, be and the same is hereby modified as follows:

1. Part I of said Decree is modified to provide as follows:

'That the defendants and their officers, agents, servants and employees, and all persons acting under, by or in behalf of them or any of them, or claiming so to act, be and they are hereby perpetually enjoined, restrained and prohibited from directly or indirectly entering into, engaging in, or carrying into effect any combination or conspiracy, or any act, rule, regulation, resolution, agreement, contract, understanding or practice constituting a part thereof, or any similar combination or conspiracy having the purpose or effect of illegally or unreasonably restraining interstate trade or commerce in peanuts.'

2. Paragraph (a) of Part II, To adopt or use a uniform sales contract and or acceptance or confirmation blank, unless the same shall be approved by the Department of Justice of the United States.

3. Paragraph (b) of Part III of the said decree is modified to provide as follows:

(b) To give to each other in any manner information concerning, or to discuss with each other, by telephone or in person, by correspondence, or by telegraph, pursuant to any plan, arrangement, agreement or understanding to reduce, maintain, or increase buying or selling prices or terms or conditions.

(a) the condition and quantities of crops or farmers' stocks on hand, quantities of farmers' stocks sold, prevailing prices for farmers' stocks, past or prospective prices for farmers' stocks, past, present, or prospective supplies of farmers' stocks;

(b) the quality of cleaned and shelled stocks, the quantities of cleaned and shell-stocks on hand, actual sales, the demand, price lists, prices actually obtained, prevailing prices, past and/or prospective prices, or analyses of future conditions.

(4) Paragraph (c) of Part III is revoked and removed in its entirety,

Provided, however, that the modification hereby granted may be revoked at any time on application of the United States upon a showing that the provisions of paragraphs (b) and (c) of Part III as contained in the original decree of June 15, 1925, are necessary for the proper enforcement of the law or of the other provisions of the said decree."

The decree of June 2, 1933, retained jurisdiction of the cause for the same purposes

specified in the original decree of June 15, 1925.

Second Modification

The original decree was further modified by an order entered with the consent of the United States on April 2, 1934, to permit the defendants to subscribe to the N. I. R. A. Code of Fair Competition for the Raw Peanut Milling Industry and the A. A. A. Marketing Agreement and License for Peanut Millers.

The order of April 2, 1934, after reciting that provisions of the decree of June 15, 1925, and the modifying order entered June 1, 1933, "conflict with certain of the provisions of the Code of Fair Competition for the Raw Peanut Milling Industry, as approved January 12, 1934, pursuant to Title I of the National Recovery Act, and with certain of the provisions of the Marketing Agreement and License for Peanut Millers approved and promulgated January 23, 1934, pursuant to the provisions of the Agricultural Adjustment Act," provided as follows:

"That nothing contained in the aforesaid decree entered June 15, 1925, and the order modifying said decree entered June 1, 1933, shall be deemed or construed to prevent the defendants, or any of them, from doing the acts required of, or permitted to, said defendants as members of the raw peanut milling industry, by the provisions of the aforesaid Code of Fair Competition for the Raw Peanut Milling Industry as approved on January 12, 1934, or by the provisions of the aforesaid Marketing Agreement and License for Peanut Millers, approved and promulgated January 23, 1934, so long as the same shall remain in effect."

The Present Petition to Dissolve

On December 3, 1937, twelve of the defendants named in the original decree, filed a petition for the complete dissolution of the decree of June 15, 1925, and on August 15, 1938, a supplemental petition, seeking such dissolution.

[*Factors in support of dissolution*]

The grounds urged in the petitions for the dissolution of the decree of June 15, 1925, are as follows:

[*Increased competition*]

1. That because of greatly increased competition, both in the Virginia-Carolina area and in the nation at large, the defendants now control only a small portion of the nation's peanut business and their combined efforts to control it could have not material effect upon the peanut industry;

[*Price-fixing impossible*]

2. That it is no longer possible for defendant and other processors of peanuts to affect the prices paid to growers, because, among other things, of the action of the Government in pegging the prices to growers;

[*Personnel change*]

3. That the personnel of the defendants has so changed since June 15, 1925, the decree should no longer be in force;

[*Continuation of decree inequitable*]

4. That the decree has become inequitable, unjust, and oppressive and the ends of justice will be served by its dissolution;

[*Change in complainants' attitude*]

5. That those who prompted the proceedings which result in the Consent decree no longer favor its Continuance and it is asserted that many of the growers are not in favor of the decree. This ground has reference to the alleged changed attitude of the growers towards the defendants.

[*Revised anti-trust concepts*]

6. That there has been a definite change in the concept of the Anti-Trust laws since 1925. In this connection it is asserted that the Government is now fostering and in many instances actually performing many of the practices outlawed by the consent decree.

[*Dissolution of defendant association*]

Following the entry of the consent decree the National Peanut Cleaners and Shellers Association developed into a social club which state of inactivity continued until 1933 when the association was finally dissolved and its constitution and by laws the features of which in 1925 were particularly objectionable to the Government went into the discard.

[*Organization under NIRA*]

In the same year, 1933, the Virginia-Carolina Peanut Association was formed at the suggestion of officials representing the Government for the purpose of co-operating with the Government in promoting the objects of the National Industrial Recovery and the A. A. A. acts of Congress. All peanut processors or millers in the Virginia-Carolina area were invited to join the new Association, without regard to whether they had or had not been members of the enjoined National Association. Many who had not been members of the old joined and are now members of the new association.

[*Parties to injunction proceeding*]

As will appear from some of the stipulations hereinafter quoted, 43 of the 50 defendants named in the bill of complaint filed by the Government, were enjoined. Of that 43, 17 were corporations and 26

individuals, and in most instances, the individuals enjoined were officers of the corporations that were enjoined.

[*Changes in personnel*]

As a result of deaths or permanent retirements from business since the decree the control and management of American Peanut Corporation, Columbia Peanut Corporation, Suffolk Peanut Company Lummis and Company, four of the larger, if not in fact the largest, concerns enjoined, have passed into the hands of officers who, so far as the evidence discloses, had no connection with the National Peanut Cleaners and Shellers Association or any of its activities.

[*Compliance with decree*]

In the period of more than thirteen years that has elapsed since the consent decree, no defendant has been cited for any alleged violation of the consent decree, or, so far as the evidence discloses, ever charged with the violation of any of its provisions, or charged with having violated any provision of the anti-trust laws of the United States.

[*The industry*]

Peanuts are produced in three areas in the United States viz; the Virginia-Carolina area, the Georgia-Alabama or Southeast area and the Southwest or Texas-Okla. area. The quantities produced in other sections of the country are not sufficient materially to affect the market in any way.

[*Changes in production*]

The nation's crop the decree year, 1925, was 791,355,000 pounds and 381,000,000 pounds of that or about 48 per cent of the crop, was produced in the Virginia-Carolina area. Since that year there has been an irregular but marked decline in the percentage of the nation's total crop, produced in the Virginia-Carolina area. For instance, that area produced in 1935 about 32.2 per cent, in 1936, 30.5 per cent and in 1937, 35.5 per cent, in 1938, 28.1 per cent, of the entire crop. This decrease in percentage resulted from greatly increased production in the Southeast and Southwest areas. The total 1937 crop was 1,291,655,000 pounds of which the Southeast area produced 54.8 per cent as against 46.5 per cent in 1925; the Southwest area 9.7 per cent, as against 5.4 per cent in 1925, while the Virginia-Carolina area dropped from 48.1 per cent in 1925 to 35.5 per cent in 1937.

Figures recently released by the Department of Agriculture with respect to the 1938 crop show the total crop to be 1,424,825,000 pounds, divided between the three great producing areas as follows: Virginia-Carolina 401,285,000 pounds; Southeast area 852,630,000 pounds; Southwest area 170,910,000 pounds. In other words, the current crop is nearly twice that of the consent-decree year, 1925. The Virginia-Carolina percentage of the total crop dropped from about 35.5 per cent in 1937 to about 28.1 in 1938 and the Southeast and Southwest areas increased from 46.5 per cent and 9.7 per cent, respectively, to 59.8 per cent and 12/1 per cent, respectively. The rise in the percentage of the two latter areas resulted entirely from greatly increased production in those areas.

[*Factual stipulations*]

The following facts, among others, have been stipulated by the parties:

[*Extent of operations*]

In 1925 there were 17 peanut cleaners, operating 32 plants, in the Virginia-Carolina area (12 operating 27 plants, were subject to the decree). In 1925 there were 6 cleaners in the southwest area operating 7 plants, and 9 cleaners in the southeast operating 14 plants.

In 1938 there are 20 cleaners, operating 35 plants, in the Virginia-Carolina area (8, operating 22 plants, are subject to the decree). There are 10 cleaners in the southwest operating 14 plants, and 44 cleaners in the southeast operating 57 plants.

In 1925 the mills subject to the decree handled 191,176,215 pounds of peanuts, more or less, of the 1937 crop those subject to the decree handled 208,801,485 pounds in the Virginia-Carolina area.

[*Government program in industry*]

Pursuant to the provisions of the Agricultural Adjustment Act as amended February 29, 1936, (Sec. 32 Pub. No. 320, 74th Congress, 7 U. S. C. A. 512c) the Secretary of Agriculture placed in effect a Peanut Diversion Program for the crop grown in 1937 and marketed in the winter of 1937 and the spring of 1938. The program authorized purchases of peanuts from peanut growers by cooperative association of peanut growers of fixed prices ranging from $53 to $65 per ton, depending solely upon the type and classification of the peanuts. The Virginia Peanut Growers Cooperative was incorporated in Virginia and the Peanut Stabilization Cooperative was incorporated in North Carolina. A certificate of incorporation of the former marked "Exhibit A with Stipulation" may be admitted in evidence, if revelant and material. These cooperative associations authorized certain certified warehouses in various towns in the peanut belt to buy peanuts from the farmers and in payment for same, to issue to the farmers drafts on the Federal Commodity Credit Corporation. The cooperative associations ultimately sold the peanuts under an agreement by which the purchaser undertook to crush the peanuts into oil or by-products on or before July 21, 1938. Any loss incurred by the cooperatives was made up by the Federal Government; any profit was distributed to the individual members of the cooperatives. During the season ending April 1,

1938, the cooperatives throughout the United States purchased 172,538,000 pounds of peanuts.

Other Federal peanut programs were in effect in 1934 and in 1935, but they were less formal and less successful than the program for 1937. The Weekly Peanut Report, No. 1003, an official publication of the Department of Agriculture, dated September 14, 1938, marked "Exhibit B with Stipulation", may be admitted in evidence if relevant and material. An official publication of the Department of Agriculture, marked "Exhibit C with Stipulation" and entitled "Offer by the Secretary of Agriculture in Connection with the Removal and Disposition of Surplus Peanuts (Fiscal Year 1939)" may be admitted in evidence if relevant and material.

[*Dissolution of defendant association*]

The National Peanut Cleaners and Shellers Association was dissolved in 1933. In order to formulate an N. R. A. Code and an A. A. A. Marketing Agreement, the members of the industry formed, on July 20, 1933, the Virginia-Carolina Peanut Association. The Charter and By-Laws of the Virginia-Carolina Peanut Association, marked Petitioners' Exhibits I and II, may be admitted in evidence if relevant and material.

[*Changes in corporate structure*]

Of the 22 corporate defendants named in the original bill, 6 were not subject to the decree; of the balance 3 have merged with the American Peanut Corporation (which is subject to the decree), one has merged with the Barnhart Mercantile Company (which is subject to the decree) and 3 are dissolved and out of business.

Of the 31 individual defendants named in the original bill, 5 were not subject to the decree; of the remaining 26, nine are dead, 17 are alive and subject to the decree. Of these 17, 4 are known to have no connection with the peanut industry and 2 are believed to have no connection.

Under the 1938 Agricultural Conservation Program the Department of Agriculture has allotted peanut acreage by state, county and individual farm. For 1938 the national goal for peanuts is from 1,500,000 to 1,600,000 acres.

[*The product*]

The Virginia type peanut is grown commercially only in the Virginia-Carolina area. The quantity of the other types of peanuts grown in the Virginia-Carolina area is not more than 10% of the total quantity grown in that area. The Virginia type peanut is regarded as a superior type and is the only type sold commercially to consumers in the shell. The percentage of the Virginia type peanuts sold to consumers in the shell has ranged from approximately 25% to 50%. For the past few years the percentage has been approximately 25%.

[*Classifications of peanuts*]

Peanuts are classified as follows:

A. Virginia Type; (1) Jumbo, (2) Bunch, and (3) Shelling Stock;

B. Spanish Type; and

C. Runner Type.

The Virginia type is larger than either the Spanish or the Runner, except that the Runner may depending upon the rainfall in the Southeast area, be as large as the Virginia Shelling Stock but not as large as the Jumbo or Bunch.

[*Differentiations*]

There is a distinct difference in shape and a slight difference in color of skins between the three major types of peanuts.

There is a difference in flavor between all three types of peanuts.

The Spanish type peanut has a larger oil content than either the Virginia or the Runner, the Runner containing more oil than the Virginia. Under normal conditions it is unprofitable to crush Virginia peanuts into oil.

There is a distinct and separate consumer demand for the Virginia type salted nut. There is a distinct and separate consumer demand for the Spanish type salted nut. Runner peanuts are never salted.

Some candy manufacturers use only the Virginia type peanuts, others only the Spanish type, and others use either of the two. A small quantity of Runners are also used in candy, and this use is increasing.

Peanut butter can be made from any of the three types of peanuts, or from any combination thereof; but peanut butter made exclusively from Runners has a beany flavor, that made exclusively from Virginias is too dry, and that made exclusively from the Spanish is too oily. The best peanut butter is made from a mixture of the Virginia and Spanish types, the mixture varying from 50-50 to 60-40 either way.

Peanut brittle is made with the Spanish type peanut only.

Govt's Exs. 1, 2 and 3, entitled "Form MS-18 Peanut Data, Preliminary, U. S. Department of Agriculture," "Department of Agriculture, Cleaned and Shelled Peanuts: Monthly Average Prices for Prompt Shipment," and "Department of Agriculture, Peanuts; Price of Farmers' Stock to Growers," respectively, may be received in evidence if relevant and material.

It is usually more profitable to sell in the shell as many peanuts having the necessary size, color and appearance as the limited market (approximately twenty-five per cent of the Virginia type peanut) will take.

[*Market for product*]

The Bureau of Agricultural Economics of the United States Department of Agriculture reported that the total United States peanut production during the 1937-1938 season amounted to 1,291,655,000 pounds (Exhibit 3). It is estimated that this crop was consumed approximately as follows:

(a) From 375,000,000 to 400,000,000 pounds of farmers' stock were made in peanut butter.

(b) From 120,000,000 to 130,000,000 pounds of farmers' stock were turned back into seed.

(c) Approximately 85,000,000 pounds (or 23% of the Virginia-Carolina crop marketed) of farmers' stock were sold in the shell.

(d) From 325,000,000 to 350,000,000 pounds of farmers' stock were used for salted nuts and candy.

(e) From 160,000,000 to 200,000,000 pounds of farmers' stock were converted into peanut oil.

(f) From 40,000,000 to 50,000,000 pounds were

removed from farmers' stock in the form of dirt and trash.

(g) Approximately 76,000,000 pounds cannot be accounted for.

[*Extent of competition*]

The peanuts raised in the Virginia-Carolina area and those of the Southeast and Southwest areas are in active competition in the market at all times with the exception of the peanuts that are sold in the shells, usually for the purpose of roasting. Only the Virginia-Carolina peanuts are used for that purpose, so that in that particular part of the market the peanuts grown in the Southeast and Southwest areas are not in competition with the Virginia-Carolina peanut.

Approximately 25 per cent of the crop in the Virginia-Carolina area is sold in the shells. The defendants subject to the decree handle about 45 per cent of the entire crop in this area. If it may be fairly assumed that these percentages are substantially accurate when applied to the unshelled peanuts handled by the defendants, (and there is nothing in the proofs to indicate the contrary), it would appear that defendants handle about 12 per cent of the entire Virginia-Carolina crop in a manner (unshelled) that such 12 per cent does not have to face the competition of the peanuts of the Southeast and Southwest areas. But such 12 per cent handled by defendants is in competition with the remaining 55 per cent of the Virginia-Carolina crop not handled by defendants. The evidence shows that the quantity of peanuts thus sold in the shell is decreasing.

[*Decrease in defendants' operations*]

In 1925 the defendants subject to the decree handled about 23.5 of the nation's total crop and slightly over 50 per cent of that raised in the Virginia-Carolina area. In 1937 this had dropped to 16.1 per cent of the total crop and to 45.5 per cent of the Virginia-Carolina crop. The percentage of the total 1938 crop handled by defendants will be about 14 per cent or approximately one-seventh of the entire crop of the nation.

[*Invalidity of NIRA*]

The N. I. R. A. Code of Fair Competition became effective January 17, 1934, and the A. A. A. Marketing Contract January 27, 1934. The acts of Congress upon which the Code and Peanut Marketing Contract were based were held unconstitutional May 27, 1935, and January 6, 1936, respectively, 295 U. S. 495 and 297 U. S. 1. The Code was in force about 16 months and the marketing agreement nearly 2 years.

[*Effect of NIRA codes*]

An examination of Exhibits 9, (the code), and 11 (the Marketing Agreement), discloses that these two acts of Congress and the interpretations placed upon them by the authorities charged with their enforcement, and the modifying decrees of June, 1933, and April, 1934, above quoted and referred to, resulted in modifying the injunction decree in many important respects and to such an extent as to render it very difficult not only for a layman conducting a peanut milling or processing business, but for the legal profession as well, to determine what could or could not be done without violating the injunction.

The following quotations from the Marketing Agreement Exhibit 11, pp. 6-7, are illustrative of the extent of the modification of the injunction by the decree of April 2, 1934, entered with the approval of the Government and largely at its instance:

"Article VII—Sales

Section 1. Sales of cleaned or shelled peanuts shall be made on the following terms only: Net cash ten (10) days from date of shipment, or net arrival draft, bill of lading attached, inspection allowed.

Section 2. No miller shall purchase from any person any farmers' stock peanuts which have been sold by the Grower after the effective date hereof, unless the seller submits to the Miller evidence, in form to be prescribed by the Control Board, that the Grower received for said peanuts the minimum price fixed pursuant to this agreement prevailing at the time the Grower sold said peanuts. This section shall not apply to the purchase by Millers of peanuts obtained pursuant to execution of legal process.

Section 3. No Miller shall sell peanuts in less than twenty-five (25) bag lots except at a price of not less than one-fourth cent (¼¢) per pound above his carload price for the same variety and grade.

Section 4. No Miller shall ship cleaned or shelled peanuts into any market to be sold by such Miller after arrival, except for sale in carload lots.

Section 5. Sales by Millers in the Virginia area shall be on the basis of f.o.b. mill or nearest seaport, except that freight rates may be equalized within the same region or area where competing mills are located. All invoices must show the freight differential, if any.

Section 6. The contracting Millers agree not to engage in destructive price cutting, and if in the opinion of the Control Board any Miller's prices indicate destructive price cutting tending to prevent effectuation of the purposes of this Agreement or the declared policy of the Act, the Control Board shall so notify the said Miller. If after due notice, hearing, and investigation, in accordance with Article VI, Section 2(d), the Control Board determines that such Miller has or is engaged in destructive price cutting, it may order, discontinuance, subject to the right of appeal provided in said Article VI, Section

2(d). In the event of noncompliance with any such order, the Control Committee shall notify the Secretary."

Conclusions of Law

[*Continuation of decree unnecessary*]

From the foregoing findings of fact the Court concludes as a matter of law that the provisions of the decree of June 15, 1925, have by reason of changed conditions become inappropriate and unnecessary to maintain competitive conditions in interstate trade and commerce in peanuts and are unduly and unnecessarily oppressive to the defendants who still remain subject to its terms, and that said injunction should be dissolved.

Memorandum by the Court

A case cited and apparently relied on by counsel for both the government and the defendants as controlling in disposing of the motion to dissolve is *United States v. Swift & Co., et al.*, 286 U. S. 106. The rules announced in that decision which are deemed applicable to the instant case are summarized in headnote 5 of the opinion, as follows:

"(1) The question is not of reviewing the decree to determine whether it was right or wrong originally, but is whether, having been made to include the collateral lines of trade with the consent of each defendant, it should now be relaxed because of changed conditions.

(2) The changes that would justify removing this restraint would be such as did away with the reasons upon which it was founded.

(3) In the absence of proof that the reasons for the restraint have vanished, or that the hardships of the decree amount to oppression, the injunction should not be modified."

In the *Swift* case the consent decree, among other things, prohibited the defendants from trading in groceries. Upon an application to modify the decree, the lower Court entered an order modifying the injunction and permitting defendants to trade in groceries. With respect to that action the Supreme Court said:

"The defendants, controlled by experienced business men, renounced the privilege of trading in groceries, whether in concert or independently and did this with their eyes open. Two reasons, and only two, for exacting the surrender of this adjunct of the business were stated in the bill of complaint. Whatever persuasiveness the reasons then bad, is theirs with undiminished force today.

The first was that through the ownership of refrigerator cars and branch houses as well as other facilities, the defendants were in a position to distribute substitute foods and other unrelated commodities with substantially no increase of overhead. There is no doubt that they are equally in that position now. Their capacity to make such distribution cheaply by reason of their existing facilities is one of the chief reasons why the sale of groceries has been permitted by the modified decree, and this in the face of the fact that it is also one of the chief reasons why the decree as originally entered took the privilege away.

The second reason stated in the bill of complaint is the practice followed by the defendants of fixing prices for groceries so low over temporary periods of time as to eliminate competition by rivals less favorably situated.

Whether the defendants would resume that practice if they were to deal in groceries again, we do not know. They would certainly have the temptation to resume it. Their low over-head and their gigantic size, even when they are viewed as separate units, would still put them in a position to starve out weaker rivals."

[*Cause of restraint non-existent*]

In the instant case the reasons for the restraint have vanished and the decree instead of serving the purpose for which it was originally intended now operates as a hardship upon those still subject to its terms. Changed conditions make it manifest that it is impossible for such defendants as remain subject to the decree to control or monopolize the peanut industry as a whole or any important branch or phase of that industry. To assume that they can do so, is to assume that processors who handle approximately 1/7 of the total crop can so control or affect the remaining 6/7 of the crop as virtually to have a mononpoly of the industry as a whole or in one or more of its important branches. At the time the decree was entered about half the peanuts produced in the United States were produced in the Virginia-Carolina area and defendants handled over half of the crop in that area. Now that are produces substantially less than ⅓ of the total crop and the defendants subject to the decree handle less than half of the Virginia-Carolina crop. At least half of the individual defendants who were enjoined are no longer in the peanut business. The National Association, the soul of the combine enjoined, went out of existence years ago along with its objectionable constitution, by-laws and rules and the official personnel of the leading corporations which largely dominated the National Association has changed to a marked extent. In fact, it is not suggested that the new association which came into existence in 1933 for the very purpose of assistance in the Government's program and many of whose members were never members of the old Association, is in any way tainted with the objectionable features or objects of the dissolved National Association.

[*Effect of governmental participation*]

The Government's Peanut Diversion program, one of the important features of which

is to peg the prices of peanuts to the producers, renders more remote and impossible danger of any combine, however great, successfully controlling and depressing prices to the producers.

[*Control of prices impossible*]

According to the stipulations, there are only 8 cleaners operating 22 plants (all in the Virginia-Carolina area) subject to the decree. In that area 12 cleaners operating 13 plants are not subject to the decree. In the Southwest area there are 10 cleaners with 14 plants and in the Southeast area 44 cleaners with 57 plants not subject to the decree. In other words, 8 cleaners with 22 plants are subject to the decree while 65 cleaners who operate 76 plants are not subject to it. (Eight plants operated by Columbia Peanut Company in the Southeast area are excluded frm the figures last above given.) The inability of the defendants subject to the decree to control in any material way prices to the consumers is apparent.

[*Hardship of decree*]

It is said in the Government's brief that since the decree prohibits nothing which is not condemned by the Sherman Act dissolution of the decree cannot remove the psychological fear of wrongdoing. But this does not fairly describe the situation that confronts the defendants still subject to the decree. In the conduct of their business they are, of course, at all times subject to the provisions of the statute. The statute in general terms declares illegal every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states. But many of the acts which defendants are forbidden by the injunction to do are entirely legal and proper under the statute if they are not parts or in furtherance of an illegal contract combine or conspiracy. They are, however, not permissible under the injunction decree. The latter in express terms forbids them although it is clear that the combine went out of existence years ago. Hence, under conditions as they now exist, the injunction has become an instrument of oppression to defendants as members of the industry because they are forbidden to do in any event many acts which their competitors may do with impunity so long as the latter do not enter into a forbidden contract, combine, or conspiracy. That this situation unduly hampers and oppresses them in the conduct of legitimate business is apparent from the testimony, and the necessity of modifying the injunction decree in the respects set forth in the decree of April 2, 1934, in order to permit compliance with the N. R. A. Code and the Marketing Agreement further supports this conclusion with respect to the present effect of the decree.

[¶ 55,221] United States of America v. Jacob Shapiro.

United States Circuit Court of Appeals, Second Circuit. Decided May 1, 1939.

Appeal from the United States District Court, Southern District of New York.

A conspiracy to monopolize interstate commerce, and the accomplished monopolization of the commerce, within the prohibition of the Sherman Anti-Trust Act, do not merge into a single offense and convictions on separate counts based upon the separate violations warrant the imposition of consecutive sentences and fines.

Berkeley W. Henderson, Sp. Asst. to Atty. Gen. (John T. Cahill, U. S. Atty., Thurman Arnold, Asst. Atty. Gen., and William L. McGovern, Sp. Atty., on the brief), for appellee.

Vincent R. Impellitteri, of New York City (Erwin N. Schapira, of New York City, of counsel), for appellant.

Before SWAN, CHASE, and CLARK, Circuit Judges.

[*Statement of the case*]

CLARK, Circuit Judge: This appeal is from a judgment of conviction upon four counts of an indictment for violation of the Sherman Anti-trust Act, 15 U. S. C. A. [illegible] with respect to interstate com[illegible]r skins.[1] The appeal assigned certain errors in the trial itself, as well as error in the sentence imposed upon the accused after his conviction.

[*Assignments of error*]

The errors assigned as to the conduct of the trial do not appear to be substantial. Chief reliance is placed upon the failure

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[illegible]re named in this indictment (see [illegible]ternational Fur Workers Union, 2 Cir., 100 F. 2d 541), but the case was severed as to this defendant and he was tried separately.

of the court to declare a mistrial when the prosecutor in summation said: "I call your attention to the fact that that witness chair there has been empty of a single witness for the defense." It was claimed that the only witness who could have testified for the defense was the defendant himself, and that this remark constituted a comment upon the defendant's failure to testify in his own behalf. The court, however, promptly stated to the jury that all that had been said was "an actual fact" which they knew, but that no inference was to be drawn from it, as the defendant was not required to take the stand. Later in his charge he repeated his admonition and then charged fully that no inference was to be drawn from the failure of the accused to testify. In the restricted form in which it was made, it is not clear that the remark of the prosecutor was prejudicial (*Jamail et al. v. U. S.*, 5 Cir., 55 F. 2d 216; *Lefkowitz v. U. S.*, 2 Cir., 273 F. 664, cert. den. 257 U. S. 637), but in any event the prompt action of the judge in admonishing the jury to disregard it and his later charge cured the error if any existed. *Robilio v. U. S.*, 6 Cir., 291 F. 975, 986.

[*Sufficiency of charge*]

The other error assigned as to the trial is the claimed inadequacy of the court's charge upon the subject of reasonable doubt. But the charge, covering as it did the presumption of innocence, the duty of the jury to acquit "if the testimony is as consistent with innocence as with guilt," and the effect of a failure of the Government to establish guilt to their satisfaction beyond a reasonable doubt, seems to us entirely adequate. *Miles v. U. S.*, 103 U. S. 304, 312; *U. S. v. Austin-Bagley Corp. et al.*, 2 Cir., 31 F. 2d 229, 234.

[*Sentence in court below*]

The objection to the sentence imposed upon the defendant raises an important issue as to whether a conspiracy to create a monopoly is the same as, or a different offense from, the creation of the monopoly itself. Of the four counts upon which the accused was convicted, the first alleged a conspiracy to restrain trade and commerce in fur skins among the several states; the second, a conspiracy to monopolize such trade and commerce; the third, an attempt to monopolize such trade and commerce; and the fourth, that the defendant had unlawfully monopolized such trade and commerce. The facts upon which the last three counts were based were incorporated by reference from the first count. The first count rested upon § 1 of the Sherman Anti-trust Act, while the second, third, and fourth counts were based upon § 2 of that Act (15 U. S. C. A. §§ 1, 2). After his conviction, the defendant was sentenced to imprisonment for one year on each count; the sentences on counts 1, 2, and 4 were to run consecutively with each other, while that on count 3 was to run concurrently with the others. He was also fined $5,000 cumulatively on each of the three counts 1, 2, and 4. In result, therefore, he was sentenced to three years' imprisonment and a fine of $15,000.

[*Contentions of defendant*]

Defendant concedes that the court had power to impose consecutive sentences of imprisonment and cumulative fines on the first and second counts, based upon the first and second sections of the Act. Offenses under these sections are not identical, even though all the evidence is applicable to both counts. *U. S. v. Buchalter*, 2 Cir., 88 F. 2d 625, cert. den. 301 U. S. 708; *U. S. v. MacAndrews & Forbes Co.*, C. C. N. Y., 149 F. 836. It is the defendant's contention, however, that all the counts under § 2 of the Act are but different ways of stating one offense, the penalties for which are limited to imprisonment for not more than a year or fine of not more than $5,000 or both, and hence that the sentences of imprisonment on the last three counts should have been concurrent, and not consecutive, and only one fine should have been imposed. The court below evidently concluded that the attempt to monopolize interstate commerce merged with the act of monopolizing it, since sentences on the counts making these charges were made concurrent. But it concluded otherwise as to the charges of conspiracy to monopolize and of actual monopolizing of interstate commerce.

[*Statutory provision*]

§ 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 15 U. S. C. A. § 2.

[*Prohibited acts distinct offenses*]

In form this section names three separate offenses: the act, the attempt, and the conspiracy to monopolize interstate commerce. See *U. S. v. Patterson*, D. C.

S. D. Ohio, 201 F. 697, 725; *U. S. v. American Naval Stores Co.*, C. C. S. D. Ga., 186 F. 592. A charge of an attempt to monopolize may well be considered as included in a charge of the successful accomplishment of the act. It does not follow, however, that the conspiracy to monopolize is merged with the act. Ordinarily, conspiracy and the substantive crime which is the object of the conspiracy are distinct offenses. *U. S. v. Rabinowich,* 238 U. S. 78; *Kelly v. U. S.*, 6 Cir., 258 F. 392; *Bens v. U. S.*, 2 Cir., 266 F. 152; *Moorehead v. U. S.*, 5 Cir., 270 F. 210; *Curtis v. U. S.*, 10 Cir., 67 F. 2d 943. As the court said in *Kelly v. U. S., supra,* p. 395: "Conspiracy alleged may fail in proof, as well as proved conspiracy may fail in execution. Failure, then, to prove the existence of a conspiracy alleged to have been formed to commit a particular character of fraud cannot affect the right, regardless of conspiracy, to prove that fraud of the same character was actually committed."

[*Offenses not inseparable*]

There would appear to be no reason for departing from this principle with respect to offenses under the anti-trust laws. It is asserted that all such offenses must be a result of a combination of persons acting together, but this, although probably the usual situation, does not seem to be a necessary one. One person or one corporation might successfully monopolize certain types of interstate commerce or, several might succeed in doing so when adequate proof as to the extent to which they had planned together and acted in concert might be lacking. Certainly, too, it is possible that such a conspiracy exists when in fact there has not been created a successful monopoly. There is no such close relationship between the substantive act and the conspiracy in this situation that the two offenses must be considered as inseparable. See *Curtis v. U. S.*, 10 Cir., 67 F. 2d 943. The moderate nature of the sentences provided in the statutes for these serious and far-reaching offenses may tend to show that Congress recognized the possible existence of several offenses in one general course of business activity.

[*Conclusion*]

The fact that various overt acts which are offered to prove the conspiracy are also offered to prove the successful accomplishment of the purpose of the conspiracy is immaterial if the offenses are separate and distinct. *U. S. v. Wexler,* 2 Cir., 79 F. 2d 526, cert. den. 56 S. Ct. 384; *Blockburger v. U. S.*, 284 U. S. 299; *Fall v. U. S.*, App. D. C., 49 F. 2d 506; *U. S. v. Buchalter, supra; U. S. v. MacAndrews & Forbes Co., supra.* In *U. S. v. Wexler, supra,* this court sustained a conviction and sentence on a charge of conspiracy, as well as on a charge of an attempt, to defraud the income tax. We do not think that case is to be distinguished from the present. *U. S. v. Mazzochi,* 2 Cir., 75 F. 2d 497, is not in conflict. There separate sentences were held improper on convictions on two conspiracy counts, identical except as they alleged two sales of unlawfully imported drugs to two different purchasers. These two sales were not separate offenses, but were merely two overt acts tending to prove the existence of one single conspiracy.

Affirmed.

[¶ 55,222] J. Richard Shryock, trading as Shryock Radio Company, v. Association of United Fraternal Buyers, Inc.

Pennsylvania Superior Court, Philadelphia District. Filed April 21, 1939.

Appeal from the Court of Common Pleas, No. 3, Philadelphia County.

Injunctive relief against sales at prices below the minimum resale prices established in fair trade contracts under the Pennsylvania Fair Trade Act is unwarranted where the alleged violation, occurring without knowledge on the part of defendant, does not constitute unfair competition within the prohibition of the Act.

Reversing the decree of the Court of Common Pleas, No. 3, Philadelphia County. Before STADTFELD, J.

[*Statement of the case*]

STADTFELD, J.: J. Richard Shryock, trading as Shryock Radio Company, brought a bill in equity to enjoin the Association of United Fraternal Buyers, Inc., from selling RCA Victor radios at less than the minimum price stipulated in any contract entered into pursuant to the provisions of Section 1 of the "Fair Trade Act" of June 5, 1935, P. L. 266; to recover damages alleged to have been sustained because of a sale made by the Assocation in violation of the Act, and to obtain such other and further relief as

may seem just and proper under the circumstances.

[*Findings in court below*]

The cause came on for hearing on bill, answer and proofs, before Davis, P. J., sitting as chancellor. The findings of fact as set forth in his adjudication, are substantially as follows: Shryock Radio Company is a retail dealer of RCA Victor radios which bear the trademark, brand or name of the producer or owner. The Association of United Fraternal Buyers, Inc., is a corporation engaged in selling commodities and trademarked merchandise at less than the retail or list or advertised price, to its members, or to its dependents, or to members of affiliated organizations. On or about October 1, 1937, Raymond Rosen & Company, distributors of RCA Victor radios, entered into a contract with plaintiff and other retail dealers, pursuant to the provisions of the Act of June 5, 1935, P. L. 266, for the resale price maintenance of RCA Victor radios to the general public. On or about October 7, 1937, the defendant Association sold an RCA Victor radio to one Samuel A. Armstrong, a member of the general public, at less than the price stipulated in the contract entered into between the distributor, Raymond Rosen & Company, and the retail dealer, Shryock Radio Company. At the time of this sale, the Association had no knowledge of the contract entered into between the distributor and retail dealer of RCA Victor radios.

[*Decree of lower court*]

A decree *nisi* was entered against the defendant Association. Exceptions filed thereto and to the findings of fact and conclusions of law were dismissed in an opinion entered by the court *en banc.* Thereupon the final decree, from which this appeal is taken, was entered in the following form: "And now, October 26, 1938, upon consideration of the foregoing case, and after hearing of exceptions to the Decree *Nisi* herein, dated June 27, 1938, it is ordered, adjudged and decreed, as follows: That the defendant Association of United Fraternal Buyers, Inc. be and the same hereby is perpetually restrained from wilfully and knowingly advertising or offering for sale, or selling, RCA Victor radio or phonographs, or any commodity which bears, or the label or content of which bears, the trademark, brand or name of the producer or owner of such commodity, at less than the retail price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act of June 5, 1935, P. L. 266. The parties to this proceeding to pay their respective costs herein."

[*Statutory provisions*]

Section 2 of the Act of June 5, 1935, P. L. 266 (73 PS 7-11) provides as follows: "Wilfully and *knowingly* advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section one of this act, whether the person so advertising, offering for sale, or selling is, or is not, a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby." (Italics supplied). It is clear that this section makes unfair competition actionable and defines unfair competition, with the meaning of this Act, as engaging, wilfully and *knowingly,* in certain enumerated trade practices, including the selling of any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of the said Act.

[*No intentional violation*]

Among the conclusions of law contained in the adjudication of the cause by the chancellor, and adopted by the court *en banc,* the following is to be found: "3. The evidence is wholly lacking that the defendant '*knowingly*' engaged in unfair trade competition in the sale of the RCA radio, Model 86-T of 1938 to S. A. Armstrong, at less than the price stipulated in the agreement entered into between plaintiff and the distributor." A review of the testimony supports this conclusion.

In view of this conclusion, no alleged act contrary thereto and unsupported by the evidence can be made the basis for a prayer for equitable relief, nor for the granting of an injunction. For the conclusion itself makes it obvious that the party against whom such relief is sought is beyond the reach of the Act of Assembly. The Supreme Court of the United States, upholding the validity of the Fair Trade Act of Illinois * in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.* 299 U. S. 183, 199, 57 Sup. Ct. 139, 144, stated in the opinion by Mr. Justice Sutherland: "It is first to be observed that section 2 reaches not the *mere* advertising offering for sale, or selling at less than the stipulated price, but the doing of any of these things *wilfully* and *knowingly.*" (The court's italics).

[*Contention of appellee*]

Appellee contends, however, that he is

* The Illinois Fair Trade Act (Smith-Hurd Ill. Stats. 121½ § 188 *et seq.*) reads the same as the Pennsylvania Act. Forty-two states have passed the same or similar Acts.

entitled to equitable relief irrespective of appellant's knowledge of the agreement made pursuant to the Act of Assembly. This contention is based upon what appellee conceives to be a threat on the part of appellant to sell anything it pleases at a discount in violation of the Fair Trade Act, and appellee points to paragraph 17 of appellant's answer as disclosing such intention. Appellee quotes the following excerpt: "* * * it (defendant) intends to continue selling goods trademarked or otherwise at discount from regular list prices, solely to its purchasing members, * * *". Justice to appellant requires that sentence be completed according to that paragraph which continues as follows: "* * * but that *it has no intention,* has not threatened to and is not organized for the purpose of *making any sales contrary to any minimum resale prices lawfully established by the producer or manufacturer or in violation of the rights of any person in any trademark, brand or name.*" (Italics supplied).

[*Absence of intended or threatened violation*]

As we read the entire statement contained in that paragraph of the answer, neither intention nor threat is manifested on the part of appellant to sell those trademarked goods at a discount whose minimum resale price has been established by contract made pursuant to the Fair Trade Act. Furthermore, there is nothing in the record that would warrant the finding of such intention or threat as a fact.

[*Conclusion*]

We conclude, therefore, that neither the pleadings nor the proved facts, as found by the chancellor, warrant a decree for injunction. Since an injunction is a very drastic remedy the use of which should be restricted except upon clear and convincing testimony of an intended or threatened injury, we are of the opinion that appellee is not entitled to such equitable relief based upon its general prayer therefor, as incidental to the specific relief sought but which is denied in the instant case involving the particular parties to this suit. Neither the proof nor the prayer supports the decree of the chancellor granting general relief. In the absence of conformity between them, the decree cannot be sustained: *Goslin, Admr. v. Edmonds,* 325 Pa. 154, 159, 188 A. 851.

[*Complaint dismissed*]

The decree of the court below is reversed and the bill of complaint is dismissed, costs to be paid by appellee.

[¶ 55,223] Bunte Brothers, Inc., a corporation, v. Federal Trade Commission.

United States Circuit Court of Appeals, Seventh Circuit. Decided May 17, 1939.

Petition for review of order of the Federal Trade Commission.

Shipments of candy in interstate commerce for disposal by retailers in connection with accompanying punch boards constitute unfair competition within the prohibition of the Federal Trade Commission Act where diversion of business from competitors is caused by the inducement of gambling, contrary to public policy.

Discontinuance of trade practices determined to be unfair by the Federal Trade Commission does not render the matter moot, and a finding of compliance made by the Commission offers no bar to the entry of an order to cease and desist.

Affirming the order of the Federal Trade Commission of February 19, 1938, Complaint No. 1811.

Before SPARKS, MAJOR and TREANOR, Circuit Judges.

[*Statement of the case*]

MAJOR, Circuit Judge: This is a petition to review an order of the Federal Trade Commission entered February 19, 1938, under Section 5 of the Federal Trade Commission Act, 15 U. S. C. 45, in reference to unfair methods of competition in commerce, which order involves, among other things, the interstate shipment of candy described as "break and take" and "punchboard assortments." The order is based on findings of the Commission made after hearings held on an amended complaint issued January 7, 1936. The original complaint against petitioner was issued May 1, 1930, involving only the "break and take" assortments. As to this, petitioner did not contest and an order was entered by the Commission April 3, 1934. This order was set aside January 17, 1936 when the amended complaint was filed, covering both candy assortments.

[*Findings of the Commission*]

The Commission found, among other things, that petitioner is an Illinois Corporation, with its principal place of business in Chicago; that it has been for several years engaged in the manufacture of candies and in the sale and distribution thereof to wholesalers, jobbers and retail dealers located in all states of the United States, and makes its shipments interstate. It was found that petitioner, prior to April 1, 1934, shipped in interstate commerce, assortments of candy known in the candy trade as "break and take" assortments; that such assortments consist of a number of pieces of candy retailing for one cent each and with differently colored centers and a few larger bars; that the smaller pieces of candy purchased for one cent each are broken open by the purchaser to determine the color of the center; that some pieces with certain colored centers and the last piece in the assortment entitle the purchasers thereof to a larger bar of candy free of charge; that the assortments comprise both the smaller pieces of candy and the prizes and are sold by the petitioner as a unit to the purchasers of such assortments. The Commission found that on or about April 1, 1934, the petitioner discontinued the sale and distribution of assortments similar to those just described to purchasers located in states other than the State of Illinois.

[*Punchboard assortments*]

The Commission also found, among other things, that the petitioner ships in interstate commerce, assortments of candy consisting of a number of boxes of candy accompanied by a punchboard; that a punchboard is a cardboard device containing pieces of paper with printed numbers; that the numbers on each board are effectively concealed from the purchasers until a punch or selection has been made and a particular punch selected from the board; that the punches or chances sell for five cents each; that purchasers of chances who select winning numbers are given one of the boxes of candy without additional charge; that the purchasers of chances who do not select winning numbers receive nothing but the privilege of punching a number from the board; that some of the boards distribute boxes of candy and other articles of merchandise as prizes to purchasers selecting or punching particular numbers. The packages of candy in the assortments consist of one or two pound boxes which range in retail price from sixty cents to $5.00 per box; these assortments consisting of boxes of candy and a punchboard are sometimes referred to as "deals."

[*Admissions by petitioner*]

The above related facts as to both the "break and take" and "punchboard assortments" are not in dispute. In fact, they are conceded by petitioners. It is also admitted that each candy assortment involves the use of chance and that such use is contrary to public policy.

[*Compliance no bar to order*]

It is also agreed by the petitioner that the use of chance prior to April 1, 1934 in the "break and take" assortments constituted an unfair method of competition under the Act in question. It is agreed that the sale of penny candies by the aid of the element of chance in such assortments necessarily injures its competitors and that proof of such is unnecessary. The only question raised with reference to the Commission's order insofar as it pertains to this assortment is that inasmuch as petitioner had made a report of compliance to the Commission, that it would cease and desist from selling such assortments in interstate commerce and that a finding to such effect was made by the Commission, that the Commission's order in respect thereto is unauthorized or justified. This contention can not be sustained. The Act in question provides:

> "Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce * * * it shall issue and serve * * * a complaint, *etc.* * * *."

It seems obvious that the words "has been" in the language just quoted authorize the Commission to issue its cease and desist order notwithstanding the unfair method complained of has been discontinued. This construction of the statute is sustained by the great weight of authority.

In *Federal Trade Commission v. Goodyear Company,* 304 U. S. 257, 260, the court said:

> "Discontinuance of the practice which the Commission found to constitute a violation of the Act did not render the controversy moot."

This court, in *Federal Trade Commission v. A. McLean and Son,* 84 F. (2d) 910, 913, with reference to this same question, said:

> "Discontinuance or abandonment is no defense to the order, for, if true, it would be no guaranty that the challenged acts will not be renewed. *Federal Trade Commission v. Wallace* (C. C. A.) 75 F. (2d) 733. The benefit to respondents of an abandonment may be fully protected by their report to the Commissioner as required by the Commission's order."

In *Federal Trade Commission v. Wallace,* 75 F. (2d) 733, 738, the court said:

"Respondent says that he ceased his 'admitted activities' at once when this cause was filed. Abandonment will not be presumed and, even though pleaded and presently effective, is no bar to the entry of an enforcement order."

[*Contentions of petitioner*]

Petitioner's attack upon the Commission's order as it affects the "punchboard assortments" is somewhat difficult for us to comprehend. After conceding that such assortments involve the use of chance and is violative of public policy, it argues that the sale of such assortments is not an unfair method of competition under the Act. We find this statement in petitioner's reply brief:

"If this court determines that the use of chance in connection with the distribution of merchandise is an unfair method of competition *per se* under all circumstances, regardless of the manner in which it is used or its effect, then the court must decide that the Commission had jurisdiction."

[*Limited competition claimed*]

Apparently, the distinction which is sought to be made between the instant case and the many adjudicated cases wherein the courts have considered and sustained the Commission's order under the same or similar circumstances, is the use made by the retailer of the condemned device. It is this use which is finally made upon which petitioner premises its argument that there is no competition with the sale of legitimate candy, and that the only competition afforded is with other punchboard operators or gambling devices. This fanciful theory is thus illustrated by petitioner:

"A customer with $1 in his pocket intending to buy a box of candy goes into a drug store and passes a counter with candy punchboards. He hesitates, attempting to decide between his desire to buy the candy and his desire to gamble. He finally prefers the punchboard and plays his entire dollar away on it. He either gets nothing for his dollar or wins a box of candy. In either case he does not buy the candy he came in to buy. There is diversion here from the person who manufactured the box of candy to the manufacturer of the punchboard assortment. Had the manufacturer of candy also manufactured punchboard assortments he could have had an even chance at this customer's dollar; by not doing so he has lost the business that might be obtained had he manufactured and sold punchboards."

Then it is argued:

"There has been diversion here but there is no competition. The want or desire to gamble on the punchboard is not the same desire or want as the desire or want to eat candy. One set of competitors compete with each other to supply the want or the desire to gamble; a completely different set of competitors compete with each other to supply the want or desire for candy."

[*Competition by diversion of business*]

We are unable to subscribe to such theory. To use it is devoid of all logic. The customer who spends his dollar on a candy punchboard does so with the expectation of acquiring a box of candy. If he succeeds he has procured a box of candy which otherwise he would have purchased as a cash sale. If, however, he spends his dollar on the punchboard and wins nothing, his money is gone and there will be no cash sale of a box of candy. In either event, the dealer who offers his candy for cash has been deprived of a sale and his business reduced and interfered with to that extent. We think it is a fallacy to say there has been a diversion but no competition. It is difficult for us to understand how a competitor could be injured except by diverting his business. The one who is responsible for that diversion is a competitor and if the diversion is occasioned by a gambling apparatus which is contrary to public policy, *per se,* we think, unquestionably, such a method constitutes unfair trade practice as defined by the Act.

We are familiar with no case where this precise question has been determined, yet there are cases where competition apparently is recognized to result from diversion. In *Federal Trade Commission v. Winsted Company,* 258 U. S. 483, 493, it is said:

"For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods."

In *Federal Trade Commission v. Raladam Co.,* 283 U. S. 643, where the order of the Commission was reversed for failure to show competition, the court, in discussing the matter, on page 653 said:

"It is impossible to say whether, as a result of respondent's advertisements, any business was diverted, or was likely to be diverted, from others engaged in like trade, * * *."

In *Federal Trade Commission v. Keppel & Bros.,* 291 U. S. 304, 308, which we think is decisive of the case here, the court said:

"Upon the record it is not open to question that the practice complained of is a method of competition in interstate commerce and that it is successful in diverting trade from competitors who do not employ it."

And again on page 313:

"A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought to involve the kind of unfairness at which the statute was aimed."

[*Retail sales improperly increased*]

If, however, there were any merit in petitioner's contention concerning the form which its business takes in the retail trade, it would constitute no defense to the order complained of for the reason that the order only runs against interstate sales of "chance" candy to dealers. The means employed by the dealer in disposing of the candy is of little consequence. Petitioner sells to jobbers, wholesalers and dealers, candy in an assortment which includes a punchboard as a means to be used in its final disposition. In such business he is in direct competition with the candy manufacturer who is engaged in the sale of his product for cash. The latter, under such circumstances, is not able to successfully compete with such a method. As a result, he must either suffer a loss of business or engage in a method which, admittedly, is a species of gambling and contrary to public policy.

The court, in *Federal Trade Commission v. Winsted Company, supra,* page 494, said:

"The honest manufacturer's business may suffer, not merely through a competitor's deceiving his direct customer, the retailer, but also through the competitor's putting into the hands of the retailer an unlawful instrument, which enables the retailer to increase his own sales of the dishonest goods, thereby lessening the market for the honest product."

There the court was dealing with the use of false and deceptive brands and labels attached to merchandise. Much stronger language, we think, would be appropriate in the instant case where the sales of petitioner's product are enhanced by the use of a gambling device sold in connection therewith and placed in the hands of the retailer for the purpose of increasing its sales.

[*Similar case*]

Owing to the narrow question which petioners here raise, it would serve no good purpose for us to cite or review the many authorities where the Act in question has been construed and discussed. In the recent case of *Ardelle, Inc. v. Federal Trade Commission,* 101 F. (2d) 718, the court sustained the order of the Commission under facts almost identical with those here presented.

[*Conclusion*]

A study of the authorities and the record convinces us that the order of the Commission was justified, both by the law and the facts.

[*Affirmance of order*]

The same is affirmed.

[¶ 55,224] National Candy Company v. Federal Trade Commission; March of Time Candies, Inc. v. Same; Dietz Gum Company, et al. v. Same.

United States Circuit Court of Appeals, Seventh Circuit. Decided June 2, 1939.

Petitions for review of orders of the Federal Trade Commission.

Orders of the Federal Trade Commission are not rendered legislative in character by the 1938 amendment of Sec. 5 of the Federal Trade Commission Act which merely changes the agency of enforcement, and in no event is the Commission's order open to attack as discriminatory legislation where the order, by its terms, applies equally to all persons similarly situated.

Sales of candy in which lottery methods are employed constitute unfair trade practices within the prohibition of the Federal Trade Commission Act.

Affirming the orders of the Federal Trade Commission Dockets No. 1802, 2806 and 3189.

Before SPARKS, TREANOR and KERNER, *Circuit Judges.*

[*Statement of the case*]

SPARKS, Circuit Judge. On motion of the parties, cause No. 6647, *March of Time Candies, Inc. v. Federal Trade Commission;* and No. 6648, *Dietz Gum Company of Chicago, et al. v. Federal Trade Commission,* were consolidated for hearing in this court, because the general subject matter in all of the cases is the same. The last two cases were considered upon the briefs submitted in the *National Candy* case, and we were requested to decide the last two cases in

accordance with our disposition of the first. In our discussion, therefore, we shall refer to petitioner as the National Candy Company.

[*Nature of business*]

By this action petitioner seeks to review a cease and desist order issued by the Federal Trade Commission under 15 U. S. C. A. section 45. The order was based upon what is termed an amended and supplemental complaint issued by the Commission on April 22, 1937, which in substance contained the following allegations: The petitioner is a New Jersey corporation with its principal office and place of business in Saint Louis, and having another place of business and factories in Chicago. For several years last past it has engaged in the manufacture of candies and in the sale and distribution thereof to wholesale dealers and jobbers and to retail dealers located in various States of the United States. It causes its products when sold to be transported from Chicago to purchasers in other States of the Union to their respective places of business. During that time, and now, there is a course of trade and commerce by the petitioner in such candy between and among the States of the Union. In the conduct of this business, petitioner is in competition with other corporations, individuals and partnerships engaged in the sale and distribution of candy in commerce between and among the various States. In the conduct of this business, petitioner sells and has sold to wholesale dealers and jobbers and to retail dealers, assortments of candy so packed and assembled as to involve the use of a lottery scheme where sold and distributed to the consumers thereof.

[*Prize-lot candy*]

One of the assortments thus sold is composed of a number of pieces of chocolate-covered candy, together with certain other articles of merchandise, which articles are to be given as prizes to purchasers of the candy, in the following manner: The pieces of candy are of uniform size and shape and the majority of them have centers of the same color. A small number of them have centers of a different color, and retail at a price of two for one cent. The purchaser who procures one of the candies having a center of a color different from the majority is entitled to receive, and is to be given free of charge, one of the articles of merchandise. The purchaser of the last piece of candy is likewise entitled to receive, and to be given free of charge, one of the articles of merchandise. The color of the center of each piece of candy is effectively concealed from the purchasers until a selection has been made and the piece of candy broken open. Thus the winners procure the articles of merchandise wholly by chance. With such assortment the petitioner furnishes to the wholesale dealers and jobbers and retail dealers a display card to be used by the retailer in offering the candies for sale to the public, which card bears a legend or statement informing the prospective purchasers that the candy is being displayed in accordance with the above plan.

[*"Pushboard" sales*]

Another assortment thus manufactured and displayed by petitioner is composed of a number of chocolate-covered candy malted milk balls, together with a device known as a "pushboard," by means of which the candy in this assortment is displayed to the consuming public in the following manner: The pushcard has a number of partially perforated disks which are arranged in four sections. Concealed within each of the disks is a legend. Each sale is for one cent, and the card has statements or legends at the top, stating that certain specified legends entitle the purchaser to one ball. Certain other specified legends entitle the purchaser to two balls; others respectively to three, five, six, eight, ten and twenty balls. The card also bears the legend that the last play in each of the three sections completed receives five balls. The last play on the card receives fifteen balls. The legends in the perforated disks are effectively concealed from purchasers until the selection has been made and the disk is separated from the card. The fact as to what number of balls a purchaser receives is thus determined wholly by chance.

[*Effect of lottery methods*]

The wholesale dealers and jobbers to whom petitioner sells its assortments resells the same to retail dealers and they, as well as those retail dealers who purchase directly from petitioner, offer the same for sale and sell them to the public by means of the plans referred to, thus placing in the hands of others the means of conducting lotteries in the sale of these products. Such plans have the tendency and capacity of inducing purchasers to purchase petitioner's candy in preference to that offered for sale and sold by petitioner's competitors.

[*Prevailing public policy*]

Petitioner's use of such methods is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy, and is contrary to the public policy of the Federal Government. The use of such methods has a

tendency to hinder competition and create monopoly in trade and to exclude therefrom such competitors who do not adopt, or do not choose to adopt the use of the same or an equivalent method.

Many dealers and ultimate purchasers of candy are attracted by these methods and by the element of chance involved therein, and they are thereby induced to purchase petitioner's candy in preference to that offered for sale and sold by petitioner's competitors who do not use the same or equivalent methods.

[*Diversion of trade*]

Petitioner's use of these methods has the tendency and capacity, because of the element of chance, to divert trade to petitioner from its competitors who do not use such methods; to exclude such competitors from such trade; to restrain competition and create monopoly in such trade; to deprive the public of the benefit of other competition therein; and to exclude therefrom actual and potential competitors who do not adopt and use the same or equivalent methods.

[*Unfair competition*]

The petitioner's methods, acts and purchases, as referred to, are to the prejudice of the public and of petitioner's competitors, and constitute unfair methods of competition in commerce within the intent and meaning of section 5 of the Federal Trade Commission Act.

[*Compliance offered*]

On January 19, 1938, by permission of the Commission, the petitioner who was the respondent below, withdrew its answer theretofore filed, and substituted therefor and filed its amended answer dated June 18, 1937,[1] in which it failed to deny any allegation of the complaint, and expressly admitted all material allegations thereof, and it consented to the issuance of an order to cease and desist.

[*Effect of admission of complaint*]

The Commission's findings of fact specifically cover every fact alleged in the complaint, and are within the issues tendered by the complaint. Rule VII of the Commission's Rules of Practice provides that the respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state. The petitioner's failure to deny, and its express admission of the allegations of the complaint authorized and warranted the findings by the Commission of all the facts alleged. Under this rule it has been held that where an alleged fact is left without denial, any issue with respect to such allegation is foreclosed by the pleadings. *Federal Trade Commission v. Standard Education Society*, 86 F. 2d 692. Aside from rule VII, any allegation of the complaint which is not denied is to be taken as true without evidence or finding. *Deputron v. Young*, 134 U. S. 241; *Swift & Company v. United States*, 276 U. S. 311.

[*Effect of 1938 amendment*]

It is contended by petitioner that because of the competitive situation in the industry, it will be prejudicially discriminatory against it under the due process clause, to permit the order to become operative against it. For this reason it urges that the order should be vacated. This contention is based on the assertion that practically all candy manufacturers have for many years used, and now use, the same methods of competition as does the petitioner. It concedes the Commission's jurisdiction but questions the propriety of the proceeding in the particular record, and under the law as it has been modified, since the order was entered, by the Amendatory Act of March 21, 1938, 15 U. S. C. A. section 45. Petitioner's contention is that the amendment of section 5 of the Act transformed the Commission's previous administrative quasi-judicial order into a legislative regulation of the candy interest trade; and that, as legislation it is void for unconstitutional discrimination against petitioner as between it and its competitors against whom no such order has been made. It is settled that the Commission is a quasi-judicial tribunal and its orders are administrative orders as distinguished from judicial decrees. *Schechter Poultry Corp. v. United States*, 295 U. S. 495; *Humphrey's Executor v. United States*, 295 U. S. 602; *Sears, Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 307. Prior to

[1] "Comes now the respondent, National Candy Company, Inc., and requests permission to withdraw its answer heretofore filed on May 13, 1937, and to substitute therefor this its amended answer to the Commission's complaint issued herein on April 22, 1937, and states that it desires to and hereby waives hearings on the charges set forth in the complaint herein; that it admits all of the material allegations of the complaint to be true save and except it states that it has not since April 2nd, 1934 sold or shipped in interstate commerce the assortment described in paragraph Two (a) of the complaint; that it consents that the Commission, without hearing, without further evidence, and without other intervening procedure, may make, enter, issue and serve upon it, its findings as to the facts and conclusion based thereon, and an order to cease and desist from the methods of competition alleged in the complaint."

the Amendatory Act, the Commission had power to file in this court a petition for the enforcement of its order to cease and desist, and the other party had power to file a petition for a decree setting such order aside. This remedy of the Commission was eliminated by the amendment, and the petitioner's right to file a petition to set aside the order is left precisely as it was in the original enactment, except that the amendment fixed a limit of sixty days on the petitioner's right to exercise its power to file such petition. The pending petition was duly filed within the time.

[*Enforcement power transferred*]

Under the amendment, if the respondent fails to file a petition to set aside the order within sixty days, the Department of Justice is given power in the case of the violation of such order, to institute a suit to recover from such respondent a civil penalty in the sum of not more than $5,000. In other words, the power to enforce is transferred from the Commission to the Department of Justice, and jurisdiction of such proceeding is transferred from the Circuit Court of Appeals to the United States District Courts.

[*Due process not violated*]

We think the order attacked is not legislative in its character, and that if it were it would not be discriminatory because the statute and all orders thereunder apply equally to all persons in like conditions. The equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances. *Louisville v. Coleman*, 277 U. S. 32. The amendment did not transform the Commission's order into a legislative act. It merely changed the Government's remedy for its enforcement. *Cf. Crane v. Hahlo*, 258 U. S. 142. So far as this court is concerned, the constitutionality of section 5 of the original Act has been determined. *Federal Trade Commission v. McLean & Son*, 84 F. 2d 910. The provision for a judicial review of an administrative order constitutes due process of law (*Bourjois, Inc. v. Chapman*, 301 U. S. 183), and we are convinced that section 5 as amended does not offend the due process clause.

[*Competitive practice not controlling*]

Petitioner further urges that it would be prejudicially discriminatory against it to permit the order to become operative because its competitors use the same methods. In other words, it argues that unless the Government proceeds against all such offenders at one time, it would be wrong to proceed against it alone. There is no merit in this contention. *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483; *Federal Trade Commission v. Keppel & Bro.*, 291 U. S. 304.

[*Interstate operations*]

Petitioner also contends that the order must rest upon a complaint which alleges and finds a set of facts within the jurisdiction of the Commission, and it urges that the facts here alleged and found did not disclose that petitioner has shipped any of the products in question in interstate commerce. For this reason it urges that the order should be vacated. A perusal of the complaint and findings, which are practically identical, discloses that such allegations and findings are present. Since the allegations of the complaint are expressly admitted, such admission is unimpeachable now.

Petitioner further calls to our attention the fact that at the time it filed its amended and substituted answer on January 19, 1938, it suggested that the Commission should hold it until it was in a position to issue some restraining orders against at least the most substantial of respondent's competitors. It is not claimed that this was agreed to by the Commission, in fact it was not agreed to and the order complained of was entered with petitioner's knowledge within three days after the amended answer was filed. This suggestion does not add any support to petitioner's contention.

Petitioner's next contention is that the complaint does not allege, and the findings do not determine, that the petitioner's products are deceptive or otherwise injurious to the consumer. In connection with this contention, it further urges that the asserted jurisdiction upon grounds of public policy is not supported by the decisions bearing upon this subject matter. It will be noted that these contentions do not purport to challenge the jurisdiction of the Commission over the subject matter of the complaint.

[*Jurisdiction of commission*]

If petitioner may rightfully challenge the sufficiency in law of the complaint, still we think that there is no issue presented in these respects. The complaint does not allege that petitioner's products are deceptive or otherwise injurious to the consumer, but it does allege the sale of candy and punchboards intended to be used in the resale of the candy by the use of a lottery scheme or game of chance. This being true, the element of chance which is admitted, is as sound a basis for complaint as deception would be. *Federal Trade Commission v. Keppel & Bro., supra.* Under the

ruling of that case, we think there is no error with respect to this issue and that the Commission's jurisdiction upon grounds of public policy is complete. It is urged, however, in this respect that the decision of *Erie R. R. Co. v. Tompkins,* 304 U. S. 64, nullifies the decision in the *Keppel* case. With this conclusion we cannot concur. The Erie case merely holds that in determining the law of a State, the Federal courts are to be governed by the decision of the highest courts of such State. In the instant case, however, this court has no occasion to determine or apply any State law because the Commission's order is not based upon any State law.

[*Propriety of order*]

It is further contended by petitioner that the order is not properly restricted to shipments in interstate commerce. A perusal of the order disclosed quite clearly that it is properly restricted to shipments in interstate commerce and the contention is denied. It is fair to say that this contention is based upon petitioner's objection to the words "in connection with the offering for sale and distribution of candy in interstate commerce." From this language petitioner anticipates a construction of it which will be held to apply to intrastate sales of chance candy, and it insists that the words "in connection with" should be stricken out of the order. To do so might leave the petitioner free to sell candy at one price on one contract, and at the same time enter a separate contract and sell the punchboard to be used in the resale of the candy. Such modication would obviously defeat the intention of Congress and provide a way of defeating the purpose of the enactment. We are convinced that the Commission's order cannot be rationally construed to interfere with intrastate commerce.

It is further contended by petitioner that the order is too broad in that it purports to prohibit the shipment of candy which may be sold or distributed upon a chance basis and, as such, is in conflict with an earlier decision of this court, *Federal Trade Commission v. McLean,* 84 F. 2d 910. There we concluded that the language of the order was sufficiently broad to apply to straight candy to be sold by the several respondents, and we accordingly struck the word "may" from paragraph one and two of the order, which is identical with the order here involved, and substituted therefor the words "are designed to." In that case, and here, counsel for the Commission did not deny that straight candy sold to a retailer might be resold by him for use in a game of chance, but it did not deny that it was, and is now, legally possible for the words of the original order to be construed to include sales of straight candy.

This particular question had but scant attention in the argument of that case, and there was not presented to this court the authorities upon which the Commission based its opinion that the words of the original order could not be construed to apply to straight candy. The Commission filed no petition for a rehearing nor did it ask for a writ of *certiorari.* It now presents authorities in support of its construction of the present order and urges us to approve the present order on the theory that it cannot reasonably be construed to apply to the sale and distribution of straight candy, that is to say, to candy that is not "so packed and assembled that sales of such candy to the general public are to be made or may be made by means of a lottery, gaming device, or gift enterprise."

[*"Straight" candy not affected*]

We deem this suggestion worthy of consideration in view of the fact that the development of plans calculated to evade the intent of the statute, as illustrated by those here presented, convinces us that the substitution we made in the *McLean* case lacks effectiveness in carrying out the intention of Congress. A further consideration convinces us that the language of the order in the light of the allegations of the complaint and findings of the Commission cannot reasonably be construed to be applied to the sale of "straight" candy. Regardless of the substitution made by us in the *McLean* case, we affirm the order of the Commission as here presented. We regard it as inapplicable to "straight" candy or to any candy that does not carry an unfair appeal to retail dealers and retail purchasers because of the element of chance involved in the sale thereof. We had no intention of holding otherwise in the *McLean* case.

[*Effect of waiver*]

It is further contended by petitioner that its "admissions of answer did not waive insufficiency and constitutional error asserted." We are of opinion that the Commission's rulings were not violative of the Federal Constitution, and that there were no insufficiencies of allegation in the complaint, the findings, or the order. By petitioner's failure to deny, and its express admissions of the allegations of the complaint, it waived all questions except the sufficiency in law of the allegations of complaint. Likewise its consent that the cease and desist order might issue waived every defense except a challenge of the jurisdiction of the Commission over the subject

matter. This jurisdiction the petitioner concedes in its complaint, and we think the complaint is sufficient in law.

[*Conclusion*]

Petitioner further contends that its business as conducted according to the plans hereinbefore set forth, is not in competition with sellers of straight candy. We do not concede this to be true, but if true, such sales are contrary to the established public policy of the Federal Government. *Federal Trade Commission v. Keppel & Brother, supra.* This is sufficient even in the absence of competition, for in the *Keppel* case the Court said that a method of competition which is contrary to the established public policy of the United States in an unfair method of competition within the intent and meaning of section 5 of the statute. A violation of a public policy is an injury to the public, and it is in the public interest to prevent the use of a method of competition which is contrary to an established public policy of the Federal Government, even if injury to competitors be not alleged or proved. *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441. However, we are of opinion that the use of the unfair methods in question constituted injuries both to the public and to petitioner's competitors (see *Bunte Bros. Inc. v. Federal Trade Commission*, decided by us May 17, 1939), and this finding is supported by substantial evidence.

[*Orders affirmed*]

In each of the cases the order of the Federal Trade Commission is affirmed.

[¶ 55,225] Seaboard Terminals Corporation and Seaboard Midland Petroleum Corporation, Plaintiffs-Appellants, v. Standard Oil Company of New Jersey and The American Oil Company, Defendants-Appellees, and Socony-Vacuum Oil Company, Incorporated, Defendant.

United States Circuit Court of Appeals, Second Circuit. Decided June 12, 1939.

Appeal from the United States District Court, Southern District of New York.

Dismissal of a cause of action under the Federal Anti-Trust Acts is affirmed where institution of the proceedings is barred by the governing state statute of limitations, whose applicability is determined by the situs of the loss and of the wrongdoing, where affidavits filed in a motion for summary judgment fail to establish the applicability of another limitations statute.

Affirming the judgment of the United States District Court, Southern District of New York.

Henry K. Urion, for Plaintiff-appellants.

Edwin F. Blair, for the Standard Oil Company.

David Paine, for the American Oil Company.

Before HAND, L., HAND, AUGUSTUS N., and CLARK, Circuit Judges.

[*Statement of the Case*]

PER CURIAM: We adopt as our own Judge Patterson's opinion, so far as it disposes of the action against the Standard Oil Company of New Jersey and the American Oil Company. We do not commit ourselves, however, as to the proposition that on a motion for summary judgment affidavits going beyond the complaint can under no circumstances be considered. The judgment finally disposes of the action, and if facts appear in affidavits which would justify an amended complaint, there may be ground for treating the complaint as though it were already amended to conform. The affidavits in the case at bar did not, however, add anything which changed the result. They showed (1.) that the Midland's principal place of business was New York until September 1, 1931; (2.) that most of its customers were outside Maryland; (3.) that it had tanks and other apparatus in Pennsylvania and Virginia as well as in Maryland; and (4.) that it bought its gasoline outside Maryland. Little of this is relevant, for the complaint specifies the damages suffered as made up of (1.) the forced sale of its business in Baltimore, at a loss of about $550,000, and (2.) running losses for the four years, 1930-1933, on an average of about $220,000 a year, making $880,000 in all; a total of $1,430,000. It does not appear where the other $170,000 was lost, but, since the principal place of business was not in New York after September 1, 1931, at least two-thirds of the

total loss must have been suffered in Maryland. If then the cause of action "arises" where the loss occurs, this cause of action arose in Maryland, for obviously there can be only one period of limitation for a single wrong, and this wrong was necessarily single. That demands that the several increments of loss must be integrated and localized somewhere, and the most reasonable, the only reasonable, place for that is where the greater part of them occurred. On the other hand, if the cause of action "arises" at the place of the incidence of the wrongful acts, and not of the losses, that, in the case at bar, was where the defendants deprived the plaintiffs of gasoline, which was at their tanks and other "facilities". In either view therefore, the cause of action must be held to have "arisen" in Maryland.

[*Conclusion*]

Judgment affirmed.

[¶ 55,226] California Lumbermen's Council, Coast Counties Lumbermen's Club, Central Valley Lumbermen's Club, Northern Counties Lumbermen's Club, Peninsular Lumbermen's Club, San Joaquin Lumbermen's Club, and the officers, councilmen and members of said organizations and associations, Petitioners, v. Federal Trade Commission, Respondent.

United States Circuit Court of Appeals, Ninth Circuit. Decided June 5, 1939.

Upon petition to review an order of the Federal Trade Commission.

Upon motion of petitioners for order requiring respondent to file supplemental transcript of record.

A motion to require the Federal Trade Commission to file a supplemental transcript of the record in proceedings for review of an order of the Commission is denied where consideration of the basis for the motion, centering upon alleged insufficiencies of the record, is proper only in conjunction with determination of the petition to review the administrative order itself.

Denying motion for supplemental transcript of records in proceedings to review the order of the Federal Trade Commission of July 23, 1938, Dkt. No. 2898.

Morgan J. Doyle, San Francisco, Calif.; for Petitioners.

W. T. Kelley, Chief Counsel, Martin A. Morrison, Asst. Chief Counsel, Daniel J. Murphy, James W. Nichol, Spec. Attys., Federal Trade Commission, Washington, D. C.; for Respondents.

HANEY and STEPHENS, C. J., concur; GARRECHT, C. J., dissents.

[*Denial of Motion*]

HANEY and STEPHENS, Circuit Judges. The motion of the petitioners for an order requiring respondent to file a supplemental transcript of the record is denied. We are of the opinion that the matters in the motion can be properly considered by us only in connection with our consideration of the merits of the petition to review the cease and desist order made by the respondent.

[*Dissenting Opinion*]

GARRECHT, Circuit Judge, dissenting:

Petitioners assert that the transcript heretofore filed by respondent is incomplete in this, that certain exhibits and offers of evidence were made by petitioners during the trial which were refused and rejected. Such offers and rulings respondent has refused to make a part of the record. That these assertions are true is admitted. Petitioners insist that these exhibits and evidence are an important part of their defense to this action. Respondent claims that the exhibits and evidence are immaterial. It is further charged by petitioners and admitted by respondent that certain other evidence offered by petitioners was received, but thereafter, and before such evidence was transcribed, the examiner who conducted the hearing on behalf of respondent ordered the court reporter to delete such testimony from the record. It is thus made to appear, which is admitted by all parties, that the record which respondent has filed in this court is not a full, true and correct transcript of all that took place in the course of the hearing.

I believe this court should require these omissions to be supplied so that the court may intelligently pass on the materiality and relevancy of the proffered proof and determine for itself whether or not it constitutes a defense to the action.

[¶ 55,227] **Bristol-Myers Company, Appellant, v. Lit Brothers, Inc.**

Pennsylvania Supreme Court, Eastern District. Filed June 19, 1939.

Appeal from the Philadelphia County Common Pleas Court, No. 7.

The issuance of trading stamps on request is not a sale below resale contract price within the prohibition of the Pennsylvania Fair Trade Act where issuance of the stamps is made in good faith as part of a long-established business policy and is a legitimate competitive device which the provisions of the Act are not intended to prohibit.

William H. Trinkle, 929 Land Title Bldg., and Frank F. Truscott, same address, (Truscott, Trinkle & Wright), same address.

Sylvan H. Hirsch, 1632 Bankers Securities Bldg., Philadelphia, Pa.; I. Jerome Stern, same address (Sundheim, Foltz & Sundheim; same address).

By MAXEY, J.; DREW, J. and the CHIEF JUSTICE, dissent.

Opinion of the Court

[*Statement of the Case*]

MAXEY, J. Plaintiff filed a bill in equity to restrain by injunction an alleged violation of section 2 of the Pennsylvania Fair Trade Act of June 5, 1935, P. L. 266 (73 P. S. secs. 7 and 8), on the ground that defendant issues yellow trading stamps, when requested, on all purchases of merchandise, including the trade-marked articles, Sal Hepatica and Ipana Tooth Paste, produced by plaintiff. The court below upheld the adjudication of the Chancellor and dismissed the bill. This appeal followed.

[*Statutory Provision*]

Section 2 of the Fair Trade Act provides: "Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section one of this act, whether the person so advertising, offering for sale, or selling is, or is not, a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

[*Alleged Violation*]

Plaintiff contended that defendant violated section 2 of the Act in that it issued and delivered trading stamps as part of its retail sales of plaintiff's trade-marked products, these trading stamps being redeemable or exchangeable for premiums on articles of value and being issued to purchasers of plaintiff's trade-marked commodities at a rate of one of such trading stamps for each 10 cents of purchase price of the commodity.

[*Answer of Defendant*]

Defendant in its answer denied "any violation of the minimum resale price as averred by plaintiff, or any violation of the Fair Trade Act . . .," denied that "the issuance of trading stamps as averred, constitutes a discount, but on the contrary" averred that "the issuance of the trading stamps is solely for advertising purposes and in accordance with a long continued policy of the defendant so to do over a period of thirty years," and averred further that "the trading stamps . . . in and of themselves have no value, nor may the stamps issued in connection with the sales of Sal Hepatica and Ipana Tooth Paste, of themselves be redeemed for any article of value." Defendant further denied that "it has committed any unlawful acts which have resulted in inducing breaches of plaintiff's contracts with other retail dealers, or damage and destruction to plaintiff's system of doing business; or that said acts have deprived plaintiff of the benefit of the Fair Trade Act of Pennsylvania and of the Act of Congress; or that said acts have damaged plaintiff's trade-marks and good will."

[*Findings of Fact in Lower Court*]

The chancellor found, *inter alia,* the following facts: "That after defendant had notice . . . that plaintiff had entered into contracts with others fixing the resale price of plaintiff's products, it always sold Ipana Tooth Paste . . . and Sal Hepatica . . . at the resale prices fixed by plaintiff in contracts with others"; . . . "that the purpose of the issuance of trading stamps is to attract people into the store . . .; that before a customer can receive sufficient stamps to obtain anything, he must fill a book, and a book represents the purchase of $99.00 worth of merchandise . . .; that these stamps are redeemable only by the Yellow Trading Stamp Company"; that "they are not redeemable on defendant's premises" and defendant "has no connection with the . . . stamp company except its contractual relationship in

respect to the stamps"; that "defendant pays the stamp company for stamps which are actually redeemed, at the rate of $1.40 per thousand stamps . . .; that if an injunction were granted in this case, it would have a very serious effect on the operation of defendant's business . . .;" that "there is no way that defendant could issue trading stamps only with merchandise not affected by the Fair Trade Act because this would necessitate an examination of one hundred thousand charge account bills a month, item for item, for the purpose of determining with which merchandise trading stamps could be given and that 533,000 to 600,000 items per month are billed to customers; that it would not be practically possible to examine all of the items on these bills in order to pick out the merchandise for which stamps could be given; that such a procedure would develop ill-will on the part of the customers . . .; that the cost of such an examination of charge account bills would be prohibitive . . .; that the trading stamps issued in connection with sales of plaintiff's products of themselves cannot be redeemed for any article of value"; that "such redemption can be made only after 990 of the stamps have been pasted in the stamp book furnished for that purpose"; and that "to obtain 990 stamps . . . it is necessary to purchase $99.00 of merchandise;" and "that no evidence was offered to show that defendant's competitors had suffered any damage, or that plaintiff's business had in any way been affected or threatened to be affected, or that its trademark had been or was about to be damaged, or that the public had been or was being misled."

[*Conclusions of Law of Lower Court*]

The chancellor's conclusions of law are, *inter alia:* "That defendant's delivery of trading stamps upon request . . . is not in violation of the . . . Fair Trade Act; that trading stamps, when issued in good faith with all merchandise and not as a subterfuge for the purpose of evading the Fair Trade Act, are a form of advertising in the same category as free delivery service" etc. . . .; "that the purpose of the . . . Fair Trade Act was to prevent predatory price cutting and 'loss leaders' and defendant's issuance of trading stamps is not within the purport of the Act; . . . that if defendant were enjoined from issuing trading stamps with plaintiff's products, it would compel defendant entirely to discontinue the issuance of trading stamps, one of the basic and long-established policies on which defendant's business has been founded, and that the advantage which might be obtained by plaintiff is slight as compared with the substantial damage which would be done to defendant; and that plaintiff has not presented any proof that it has either sustained or been threatened with any substantial or irreparable damage."

[*Amicae Curiae*]

Briefs have also been filed by E. R. Squibb and Sons, and by the Lambert Pharmacal Company, each party being self-described as "one of those protected [by the Fair Trade Act]" and as *"amicus curiae"*.

[*Purpose of Act*]

The purpose of the Fair Trade Act is obvious, it being to prevent the cutting by any dealer, of the established price of any commodity identified by the trade-mark, brand or name of the producer. This price cutting which confers a slight pecuniary advantage to the buyer has nevertheless been adjudged by the lawmakers of forty states to be prejudicial to the public interest. Such price cutting forces, or at least prompts, other dealers to abandon the sale of the price-cut commodity, with the result that the producer of it suffers a loss of business which in turn leads to unemployment in his establishment. The abandonment of the sale of this price-cut commodity by many dealers means the narrowing to the public of opportunities to purchase it and if it is an article of merit, as it presumably is, the public interest is thereby affected adversely. Our state legislature by the enactment of the law now invoked has declared that it is the public policy of this Commonwealth to stop this "cut-throat competition." Price cutting through "loss leaders", that is, by selling a certain commodity at less than cost in order to attract trade to the store where many other commodities, as well as the "loss leader" commodity, are sold, has come to be generally looked upon as unfair and predatory, and the prevention of such practices was the undoubted purpose of the Pennsylvania Fair Trade Act of 1935.

The purpose and scope of Fair Trade Acts are succinctly set forth by Mr. Justice Sutherland, speaking for the United States Supreme Court in *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183 (a case arising under the Fair Trade Act of the State of Illinois, with provisions similar to ours), as follows:

"Generally speaking [state court decisions] sustain contracts standardizing the price at which 'identified' commodities subsequently might be sold, where the price standardization is primarily effected to protect the good will created or enlarged by the identifying mark or brand. Where a manufacturer puts out an article of general production identified by a special trade-mark or brand, the result of an agreement fixing the subsequent sales price

affects competition between the identified articles alone, leaving competition between articles so identified by a given manufacturer and all other articles of like kind to have full play. In other words, such restraint upon competition as there may be is strictly limited to that portion of the entire product put out and plainly identified by a particular manufacturer or producer. . . . Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing assent to the protective restriction, with consequent liability under section 2 of the law by which such acquisition was conditioned. . . . Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it. . . . Good will is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of commodities. And distinctive trade-marks, labels and brands, are legitimate aids to the creation or enlargement of such good will. It is well settled that the proprietor of the good will 'is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trade-mark without his consent and authority.' *McLean v. Fleming,* 96 U. S. 245, 252, 24 L. Ed. 828, 831. 'Courts afford redress or relief upon the ground that a party has a valuable interest in the good-will of his trade or business, and in the trade-marks adopted to maintain and extend it.' *Hanover Star Mill Co. v. Metcalf,* 240 U. S. 403, 412, 60 L. Ed. 713, 717, 36 S. Ct. 357. The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with. Sec. 2 of the Act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates 'unfair competition.' See *Liberty Warehouse Co. v. Burley 'Tobacco Growers' Co-op. Marketing Asso.,* 276 U. S. 71, 91, 92, 96, 97, 72 L. Ed. 473, 480-483, 48 S. Ct. 291. . . . There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well."

[*Issue Presented*]

The question before us is: Did the trade practice of the defendant amount to a violation of the Fair Trade Act and tend to defeat its purpose? The facts are not in dispute. They are that appellant entered into contracts with certain retailers in this state, of whom appellee was *not* one, whereby these retailers agreed not to resell these products except at the prices stipulated by appellant, namely, 39 cents for "Ipana Tooth Paste" and 25 cents for a small package of "Sal Hepatica". On October 22, 1937, appellant notified appellee that it had entered into such contracts in Pennsylvania and advised the appellee of the minimum resale prices fixed by these contracts. The appellee, although not a party to these contracts, nevertheless maintained the prices fixed by appellant on these commodities but did issue trading stamps with the sales of these commodities as it did (and has done for 30 years) with the sales of all its merchandise. The alleged violation of the Fair Trade Act consists *not* of the sale of the specified commodities for less than the prices fixed by the appellant, but in the issuing of trading stamps with these sales. The stamps issued are those of the Yellow Trading Stamp Company and are issued to the customer upon request. One stamp is issued with every purchase amounting to ten cents. These stamps are not redeemable until a book of 990 stamps have been acquired by purchases amounting to $99. For such a book, the customer receives from the Stamp Company a premium worth at retail $1.75. The appellee does not issue these trading stamps automatically with each 10 cent sale of commodities but only upon the request of the customer and when the bill is paid on time. The record reveals that on account of many customers not requesting stamps with their purchases, only 64% of the amount of stamps which would have been issued by the appellee in 1936, were in fact issued, and in 1937 this percentage was 63.

[*Trade Stamps Not Price-cutting Device*]

There is no doubt that the giving away of these stamps by Lit Brothers, Inc., its practice for 30 years—is not a price-cutting device but a means of inducing a customer to return to the store to make additional purchases so that he or she may accumulate 990 stamps paid for by purchases amounting to $99 and then upon the presentation to the Stamp Company of a book containing these 990 stamps, be given an article of merchandise worth at retail $1.75. For so doing the Stamp Company receives from Lit Brothers $1.40 when it presents the 990 stamps to the latter concern, for redemption. In other words, the customer qualifies himself to receive a bonus worth $1.75 when he has paid Lit Brothers $99 for purchases.

Instead of making it possible for a bonus of *merchandise* worth $1.75, to be secured by a customer spending $99 in their store, Lit Brothers might conceivably operate a plan whereby the customers who had paid

them $99 for merchandise, would be given a dinner worth $1.75, or seven tickets for seven days parking of an automobile at the rate of 25 cents a day, or a theatre ticket costing $1.75, or ten gallons of gasoline to induce him to motor again to Lit Brothers' store. All these things would be things of *value* to the customer, but would such rewards of patronage constitute a "price-cutting" by Lit Brothers within the meaning of the Fair Trade Act, of "Sal Hepatica" and "Ipana Tooth Paste", which Lit Brothers admittedly sell along with thousands of other commodities?

[*Fair Competition Proper*]

While it is the purpose of the Fair Trade Act to prevent "cut-throat competition", it is *not* the purpose of the Act to prevent *all* business competition. Competition is still "the life of trade," and no public policy is sound which stifles the spirit of enterprise. If, for example, merchant A provides orchestral music for his customers at a certain hour of the day, or maintains in his store a salon where works of art are exhibited, or a nursery where children are fed and otherwise cared for while their mothers are shopping in the store, or if he provides his customers free bus service to and from his store, merchant B has no grounds for complaint which the law will heed. Yet all these things confer benefits on the customer and some of these benefits are susceptible of pecuniary measurement. It follows, therefore, that for a merchant to confer pecuniary benefits upon his customers, which benefits some competing merchant does not confer, does not amount to such unfair competition as the Fair Trade Law forbids. Merchant A can extend his customers 30 or 60 days credit on the purchase of a commodity while merchant B refuses to extend any credit on the purchase of the same article. A is not thereby violating the Fair Trade Act. A may allow a discount of 1% on all bills paid within ten days after being rendered. B may allow no such discount. A is not thereby violating the Fair Trade Act.

[*Trading Stamps Legitimate Device*]

It is clear to us that the practice indulged in by Lit Brothers, of issuing trading stamps with the sales of its merchandise falls within the sphere of legitimate competition and does not constitute a "selling [of] any commodity at less than the price stipulated" and that it is not "unfair competition" within the meaning of the act appellant invokes. To come within the prohibitions of the act, Lit Brothers would have to either (1) cut *directly* the price of the commodities within the act's protection, or (2) accomplish the same result in respect to the commodities by a device which was a palpable subterfuge resorted to for the purpose of circumventing the law. The law still, as Chief Justice Shaw said in *Com. v. Hunt,* 45 Mass. 111, "looks at truth and reality through whatever guise it may assume." What Lit Brothers did in this matter is neither a direct price-cutting of certain commodities nor is it a palpable subterfuge to conceal a law evasion. It is *not* a "guise" assumed to cloak "reality". The issuing of trading stamps is and long has been a legitimate means of attracting customers to the store issuing them. It has not met with express legislative condemnation in this Commonwealth and there is nothing in the act invoked to indicate that its provisions were intended to prevent the practice.

[*Unimportance of Alleged Violation*]

There is also a time-honored maxim of the law which applies to this case, to wit: *"De minimis non curat lex"*. As Broom says in his "Legal Maxims": "Courts of justice generally do not take trifling and immaterial matters into account." In *"The Reward"*, 2 Dods. Adm. R. 269, 270, Sir W. Scott observed that "the court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim, *de minimis non curat lex*. Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked."

If, for example, a customer spent $99 in Lit Brothers' store for the purchase of 396 tubes of "Ipana Tooth Paste (a supply adequate for a long lifetime) and upon the presentation to the Stamp Company of the 990 trading stamps he received with his purchase, he was given an article worth $1.75, he would be obtaining in the form of *merchandise* a discount of 1.76%. Applying this to each 25 cent purchase of tooth paste, it would amount to four and 4/10ths mills on that purchase. When the further facts are considered that this "discount" is not in cash and that fewer than ⅔rds of the purchasers of commodities at Lit Brothers' store ask for or accept trading stamps, the infraction charged appears to be still more trifling than above indicated.

President Judge Oliver of the court below, sitting as chancellor in this case, appropriately said in his adjudication:

"In this particular case the plaintiff has failed to show that it either has sustained or will

sustain any injury or damage as a result of defendant's continuing to issue trading stamps. In the language of one of the plaintiff's executive officers who testified on its behalf, the retail dealers who complained to the plaintiff merely stated that, if plaintiff did not stop the issuance of trading stamps by defendant, they 'would be forced to meet the competition.' . . . There was no evidence that any dealers had cancelled, or threatened to cancel, their contracts with plaintiff, or that they had refused to buy any further merchandise from the plaintiff, or that plaintiff had suffered any damage at all. . . . Even if such issuance of trading stamps did constitute a violation of the act, no injunction should be issued in the present case because the injury to the plaintiff, if any, is slight, whereas the damage to the defendant caused by a restraining order might well be substantial and irreparable—certainly out of all proportion to the benefits which the plaintiff might derive from the issuance of such order."

[*Restrictions on Equitable Relief*]

A suitor who seeks a decree which will do him no good but will work a hardship on another is not armed with a cause that will make any appeal to a court of equity. As this court said in *Reynolds v. Boland,* 202 Pa. 642, 647, 52 A. 19: "Equity springs from conscience and is administered through it." The Supreme Court of the United States expressed the same principle in *Deweese v. Reinhard,* 165 U. S. 386, as follows: "A court of equity acts only when and as conscience commands."

[*Conclusion*]

The decree is affirmed at appellant's cost.

Mr. Justice Drew filed a dissenting opinion in which the Chief Justice joined.

[Dissenting Opinion]

Drew, J.

In my opinion the decision of the majority legalizes a plain violation of the Fair Trade Act and opens the door to a multitude of carefully devised schemes to effectuate indirect price-cutting. The Act expressly prohibits the sale of a commodity at a price less than that stipulated in any contract entered into pursuant to the provisions of the Act, and it seems to me that a sale of goods accompanied by trading stamps is a sale at a reduced price in violation of this statutory provision.

The undisputed facts show, and the court below found, that the trading stamps are redeemable for other merchandise or may be sold to others by the purchaser to whom they have been issued. The giving of the trading stamps is an integral part of the transaction of sale of the particular trade-marked commodity. When a customer purchases a tube of appellant's tooth paste for 39 cents he does not pay 39 cents for the tooth paste alone, but for the trade-marked commodity and the trading stamp. Since the trading stamp represents a definite value redeemable in other merchandise, he is receiving for the stipulated price something of value in addition to the trade-marked commodity.

That this amounts to a rebate or discount upon the stipulated price is evident. The stamp books themselves bear the words: "Yellow trading stamps are not something for nothing but something instead of nothing—a discount for the money you spend with the storekeeper," and "Refusing to take yellow trading stamps from the storekeeper is like forgetting your change. Always ask for them." This language clearly shows that those who issue the stamps recognize the fact that one who purchases an article with which he receives trading stamps is obtaining the particular article at a price less than the one stipulated. The fact that the discount is in the form of a stamp redeemable in merchandise rather than in the form of a direct cash rebate which could be used to purchase the same merchandise is wholly immaterial.

The contention that giving such stamps is merely a form of advertising ignores the actual fact that the customer is receiving the article at the standard price less the value of the stamp, and is contrary to the judicial decisions of other courts which have dealt with the trading stamp problem. In *Rast v. Van Deman & Lewis Co.,* 240 U. S. 342, the United States Supreme Court expressly ruled that giving trading stamps with the sale of merchandise could not be treated as a mere method of advertising, but on the contrary was "a method of giving discount, practically in some instances a rebate upon the price." See also *Sperry & Hutchinson Co. v. Hertzberg,* 69 N. J. Eq. 264.

While it is true that the Fair Trade Act is in derogation of the common law and is therefore to be strictly construed, it is equally true that an act is not to be construed to defeat the very purpose for which it was intended. In *Calvert Distillers Corp. v. Nussbaum Liquor Store,* 2 N. Y. S. (2d) 320, in interpreting the New York Fair Trade Act, the court said (p. 324): "With the economic soundness or wisdom of the statute the courts are not concerned. It expresses a new business policy by the law-making body of the state. It is not to receive such a narrow or strict judicial construction as virtually to destroy its purpose. Rather it is to receive a judicial construction designed to carry out that new policy, to effectuate its primary purpose."

We must, therefore, consider the history of this fair trade legislation and examine the evils which it sought to alleviate. The Act deals not with a commodity alone, but with a commodity which is identified by a brand or trade-mark. Although the retailer owns the particular merchandise, he does not own the brand or trade-mark which identifies the product. The courts have long recognized that the goodwill which this mark symbolizes is property, and that this property—the ownership of the goodwill—remains in the manufacturer though he has parted with the commodity. *Old Dearborn Distributing Co. v. Seagram Distillers Corp.,* 299 U. S. 183. It is to protect this property interest by preventing retailers from capitalizing on the goodwill of the producer through

price-cutting schemes that the Fair Trade Acts have been enacted: *Old Dearborn Distributing Co. v. Seagram Distillers Corp., supra; Triner Corp. v. McNeil,* 363 Ill. 559; *Weco Products Co. v. Reed Drug Co.,* 225 Wis. 474. In the first case cited the United States Supreme Court said (p. 193): "The primary aim of the law is to protect the property—namely, the goodwill—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself."

The Act recognizes the fact that a manufacturer of a trade-marked commodity derives an advantage from a uniform price known to the buying public. When a manufacturer has through national advertising and a widespread sales program established a reputation as a producer of a Dollar Watch, *any* sale of that article at a less amount discredits the article in the eyes of the consumer and injures the goodwill which the manufacturer has created. Furthermore, price-cutting by one retailer forces other retailers in the same locality to cut prices to maintain the trade on that article. The retailer's margin of profit is thereby reduced to such an extent that he is ultimately forced to discontinue handling the particular commodity or at least to push the sales of competing products. The inevitable result is that the producer suffers from the loss of distributing outlets for his product.*

Since the Act is to be construed to effectuate its purpose and to remedy the existing evils, it is thus apparent that *any* sale which tends to produce these results is to be condemned. The Act recognizes the fact that a retailer who sells a dollar article for 99 cents is impairing the goodwill of the producer. It seems to me that a practice which would permit a retailer to sell a dollar article and 1 cent worth of trading stamps for $1 is just as objectionable. If the Act permits the retailer to give trading stamps redeemable in valuable merchandise, it also would of necessity sanction the giving of the merchandise itself with each sale of the trade-marked article. And since the customer is receiving for his dollar spent more than the trade-marked product, he realizes that he is receiving it for less than $1. If the maintenance of the manufacturer's goodwill requires that the consumer shall at all times associate the price of $1 with the particular brand, the goodwill is impaired where the consumer receives the trade-marked commodity plus a 1 cent article for $1 just as much as where the consumer pays 99 cents for the trade-marked product alone.

Furthermore, in order to meet the competition of retailers who give valuable trading stamps with trade-marked commodities, other distributors will be forced to devise similar schemes to effectuate indirect price-cutting. The financing of these schemes reduces the retailer's margin of profit in the same manner as a direct reduction of the price. Here again the producer will ultimately suffer from a loss of distributing outlets. To deny the injunction in the instant case would thus permit a practice which will defeat the very purpose for which this legislation was enacted.

The argument that the giving of trading stamps is the same as providing "orchestral music for his customers at a certain hour of the day, or maintains in his store a salon where works of art are exhibited, or a nursery where children are fed and otherwise cared for while their mothers are shopping in the store" seems to me clearly unsound. Such services have no direct relation to the articles purchased or to the price paid; in fact one may receive these services even though no purchases are made. A direct reduction in the price of a trade-marked commodity injures the manufacturer's goodwill because there is a *direct association in the customer's mind between the price and the particular article.* Where the reduction takes the form of a trading stamp the value of which is directly proportional to the value of the article purchased, the same association exists since the customer realizes that he is getting the commodity at its standard price less the value of the trading stamp. The trade-name is discredited in the mind of the consumer just as much as if an actual cash rebate were given. But where the customer receives free parking or other similar services, he does not associate the receipt of these gratuities with the price of the particular article which he may purchase. There is consequently no injury to the trade-name or the goodwill of the manufacturer.

The majority opinion argues that even though appellee is violating the Act, it is not entitled to injunctive relief on the ground that the benefit to be obtained would be disproportionate to the damage done appellant. While it is true that the stamps now issued are not of great value, nevertheless the Act declares that *any* sale at less than the price stipulated is unfair competition. Although the stamp represents but a small proportion of the total purchase price of one particular article, the fact remains that it is a reduction in price and this court is not given the power to pass upon the extent of the reduction. That purchasers recognize these stamps as being valuable is established by the fact that appellee's customers requested over 146,000,000 stamps in 1937 and that 95% of these were redeemed. In passing on the question of damages in *Calvert Distillers Corp. v. Nussbaum Liquor Store, supra,* the court said (p. 325): "The only practical method of securing any kind of enforcement of the statute as now drawn is by way of injunctive relief. To obtain such relief under the statute it is unnecessary, generally speaking, for the owner or producer to prove the actual damage sustained. It is sufficient to establish that there is in existence a 'good will' to be protected and the injury thereto will ordinarily be presumed if there is unlawful price cutting." Here there is what amounts to unlawful price-cutting. Hence appellee's contention that appellant has failed to establish irreparable damage is immaterial.

Furthermore, the majority ignores the real damage which appellant will suffer if relief is denied. To meet the competition other retailers will have to devise similar schemes for granting rebates. There would be nothing to prevent appellee or any other retailer from increasing

* See: *Haring, Retail Price Cutting and Its Control* (1935); *McLaughlin, Fair Trade Acts,* 86 *U. of Pa. L. R.* 803; *The Fair Trade Laws,* 36 *Columbia L. R.* 293; *Retail Price Maintenance,* 45 *Yale L. J.* 672.

the number of stamps issued with each purchase or the value of the merchandise that could be obtained. The result would be an indirect price-cutting war with the same damaging results as those which arise out of direct price-cutting. Hence even though the particular violation here involved is not in itself causing immediate damage of serious proportions, the obvious consequences that will result from a denial of injunctive relief warrant the restraining of this practice.

The majority stresses the fact that appellee would have to discontinue the issuance of trading stamps and that this would be highly detrimental to its business. While it is true that equity will frequently refuse to grant an injunction where it will harm a defendant more than it will benefit a plaintiff, that principle can have no application here. The legal theory upon which section 2 of the Act is based is that selling below the stipulated price constitutes an interference with the producer's property rights which may properly be made tortious: *Old Dearborn Distributing Co. v. Seagram Distillers Corp., supra.* In *Sullivan v. Steel Co.*, 208 Pa. 540, this court said (p. 555): "As to the principle invoked, that a chancellor will refuse to enjoin when greater injury will result from granting than from refusing an injunction, it is enough to observe that it has no application where the act complained of is in itself as well as in its incidents tortious." The majority fails to consider that appellee bought appellant's goods for resale purposes with full knowledge of the price restriction and with full knowledge of the law which authorized that restriction. It was not obliged to buy, and as said by the United States Supreme Court in *Old Dearborn Distributing Co. v. Seagram Distillers Corp., supra*, its "voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under # 2 of the law by which such acquisition was conditioned." If the relief accorded by the Act is to be denied merely because it is profitable for a retailer to violate its mandatory provisions, certainly the Act is rendered nugatory.

The court below stressed the fact that several states, whose original fair trade acts were similar to our own, passed subsequent legislation expressly prohibiting the use of trade stamps. From this fact it is argued that our Act as it now stands was not intended to include the practice of giving trading stamps. I cannot agree that the passage of such legislation manifests an ambiguity in the acts as originally drawn. On the contrary this action shows that the legislatures in those states in enacting fair trade laws had in mind the abolition of the very practice which the majority opinion sanctions. In order to make certain that the courts would not adopt an interpretation, as does the majority in this case, which defeats the very purpose of the legislation, those states saw fit to add a provision to clarify what some might have thought ambiguous and to insure an interpretation consistent with the ends which the legislature sought to achieve. As said by Mr. Justice Holmes in *United States v. Sischo*, 262 U. S. 165, 169: "There is no canon against making explicit what is implied and adding a little emphasis to the endeavors to make the proposition broad." The Fair Trade Law seeks to prohibit *all* forms of price-cutting. Those legislatures which enacted amendments have precluded the courts of those states from interpreting their statutes in such a manner as to prevent the acts from having their intended effect. Such action should have had strong weight in persuading this court to interpret our act to carry out its desired purpose.

If the Fair Trade Act is construed to permit price rebating through the indirect instrumentality of trading stamps and other similar methods, it is only a question of time until practices of that sort will result in rendering the Act worthless. I would therefore reverse the decree of the court below and enjoin appellee from continuing a practice which in my judgment constitutes a flagrant violation of the Fair Trade Act.

The CHIEF JUSTICE joins in this dissent.

[¶ 55,228] **Kentucky Utilities Company, Appellant, v. Carlisle Ice Company, Appellee.**

Kentucky Court of Appeals. Decided June 16, 1939.

Appeal from Ballard Circuit Court.

The Kentucky Unfair Trade Practices Act exerts no retroactive effect by implication, and a valid contract of sale executed after the passage of the statute but prior to the effective date imposes no liability upon a manufacturer, because of subsequent retail sales below the general resale price, in the absence of an agency relation between defendant manufacturer and the retailer.

Gordon, Laurent, Ogden, & Galphin, of Louisville, Kentucky; M. C. Anderson, Wickliffe, Kentucky; Attorneys for Appellant.

Joe E. Warren and F. B. Martin, of Mayfield, Kentucky; Attorneys for Appellee.

[*Operations of Appellant*]

Appellant, among other activities engaged in the manufacture and sale of ice, operating one of its plants in Clinton, Hickman County. It sells its products to wholesale dealers and peddlers, who in

turn sell at retail in the town, neighboring towns and adjacent territory. Appellee operated a plant in Bardwell, Carlisle County, and since 1927 had been selling its output in Bardwell; Wickliffe, in Ballard County, and neighboring towns where it had established a trade.

[*Prices of Commodity*]

It appears from the record that the usual customary neighborhood price for ice, at wholesale, delivered at the plant was $4.00 per ton. In lesser quantities, 40¢ per cwt. when delivered. One Cosby was selling ice in Bardwell and vicinity prior to and in 1935 and 1936. He was a retailer and peddler. In 1933 the mayor of the town complained that the price of ice was too high. Cosby was paying as he says, sixty and seventy cents per cwt. Some arrangement was made whereby Cosby was enabled to sell at forty and fifty cents per cwt.

[*Contract with Distributor*]

Appellee was a competitor, selling in Bardwell and vicinity; in some neighboring villages in the same and adjoining counties. Cosby prior to 1936, did not buy ice from either appellant or appellee. The mayor loaned him an old hearse, which he rigged up as a truck, and he hauled his wares from a Paducah plant. In March 1936 Cosby entered into a written contract with appellant whereby it was to sell him ice during the year 1936, at the plant for the sum of $2.50 per ton. The only conditions in the contract were that he should sell in certain territory, and was to purchase in sufficient quantities to supply his customers.

[*Price Cutting*]

In the latter part of 1935, and the early part of 1936, Cosby sold his ice at 40¢ per cwt, which appears to have been the price maintained by appellee. Early in the 1936 season Cosby learned that Hayden, who was dealing in appellee's product, had reduced his price to 30¢ per cwt. Cosby approached Hayden, who told him he was selling "third grade" ice at 20¢. Cosby then reduced his price to 30¢ per cwt, and this price was maintained until the contract with appellant expired in December 1936.

[*Proceedings in Court Below*]

As a result appellee claims that he lost many of his former customers in the territory theretofore served by it and Cosby; that in 1936 he suffered a loss in profits, all due to the activities of Cosby and the appellant. In July 1936, before the season closed, appellee filed his petition (later transferred to the equity docket) in which he plead substantially the facts above set out, and others. The petition in form and substance was sufficient to entitle him to the relief sought, damages in treble of $3,000.00, the amount of alleged actual monetary loss, and an injunction against appellant. It was alleged that the acts of appellant were performed for the purpose of driving appellee out of business.

[*Contentions of Appellee*]

Appellee denied the allegations of the petition and asserted that its sale to Cosby was in good faith, and in order to meet competition from another point; that it was in no wise responsible for Cosby's retail sales. It plead that its sale to Cosby in March, 1936, was by written contract entered into prior to the effective date of Chapter 190, Acts of the General Assembly, regular 1936 session. (Now sections 4748i-1 *et seq.* 1936 Ky. Stats.). That the law was enacted in February 1936, and did not become operative until May 16, 1936, and it is plead and argued, that to apply the provisions of the Act to this sale would be in violation of both federal and state constitutions, which prohibit the passing of any law interfering with the freedom of contracts. An amended answer was filed, but it in no sense made affirmative defensive plea.

[*Holding of Court Below*]

A reply denied the affirmative allegations of the answer and plead that if the court should hold that the arrangement between appellant and Cosby constituted him an independent dealer, then such sales at $2.50 per ton was below production cost during the year 1936, and likewise below the price at which appellant sold ice to other independent dealers; that these acts in violation of law, contributed to bring about his injuries. The issues were completed by appellant's rejoinder. Proof was taken and upon submission the court adjudged substantially as follows:

[*Constitutionality of Unfair Practices Act*]

That the Act of 1936, Chapter 129-a, Kentucky Statutes, is a valid legislative enactment, and not violative of any provision of the state or federal constitution. The court found that previous to, and at the time of the passage of the Act, appellee was engaged in distributing ice in Bardwell, Wickliffe and adjacent territory, and that defendant was not then so engaged; the established and customary prices for ice were 50¢ per cwt., delivered, and 40¢ per cwt. at platform.

Appellant was engaged in the manufacture and sale of ice at Clinton, where the established prices were $4.00 per ton to

dealers and peddlers at platform and 50¢ delivered at retail. The court then says:

"It is therefore found and adjudged that by 'selling ice' during the season of 1936 'to H. E. Cosby at $2.50 per ton, to be sold and delivered in the towns * * * and permitting the resale by Cosby at prices below those therefore established,' appellant has violated the provisions of said Act, and that as a direct and proximate result of such violation the plaintiff has sustained actual damages amounting to $688.00, and is entitled to recover of defendant under the provisions of said act the sum of $2064.00"

which was adjudged.

The court also,

"Perpetually enjoined appellant from selling or delivering, or permitting to be sold or delivered in (the towns named) ice manufactured or sold by it at a price below the reasonable cost of production and a legitimate profit at the dealers place of business, and that delivered to customers by retail—and is further enjoined from unfair and discriminatory practices by which fair and honest competition is destroyed or prevented."

[*Nature of Appeals*]

From the judgment defendant has appealed and appellee is cross-appealing on the ground of inadequacy of damages and because the injunction is not sufficiently restrictive.

[*Provisions of Act*]

Turning now to the Act, we find that it prohibits the sale or furnishing of any commodity at a lower rate in the same, or in one territory than in another. In a separate section the sale or distribution of commodities at less than cost of production or replacement is prohibited. As indicated by the chancellor, a violation of the terms of the Act visits upon the offender treble the amount of actual damage suffered. Injunctive relief is also provided. The Act provides also that the offender, in addition to the damages in treble, and an order restraining, may upon conviction be fined or imprisoned, or both. Upon a third conviction of violating any of the denounced Acts, offender may, under *quo warranto* proceedings by the Attorney General, be barred from engaging in business forever, or for a lesser period, in the discretion of the court. The Act is not *"sans* teeth."

[*Nature of Intent*]

There is one provision of the Act to which the court did not advert in his opinion or judgment. The statute clearly makes the offender responsible in damages, and subject to injunction only if the acts denounced be committed "with the intent to destroy competition of any regular dealer in such commodity." The court did not find, or if he did it was not so stated, that appellant's acts were committed for the purpose above mentioned. The intent, as we read the statute, must exist in a case of cutting prices, as well as in selling below cost of production.

Another provision is to the effect that "this act shall not be construed to prohibit the meeting in good faith of a competitive rate." When the chancellor apparently enjoined appellant from selling in the territory named" at a price below the reasonable cost of production and a legitimate profit at the dealer's place of business," he did not express the opinion that appellant (or Cosby) had sold ice at less than production cost, plus reasonable profit, or if so it was for the ulterior purpose of destroying competition.

[*Limitations upon Injunctive Relief*]

The writ of injunction is recognized by all courts as being one of extraordinary remedy. It cannot, nor should it be employed except in cases of urgent necessity, and the right to the relief and the necessity must be clearly shown before relief under such writ is granted.

[*Construction of Similar Statutes*]

The Act in question is apparently copied word for word from a California Act. The validity of the California law has been before both the Superior and Supreme Courts of that State. *Balzer v. Caler,* 82 Pac. 2; *Wholesale Tobacco Dealers v. National C. & T. Company,* 82 Pac. 19; (both Superior Court decisions) the latter case was before the Supreme Court, the opinion reported in 118 A. L. R. 486. In these cases it was made manifest that the gist of the injurious acts was the intent to break down or destroy competition. In the *Balzer* case the court, after pointing out that the injunction was sought on several alleged grounds, said:

"Demurrers to each count were overruled. The defendant answered admitting the offers and sales at less than his invoice or replacement cost, but he denied that these acts were performed with the intent to injure competitors or destroying competition, alleging, in this connection, that he offered for sale and sold the goods for less than cost for the sole purposes of meeting the competition of other merchants and of advertising and stimulating his own business.

"Upon a trial of the cause, upon admittedly competent evidence, the trial court found that although defendant admittedly sold certain articles below cost there acts were not performed for the purposes of injuring competitors and destroying competition.

"This last mentioned finding, based as it is upon substantial competent evidence makes it unnecessary to pass upon the constitutionality of the Unfair-Practices Act as applied to the facts of this case.

"It was held in the *Wholesale Tobacco Dealers Bureau v. National Candy and Tobacco Company* Case, *supra,* that under section 3 of the act sales below cost are only prohibited when engaged in with the intent to injure competitors and to lessen competition. Under this ruling, obviously, the first and third causes of action fail to state a cause of action."

A case involving a similar act was before the Tennessee Supreme Court recently, *Rust v. Griggs,* 113 S. W. 733. The exact question was not discussed in that case, because the Act provided that sales made in a manner and under certain circumstances prohibited should be *prima facie* evidence of the fact that a sale had been made in violation of provision of the Act. The Act here in question does not contain the "presumption of guilt" clause, hence the court could not presume that the acts alleged to have been done, were so done for destructive purposes. Even had the Act contained such provision, it is under our rules of procedure only such presumptive proof as may be rebutted by competent evidence.

[*Evidence of Intent*]

Intent is easily asserted, but is difficult to prove or disprove, but the burden here was not cast on appellant to disprove. It is true that from all the facts the court, or jury, has a right to indulge the belief that proven facts created a presumption of intent. However, in this case, as we read the evidence; the appellant made it clear that such of its acts as were charged to be reprehensible, were not done for destructive purposes but in good faith to meet actual or anticipated competition. The fact that when Cosby's contract ended appellant refused to renew it or to sell him ice at less than $4.00 per ton, was evidence of its good faith and intention not to violate a statute. Compare the *Tobacco Company* case, 92 P. 3 (7) where it was admitted that sales were made in violation of the Act for the purpose of driving out competition.

[*Statutory Provision*]

Section 4748h-5, Kentucky Statutes, 1936, lends weight to our view of the meaning of the Act. It provides that

"in any injunction proceeding or in the prosecution of any person, officer, director or agent, it shall be sufficient to allege and prove intent of the person, firm or corporation for whom or which he acts."

In other words, if the injunction is sought against an agent or officer, in order to enjoin or convict such agent or officer, it is sufficient to prove the intent of the principal.

[*Intent of Principle Emphasized*]

Thus it will be seen that intent of the principal is the essential element. Without discussion at length, whether or not this is sound in law, we say that it is not involved here, since appellee did not proceed against Cosby, alleged agent of appellee. because as is explained, Cosby was not in a position to respond in damages. This fact, if true, would not prevent injunction. We note that an exact counterpart of this provision of our statute was condemned in the case of *Great Atlantic and Pacific v. Ervin,* 23 F. Supp. 70.

Appellee insists that the contract with Cosby was but a subterfuge to defeat the intent and purpose of the law. This is an inference only, and was rebutted by competent testimony. Strangely the court found that the "sale" of ice to Cosby at the reduced rate was a violation of the act. Also that the "permitting" of Cosby to cut prices in his territory was another violation. Thus we find the court condemning a "sale" and at the same time condemning Cosby's acts because permitted by appellant.

[*No Agency Relation*]

As we view the contract we are compelled to conclude that it was an outright contract of sale, and not one creating an agency. In this state of case the evil in Cosby's acts cannot be attributed to appellant on the grounds of an aider or abettor. It is true that the sale to Cosby was made in March 1936, after the Act was passed in February of the same year, but was made prior to the effective date of the Act, May 16, 1936.

[*Absence of Intent*]

The contract, unless it be subject to the criticism suggested by appellee, is, as we observe it, a legal one. Such proof as was introduced on the subject shows that there was no intention to avoid or circumvent the provisions of the Act. It shows that the agent making the contract did not know of the passage of the Act.

[*Evidence as to Low-Price Sales*]

It is admitted by appellant that it sold ice to Cosby during the 1936 season at $2.50 per ton at its plant. Cosby admits that he sold at 30¢ per cwt. in his (and appellee's) territory. Cosby did this to meet a cut in price by appellee. This is not denied; Hayden its dealer, was not introduced. As to the sale by appellant to Cosby at a price admitted to be lower than that charged other dealers and peddlers, but not at less than cost of producing, as

the proof shows, a fair and reasonable explanation is given by appellant and corroborated by others.

After the Mayor of Bardwell had warned Cosby that ice should be sold cheaper, the arrangement hereinbefore mentioned was made. Early in 1936 a plant at Paducah had installed machinery which permitted it to increase its daily output. It was looking for an outlet and made it known to Cosby that it would sell him ice at $2.50 per ton at the plant. Harbesty, the distributor for appellant, heard of this proposal and approached Cosby to sell him ice. He first made him a proposition to sell at $4.00 per ton on a downward sliding scale. Cosby was attracted by the Paducah proposal and held out until Harbesty agreed to sell on the $2.50 per ton contract. This proof is borne out by several witnesses, and there is no convincing proof to the contrary. We need not again refer to Cosby's sales by retail, since we have concluded that appellant was not responsible for his acts.

[*Act Not Retroactive*]

The case may be, and is determined on the principle of law as applied to the facts in respect of the sale to Cosby in the manner detailed. If the contract was otherwise valid and it was, then the appellant had the right to make it at the time it was made, and the provisions of the Act, which were to and did take effect prospectively and not retroactively, could not reach and condemn this sale.

[*Constitutional Safeguards*]

As we have pointed out, the statute in question is a severe and harsh one. The universal rule is that such statutes should not be given retroactive effect, unless the intent that it shall so operate is made plain by the statute itself. No statute carrying penalties and prescribing severe rules for the conduct of the citizen, is ever extended by implication. The statute under consideration is not a remedial or curative one, but one passed under the police power of the commonwealth to meet what the legislature no doubt thought was a practice inimical to the general welfare of the public. Neither necessity for its passage, nor its passage, sweep aside the provisions of the state and federal constitutions, which protect the right of citizens to legitimately contract.

"Any law which changes the intention and legal effect of the original parties, giving to one greater or the other the less benefit in the contract, impairs its obligations. The extent of the change is immaterial. Any deviation from its terms * * * imposing conditions not included in the contract, or dispensing with the performance of those that are included, however small and unimportant they may appear to be in their effect impairs the obligation of the contract. The legislature may regulate the remedy and methods of procedure under a past as well as a future contract, but it cannot impose new restrictions upon the enforcement of a past contract so as to lessen its value and benefit to either party. *O'Connor v. Hartford Accident and Indemnity Company,* 97 Conn. 9, 115 A. 115.

"A legislative act will not be permitted, even if an attempt to do so is disclosed, to operate retroactively where it will have the effect to invalidate or impair the obligation of contracts or interfere with vested rights." *Travelers' Insurance Company v. Ohler,* 227 N. W. 449; Cooley Const. Lim. 8th Ed. 771; R. C. L. Vol. 6, p. 362; *Dunlap v. Littell,* 200 Ky. 595, 255 S. W. 280.

[*Proof of Damage*]

We need not discuss other points urged, but we are much impressed with the contention of appellant that appellee failed in proof to show sufficiently that it had suffered any actual damage or loss in 1936. The proof offered was of a very unsatisfactory nature.

[*Validity of Act Not Determined*]

In reaching our conclusion we have not brought under consideration the pleaded challenge of appellant to the Act as a whole. Its efforts toward endeavoring to show unconstitutionality were chiefly, if not wholly, directed toward showing that the Act, if applied to the sale by appellant, was contrary to the provisions of the Constitutions pointed out. We agree with its contention, and this conclusion obviates the necessity of looking to the validity of the Act in its entirety, a matter upon which we express no opinion.

[*Conclusion*]

For the reason stated, *supra,* the judgment is affirmed on the cross-appeal and reversed on the appeal, with directions to set aside the same and enter one dismissing appellee's petition.

[¶ 55,229] Benjamin D. Ritholz, Morris I. Ritholz, Samuel J. Ritholz, et al., Appellants, v. Charles H. March, Garland S. Ferguson, Jr., Edwin L. Davis, et al., Appellees.

United States Court of Appeals for the District of Columbia. Decided June 26, 1939.

Appeal from the United States District Court for the District of Columbia.

Sec. 5 of the Federal Trade Commission Act is not impliedly repealed by the 1938 amendment of the statute where substantial and efficient remedies are afforded under the Act as amended, and no change in the powers of the Commission to carry on its administrative functions is effected by the amendment, which is declaredly applicable to pending enforcement proceedings.

Affirming the decision of the United States District Court for the District of Columbia, denying injunctive restraint against proceedings under FTC Complaint No. 3143.

August H. Moran and Sylvia D. Kessler, both of Washington, D. C., for appellants.

Martin A. Morrison and P. B. Morehouse, both of Washington, D. C., for appellees.

Before GRONER, C. J., and MILLER and RUTLEDGE, JJ.

[*Statement of the Case*]

GRONER, C. J.: Appellants are citizens of the United States and residents of the State of Illinois, and, as co-partners under the trade names of Dr. Ritholz Optical Company and National Optical Stores Company, are engaged in offering for sale and selling optical goods in several states. In the latter part of 1937 the Federal Trade Commission issued a complaint, charging appellants with unfair methods of competition in commerce in violation of Sec. 5 of the Federal Trade Commission Act.[1] Appellants appeared and answered, denying the charge. The cause was docketed as Commission No. 3143 and referred to an examiner, but prior to the conclusion of the hearings appellants brought suit in the District Court for an injunction to restrain the Commission from further prosecuting the complaint and from holding any hearing and taking any further testimony or evidence in relation thereto. The bill alleges that, since the issuance of the complaint, the Act of September 26, 1914, known as the "Federal Trade Commission Act", and particularly Sec. 5 thereof, has been amended by an act of Congress approved March 21, 1938[2]; that the amendment substitutes for Sec. 5 of the original act an entirely new section, which creates "new rights, obligations, liabilities, powers, penalties, and other changes of a substantive nature"; that the amendment is repugnant to, is in irreconcilable conflict with, and supersedes and repeals former Sec. 5 of the Act, as the result of which the Commission is proceeding under a void statute. The Commission appeared and moved to dismiss the bill on sundry grounds. The District Court sustained the motion to dismiss and found as a conclusion of law that Sec. 5 of the 1914 Act had not been repealed by Sec. 5 of the 1938 Act and also that the court was without jurisdiction since there was an adequate remedy at law by appeal from the decision of the Commission.

[*Amendment of Act*]

Passing by for the moment the objection to the lower court's jurisdiction to grant equitable relief, we come to the principal question raised by the bill: Did the amendment of Sec. 5 of the Federal Trade Commission Act of 1914 repeal former Sec. 5 so as to terminate the Commission's authority to proceed against persons for unfair competition occurring before the date of amendment? The original Sec. 5 was enacted to prevent unfair methods of competition in interstate commerce, and the Commission was authorized to institute proceedings to prevent such acts whenever the public interest demanded. After due notice and hearing, if the unfair method of competition was found to exist, the Commission was authorized to issue a cease and desist order; and, if the person against whom it was issued neglected to obey the order, the Commission might apply to a Court of Appeals to enforce it or on the other hand, if the person required to cease and desist thought himself aggrieved, he might obtain a review of such order in a like court. In 1938 Congress amended Sec. 5 by adding as "unlawful" unfair or deceptive acts or practices in commerce, and by changing the procedure after entry of the order, by a provision making it final within sixty days unless the person aggrieved applies to a court for judicial review, in which case the order of the court becomes final. In other words, whereas under the original

[1] Act of Sept. 26, 1914, 38 Stat. 717, as amended; 15 U. S. C. A. 41, *et seq.*; 4 F. C. A. Tit. 15, secs. 41 *et seq.*

[2] 52 Stat. 111.

section the initiative for making the order effective in the event of recalcitrancy was placed on the Commission, under the amendment the order becomes effective within sixty days unless petition for judicial review is filed by the respondent within that time. And by Sec. 5(a) of the amending Act, if the cease and desist order was served prior to the amendment, the sixty-day period begins to run as of the date of the enactment. The only other change of any moment is in authorizing a civil action in the name of the United States for the recovery of a civil penalty for disobedience of the final order. Except in the latter respect, the changes are wholly procedural, but in substituting a penalty for violation of an order in place of a contempt proceeding, appellants say that the amendment is illegal as to previous offenses, and in that view the presumption should be indulged that Congress intended a complete repeal.

[*No Implied Repeal*]

But we think this is not the case. The amending act contains no words of repeal, and if Sec. 5 of the original act was repealed it was by implication only. In *Posadas v. National City Bank*, 296 U. S. 497, 503, the Supreme Court said that there are two categories of repeals by implication—one, where provisions in the two acts are in irreconcilable conflict, and the other, where the later act covers the whole subject of the earlier one and is clearly intended as a substitute. In that case the National City Bank of New York in 1930 had established branches at Manila and Cebu in the Philippine Islands under the provisions of Sec. 25 of the Federal Reserve Act of December 23, 1913. In 1931 the Philippine Government levied a tax on branch banks not permitted by R. S. 5219. The bank paid and sued to recover, and the Philippine defense was that legislation subsequent to the passage of the Federal Reserve Act destroyed the immunity claimed by the bank under the statute. The new legislation amended Sec. 25 but retained the power of national banks to establish branches in United States dependencies. There, as here, it was claimed that the effect of the amendment was to repeal the prior provisions of the act. But the court held that such parts of the original Sec. 25 as were copied into the amended act were not thereby repealed and immediately re-enacted, but continued, uninterruptedly, to be the law after the amendment precisely as they were before. The decision is particularly apposite in its statement and reiteration of the rule that whether a statute is repealed by a later one, on the ground of repugnancy or substitution, is a question of legislative intent and that, where powers or directions under several acts are such as may well exist together, an implication of repeal cannot be allowed. The intent of the legislature to repeal must be clear and manifest. In the still more recent case of *United States v. Powers, et al.*, — U. S. — (decided May 15, 1939), a similar question arose as the result of an act extending the life of the Connally Hot Oil Act.[3] That act by its terms expired June 16, 1937, but on June 14, 1937, Congress amended this section of the act by striking out "June 16, 1937" and inserting "June 30, 1939", and the question was whether violations of the act committed prior to June 16, 1937, might be prosecuted under an indictment returned subsequent thereto. The court held that the act had never ceased to be in effect and that the amendment, unless it was apparent that Congress intended it should have this effect, should not be held to condone offenses committed prior to its passage.

[*Repeal Not Presumed*]

The original Federal Trade Commission Act consisted of eleven sections. The act of 1938 amends Sec. 4 by the addition of certain "definitions", and Sec. 5 in the respects already mentioned, and adds several new sections not material here. It leaves unchanged the Commission's authority to prevent unfair methods of competition. Only the procedure after the issuance of an order by the Commission is changed. Under the original procedure the initiative in requiring obedience to the order was placed on the Commission. Under the amendment the order is final within sixty days unless the respondent shall apply to a court for a judicial review; and, if it be conceded that the change is to place a greater burden on appellant and others in like situation, the answer is that no one has a vested right in any given mode of procedure. *Railroad Co. v. Grant*, 98 U. S. 398, 401; *Gwin v. United States*, 184 U. S. 669, 674; *Crane v. Hahlo*, 258 U. S. 142, 147. So long as a substantial and efficient remedy remains or is provided, due process of law is not denied by a legislative change, and in this view it cannot be successfully contended that the change created by the amendment can be said to indicate or evince an intention of Congress by the amendment to repeal the original act.

'There is a presumption against a construction which would render a statute ineffective or inefficient or which would cause grave public injury or even inconvenience.' We are unwilling to conclude that although the same acts continue to be prohibited after June 16, 1937, as

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[3] 15 U. S. C. A. 715, *et seq.*, 4 F. C. A. Tit. 15, sec. 715, *et seq.*

before, violations committed prior to that time will not be punishable thereafter. *United States v. Powers, et al., supra.*

[*Cases Distinguished*]

We have examined the cases upon which counsel rely: *King v. Cornell,* 106 U. S. 395; *United States v. Tynen,* 11 Wall. 88; *Chase v. United States,* 256 U. S. 1; *Hassett v. Welch, et al.,* 303 U. S. 303. But we think they are distinguishable. In each of the first three Congress had enacted a new statute, inconsistent with and covering the entire subject matter of the old. Since as to all of them there was no indication of continuity, a repeal was necessarily implied. In the *Hassett* case the question was whether an amendment covering new matter had any retrospective application.

[*Application of Amendments*]

In the case we have here, the act of Congress which constituted the Federal Trade Commission and defined its duties was changed by the amendment so as to enlarge the Commission's field of operations and to revamp the procedure for enforcement of its orders. Both before and after the amendment the Commission had precisely the same power to issue complaints, to make findings, and to render a decision, and that is what appellants now ask us to restrain. The Commission is not seeking to penalize appellants for prior acts but, as we have seen, is carrying on an administrative proceeding which at most can result in an order prospective in effect. The prior acts afford merely the occasion for the institution of the proceedings. If we need any indication that it was the intent of Congress that the new method of enforcement is to apply to pending complaints, we have it in Sec. 5(a) of the amending act—that as to orders already issued the new sixty-day period for review is to date from the enactment.

[*Conclusion*]

In view of what we have already said, we find it unnecessary to consider the further question whether the bill should be dismissed because plaintiff has not exhausted the administrative provisions of the Act. On the ground stated we are of opinion the dismissal of the bill was correct and should be affirmed.

Affirmed.

[¶ 55,230] Shaw's, Inc., v. Wilson-Jones Company.

United States Circuit Court of Appeals, Third Circuit. Filed June 28, 1939.

Appeal from United States District Court, Eastern District of Pennsylvania.

Refusal of price quotations to a dealer by the manufacturer does not constitute price discrimination within the meaning of the Robinson-Patman Act amendment to the Clayton Act where the dealer is only a prospective purchaser rather than an actual vendee as contemplated by the statute; nor is the refusal an unfair practice within the purview of the Act by prior or possible future purchasers, neither of which presently brings goods into the flow of interstate commerce.

Orr, Hall & Williams, Philadelphia, for appellant.

Philip L. Leidy and John Sailer, Philadelphia, for appellee.

Affirming (USDC, Pa.; 1939) 26 F. Supp. 713.

Before BIGGS, MARIS and CLARK, Circuit Judges.

[*Statement of Case*]

BIGGS, Circuit Judge. Shaw's, Inc., the appellant, a Pennsylvania corporation, filed suit in the court below against Wilson-Jones Company, the appellee, a Massachusetts corporation, and sought treble damages pursuant to the provisions of Section 4 of the Clayton Act, 38 Stat. 731 (15 U. S. C. A. 5). In its complaint the appellant alleges that the appellee unlawfully discriminated in price against the appellant in violation of the provisions of Section 2 (a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526 (15 U. S. C. A. 13 (a)).

[*Appeal from Denial of Dismissal*]

The appellee filed a motion to dismiss the complaint alleging that it fails to state a cause of action. The court below entered its decree dismissing the complaint. The appeal at bar is from this decree.

[*Price Quotations Refused*]

It appears from the complaint that the appellant sells supplies required for election purposes and that the appellee manufactures such supplies and sells them to dealers only, the dealers reselling them to ultimate purchasers; that the appellant had purchased such supplies from the appellee

for three years prior to happening of the events complained of; that the appellant stated to the appellee its intentions to bid upon a contract to supply the Registration Commission of Philadelphia with certain materials required by the Commission; that the appellee repeatedly promised to give it information concerning prices of the materials required. The complaint goes on to allege that the appellant repeatedly asked the appellee to quote such prices to the appellant; that despite the appellee's promises to quote such prices, five days prior to the day upon which bids were due to the Registration Commission the appellee notified the appellant that it would not quote the appellant prices and refused all information in such respect. The complaint then alleges that the appellee quoted a price to Dunlap Company, a competitor of the appellant's, and to this company only.

[*Alleged Discrimination*]

Specifically, paragraph 17 of the complaint alleges that

"* * * the defendant discriminated in price by refusing to give the same to the plaintiff and instead gave the price thereof to the plaintiff's competitor, Dunlap Company * * * exclusively. The discrimination by the defendant was pursuant to a previously arranged plan for the purpose of preventing, injuring and destroying competition between Dunlap Company and the plaintiff or anyone else in bidding for this equipment to be supplied to the Registration Commission of Philadelphia * * *."

[*Alleged Destruction of Competition*]

The eighteenth paragraph of the complaint alleges that,

"As a result of the discrimination, plaintiff could not and did not make a bid, and the only bidder was the Dunlap Company above mentioned. This discrimination prevented, injured and destroyed competition between plaintiff and Dunlap Company. The discrimination enabled Dunlap Company to be the only and successful bidder at prices considerably more than had been charged corresponding public bodies of this territory, including the counties of Allegheny and Montgomery at or about the same time, for similar comparable equipment."

Paragraph 20 of the complaint alleges that the result of the discrimination practiced by the appellee

"* * * was to substantially lessen competition and to tend to create a monopoly in the articles of commerce in question * * *."

Paragraph 22 of the complaint alleges that

"Had the price been given plaintiff which was given to Dunlap Company by the defendant, and had the plaintiff been awarded the entire contract by the Registration Commission, plaintiff would have bought said material from the defendant by suitable contract of sale, which would have been entered into between the parties, but said price not having been given by defendant to plaintiff, plaintiff could not bid on the commodities nor buy nor receive them in interstate commerce from defendant, and was discriminated against in that plaintiff lost its chance to do so in response to the advertisement of the said Commission."

Paragraph 23 alleged that there was a substantial lessening of competition and ". . . a tendency to create a monopoly" as a result of the appellant's conduct "both generally and with respect to this plaintiff", thereby destroying and preventing competition between the appellant and its competitor, the Dunlap Company, and that this conduct of the appellee created a monopoly.

[*Treble Damages Sought*]

The complaint states that by reason of the foregoing, the appellant was prevented from making a profit and is entitled to damages treble the amount thereof.

As to the Law

The portions of Section 2 (a) of the Clayton Act, as amended, (15 U. S. C. A. 13 (a)) immediately pertinent to the issues presented, provide that,

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities of like grade and quality, * * * *where either or any of the purchases involved in such discrimination are in commerce,* where such commodities are sold for use, consumption, or resale within the United States * * * where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce, *or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them* * * * : provided * * * That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in *bona fide* transactions and not in restraint of trade * * *."

We have italicized those parts of the language quoted which were embodied in Section 2 (a) by the Robinson-Patman Act of June 19, 1936, 49 Stat. 1526.

[*Effect of Amendment*]

Five other subsections were added by the amendment referred to. One of these, subsection (2), provides that

"It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

[*No Discrimination against Prospective Purchaser*]

We are concerned with only one question. Has the appellant stated a cause of action against the appellee? The appellant contends that the appellee has discriminated "in price" between different purchasers because the appellant refused to quote prices. The phrase "to discriminate in price," employed in Section 2 (a) considered by itself and entirely out of its context, might be deemed to include a refusal to offer a price to a customer upon goods which the latter desired to offer for resale. Such a conclusion is insupportable, however, after consideration of other language of the section. The discrimination in price referred to must be practiced "between different purchasers." Therefore at least two purchases must have taken place. The term purchaser means simply one who purchases, a buyer, a vendee. It does not mean one who seeks to purchase, a person who goes into the market-place for the purpose of purchasing. In other words, it does not mean a prospective purchaser, or one who wishes to purchase, as the appellant contends.

[*Past Purchasing Relations Immaterial*]

The appellant in its brief lays emphasis upon the fact that the appellee had sold supplies to it in the past and had promised to quote prices so that the appellant might bid upon Registration Commission contract. In short, the appellant contends that it was a customer of the appellee's and therefore a purchaser. Section (2) of the Act was designed, however, to prevent interference with the current of commerce. For the provisions of the Section to be operative, goods or commodities must be in the flow of commerce, or services must have been rendered or have been contracted to be rendered in connection with goods or commodities so placed. We may surmise that if the goods or commodities are not wholly within that flow, they at least must be touched by it, affected by it, so to speak. This we think to be the limitation imposed by Congress. Past purchases or conversations in respect to possible future purchases are insufficient.

The words employed in the section confirm this ruling. As we have stated, subsection (a) uses the term "purchaser." It speaks also of "commodities . . . sold for use . . . or resale," and of "sale" of commodities. The term "customers" is used but once and then only in the excepting proviso of the subsection which serves to prescribe a limitation upon the application of the Act. Again subsection (b) of Section (2) sets forth a rule of proof when it shall have been alleged that there has been discrimination in price or services or facilities "furnished." Subsection (c) treats of the payment or acceptance of commissions, brokerage or other compensation rendered in connection "with the sale or purchase of goods." Subsection (d) relates to payment for services or facilities for processing or "sale" in respect to services or facilities "furnished." Subsection (e) relates to furnishing services or facilities for processing or handling, and uses the phrase, commodities "bought" for resale.

[*Cause of Action Not Established*]

In the light of the foregoing we think that it is clear that the appellant has not alleged such facts as would constitute a cause of action under the provisions of Section 2 (a). Since no goods or commodities were offered to the appellant, the terms of the subsection are not met. The Act does not compel a seller of commodities to offer them to all persons who may wish to bid upon a contract to resell them to a third party. The discrimination in price prohibited by the subsection is discrimination in respect to commodities sold to purchasers.

The course of conduct exhibited by the appellee is not to be commended as exhibiting sound commercial practices, but this conduct is not within the prohibition of subsection (a).

Nor has the appellant stated a cause of action under subsection (e) for the reasons which we have heretofore stated.

[*Rejection of Customers Not Considered*]

In view of what we have said we deem it unnecessary to discuss the proviso contained in subsection (a) which the appellee contends gives it the right to reject customers as at common law, or to pass upon the question of damages presented by the pleadings.

[*Conclusion*]

The judgment of the court below is affirmed.

[¶ 55,231] Rambusch Decorating Company, Complainant-Respondent, v. The Brotherhood of Painters, Decorators and Paperhangers of America and Edward Ackerley, Defendants-Appellants.

United States Circuit Court of Appeals, Second Circuit. Filed June 19, 1939.

Appeal from a decree of the District Court of the United States for the Southern District of New York.

Action by the Rambusch Decorating Company against The Brotherhood of Painters, Decorators and Paperhangers of America and another for a declaratory judgment with respect to a certain provision of the defendant Brotherhood's constitution. From a decree for the complainant, defendants appeal. Reversed.

Anti-trust Laws.—A provision of the constitution of a union, which union executed a closed shop contract with an employer, requiring the payment to all employees, local or non-local, of the higher wage, whichever it may be, of either the employer's home or the place of work, does not offend the federal anti-trust laws.

A. E. Robert Friedman, of New York City, for respondent.

Walter R. Hart, of New York City (Daniel A. Dorsey, Louis Timberg, and Rubin Mazel, all of New York City, on the brief) for appellants.

Before SWAN, CHASE, and CLARK, Circuit Judges.

[*Statement of the Case*]

CLARK, Circuit Judge: This controversy involves the meaning and validity of a certain provision of the defendant Brotherhood's constitution, which governs the labor relations of the plaintiff employer with the defendant union, that on a job by a non-local contractor the shorter work day and higher rate of wages of either the contractor's home or the location of the work shall prevail. The complainant sought a declaratory judgment that this provision, if construed to require a contractor who comes from a district where wages higher than those paid locally prevail thus to pay higher wages than do the local contractors, was discriminatory and in violation of the anti-trust laws. The order below adopted the contention of the complainant, held this provision void, as in unlawful restraint of interstate trade, and declared that the complainant was required to pay members of the defendant Brotherhood only the rate of wages prevailing in the locality where the complainant was engaged in the performance of work. From this order the defendants, the Brotherhood and Ackerley, its general vice-president, have appealed.

[*Facts*]

The complainant is engaged in the business of producing murals on canvas and manufacturing decorative leaded art glass in its New York studios and shipping its product to various parts of the United States, where it is finished and hung and installed. The Brotherhood consists of many local unions, district councils, and other subordinate bodies in this country and Canada—all subject to the constiution and by-laws of a national organization which is a corporation organized under the laws of the State of Indiana. The members of the union are engaged in the trade commonly called the decorating, painting, paper hanging, and glazing industry. The issue in this action was originally formed by the defendants' demurrer to the complaint's petition for the declaratory judgment. Hearing on the demurrer was not had, however, since the parties filed an agreed statement of facts, upon the basis of which the District Court rendered its decision. On some of the material issues in this case this agreed statement is not merely unenlightening, but is, indeed, confusing. And the District Court filed no opinion, explaining the grounds for its decision. It is unfortunate that so important a matter must be decided upon so meager a record. Yet this is all we have before us.

[*Union Contract*]

The deficiencies of this statement appear at the outset when we attempt to determine how far the complainant has bound itself to observe the provisions of the defendant Brotherhood's constitution. In its original petition, complainant asserted that it had entered into a trade agreement in writing with this defendant, whereby the latter agreed to furnish it with the men it would require "in the execution of its painting and decorating contracts," and that by the terms of this agreement "the complainant became obliged to employ only members of the Brotherhood." Nevertheless it stated, "Nor does the said contract incorporate by reference or recital the constitution of the Brotherhood." This

petition was superseded by the agreed statement of facts, wherein are contained various assertions which are predicated upon the existence of an agreement between the parties making this constitution applicable. Thus, it is said that for many years prior to the controversy "the complainant has employed members of the Brotherhood exclusively and has complied with all the rules and regulations agreed upon between the complainant and the defendant," and further that it is "complying with its agreement with the Union" by employing that number of local workmen —75 per cent—required by the defendant's constitution. The parties in their briefs and argument have assumed that there is a closed shop contract between them. Unless the complainant has agreed to be bound by the provision of the Brotherhood's constitution in its relations with its workmen, there is no need for it to obtain an adjudication of the meaning of this document. We shall assume, therefore, as the parties so clearly do, that the contract between them is intended to make the provision in question applicable to this controversy.

[*Dispute Involved*]

The particular dispute leading to this action arose because the complainant started work, in June, 1938, on a contract it had for decorating and for painting and installing murals in the Hotel Roanoke in Roanoke, Virginia. Pursuant to its agreement with the Brotherhood, the complainant made arrangements to employ at least 75 per cent of its required men for the Roanoke job from among union men residing in the Roanoke district. But a dispute arose because the prevailing wage for this type of work in Roanoke was 75 cents per hour, while the New York wage was $1.50 per hour. Since the complainant refused to pay the New York wage to local employees, claiming it was bound to pay only the Roanoke wage, defendants called a strike on or about June 28, 1938, and since then "the men have failed and refused to return to their work." This action was begun on July 8, 1938. Jurisdiction was originally asserted on the ground of diversity of citizenship of the parties, but this cannot be sustained, since both the complainant corporation and the individual defendant, Ackerley, are citizens of New York, although the defendant Brotherhood is a citizen of Indiana. The petition for a declaration of illegality of a contract under the anti-trust laws and of unlawful restraint of interstate trade by the defendants does, however, present a federal question adequate to give the District Court jurisdiction. Cf. *Leach v. Ross Heater & Mfg. Co.*, 2 Cir., — F. 2d — (April 24, 1939); *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 461.

[*Effect of Court's Decree*]

While no coercive relief is asked for in this action—other than the general prayer for "such other and further relief as may be just, equitable, and appropriate in the premises"—defendants claim that the order amounts to an injunction against further enforcement of their contract. Complainant is technically accurate in stating that this is not the situation, but it is obvious that the decree does nullify the provision in dispute, as it is intended to do and should do if the theory of law upon which it is based is sound.

[*Provision of Union Constitution Involved*]

The question turns upon Section 133 of the Brotherhood's constitution, which reads as follows: "Neither the General Executive Board nor any other authority shall have power to grant exclusive or special privileges to any local union or district council working under a charter of this Brotherhood; nor shall the G. E. B. or any other authority be invested with power to force any employer to bring men from one city to work in another city, if union men can be procured in such city where the work is to be erected and finished. All conditions of such localities shall be strictly adhered to, the shorter work day and the higher rate of wages of either locality to prevail in all cases. A card fully paid up, regardless of where it is issued, shall entitle the holder to the right to work in any city, provided he conforms to the working rules and conditions of the locality and that no strike or lockout exists in that locality."

Section 132, immediately preceding this section, contains the provision that not less than 75 per cent of the men working for a non-local contractor shall come from the local district, with an exception for "sign painters' work" if it can be completed in 16 man-labor hours. Section 134, the following section, requires a union member going to a non-local job to "demand in all cases the shorter work day and the higher scale," under penalty of fine or withdrawal from the shop of the employer.

[*Provision in Dispute Repeatedly Upheld*]

An element of confusion is presented by the statement in the agreed facts that Section 133 "was enacted by the Brotherhood and became effective on January 1, 1938," whereas adjudicated cases to which

we refer below show that the essence of the agreement here in dispute has been enforced many years before. The particular provision formerly appeared in a section previously numbered 132.[1] Whether the agreed statement may mean only that the constitution was newly reënacted to be effective January 1, 1938, without attempted indication of similarities between it and earlier constitutions, or that this particular provision was suspended or relinquished for a period to be again enacted as stated, we have no way of knowing.

At any rate it is clear that the essential provision here in dispute, that the non-local contractor must pay "the higher rate of wages of either locality," his home or the place of the job, has been held lawful in reasoned opinions by able courts; no appellant court has held to the contrary. *Barker Painting Co. v. Brotherhood of Painters, etc.*, 3 Cir., 15 F. 2d 16, certiorari denied 273 U. S. 748; *Barker Painting Co. v. Local No. 734, Brotherhood of Painters, etc.*, 3 Cir., 34 F. 2d 3, affirming D. C. N. J., 12 F. 2d 945; *Barker Painting Co. v. Brotherhood of Painters, etc.*, App. D. C., 23 F. 2d 743, certiorari denied 276 U. S. 631; *New Jersey Painting Co. v. Local No. 26, Brotherhood of Painters, Decorators, and Paper Hangers of America*, 96 N. J. Eq. 632, 126 A. 399, 47 A. L. R. 384, reversing 95 N. J. Eq. 108, 122 A. 622. The case in 23 F. 2d 743 reversed a decision of the Supreme Court of the District of Columbia. The court in 15 F. 2d 16 (BUFFINGTON, J., dissenting) repudiated the unreported decision in the Supreme Court of the District of Columbia, and another in the District Court for the District of New Jersey, as well as *J. I. Hass, Inc., v. Local Union No. 17 of Brotherhood of Painters, etc.*, D. C. Conn., 300 F. 894 (THOMAS, J.). It stated that unreported decisions in Pennsylvania and Rhode Island were in accord with its holding. All matters of construction, as well as legality here involved appear to have been fully considered in the cases cited. We think these precedents are sound and should be followed.

[*Issue of Construction*]

Complainant contends, however, that the provision should be construed as applicable only to the non-local workers, or that if it is not to be so construed, it must then be held to be discriminatory and void. We shall consider both these points, having in mind, however, that we cannot interfere with the contract the parties have made unless it is one which is in definite violation of law, and that we ought not to do indirectly by contract construction what we are thus prevented from doing directly.

On the issue of construction we see no justification for reading into the clear wording of Section 133, including the admonition that the shorter work day and the higher rate of wages of either locality are "to prevail in all cases," a limitation which in substance will add the words "where men are brought from one city to work in another city" to this provision. Nothing in either the prior or subsequent sentences of the section requires or justifies such an addition. Indeed, the remainder of the section points to a contrary view. The clause just prior to the one in issue deals specifically with local laborers (that no one has the authority to force the employer to bring in outside labor "if union men can be procured in such city where the work is to be erected and finished"); while the earlier clause of that same sentence has prohibited "exclusive or special privileges" to a local union. Clearly both local and non-local laborers are in contemplation.[2] The addition changes the sense completely and is an arbitrary rewriting of the provision not suggested or apparently thought of in any of the earlier cases. It is as destructive of the apparent purpose of the contract as an outright determination of invalidity.

[1] Sec. 132 of the Brotherhood's constitution, as appears from the records in the cases before the Circuit Court of Appeals for the Third Circuit discussed below (34 F. 2d 3 and 15 F. 2d 16), is identical with sec. 133 in the present case, except that for the words "the shorter work day and the higher rate of wages of either locality to prevail in all cases," appear the words "the shorter work day and the higher scale of either locality to prevail in all cases." This provision has been in force since before 1913, 23 F. 2d 743, 745; cf. 12 F. 2d 945, 947, showing it was in force in 1922. This section contains, also, a provision that on work outside the home town there shall be employed not less than 50 per cent of the local men on the job, a provision now changed to the 75 per cent requirement of the present sec. 132. (This provision was relinquished in the case in 34 F. 2d 3.) Sec. 133 in the earlier cases is similar to the present sec. 134, except that no specific penalties are stated as to a member who violates it.

[2] Complainant tries to draw some support from the fact that in sec. 134 no penalties are asserted against a local member who fails to demand a higher than local rate when working with non-local men. But if the purpose of the disputed provision is, as suggested below, to prevent internal union disputes by discrimination between workers on the same job, we can surmise that forcing men to demand more pay than their co-workers on other jobs would likewise have germs of intramural conflict. Under the circumstances, we do not believe the clear expression of the employer's obligation can be controlled by these attempts to prevent strife within the union by stating the rights and duties of the men themselves.

[*Requirement Securing Higher Wages*]

Taking the construction heretofore had of this provision, we can see that in ultimate essence it is a requirement securing higher wages when the stated conditions exist. Any contract designed to secure higher wages may restrain trade in one sense if it is effective, for it will hamper the weak employer who cannot afford the increase. In another sense, however, it may promote commerce by making for better and more peaceful labor relations. A contract with such a purpose is hardly to be held illegal of itself, or else all union organization goes. Cf. *National Association of Window Glass Manufacturers et al. v. U. S.*, 263 U. S. 403; the *Barker* cases in 15 F. 2d 16 and 23 F. 2d 743, *supra;* and the Clayton Act, 15 U. S. C. A. § 17, as cited in the last case above. Of course, the real point here relied on is the supposed discrimination between non-resident and resident contractors. Discrimination of this general kind is one of the most natural things in the word, applied by states and cities in civil service appointments; by courts in cost bonds and other burdens against non-residents; by merchants, customers, laborers, and servants in trusting and favoring the local man with whom they have long dealt and expect to deal in the future. Such discrimination, if made along state lines, might violate constitutional restrictions; but as pointed out in 12 F. 2d 945, *supra,* that is not the case here, for the provision applies only to cities and towns, though uniformly and without discrimination among them.

The agreed statement does not set forth the reasons why this particular requirement was adopted by the union. Such reasons, however, are suggested in 15 F. 2d 16 and a note in 47 A. L. R. 391. They indicate that the immediate purpose of the rule is not much to benefit the individual workman to whom it may apply, as to preserve union solidarity and to prevent weakening of the union by the strife the other rule might bring. If the non-local contractor is forbidden to reduce the wages of the workmen he brings with him below the amount they have been receiving, then the local men will be dissatisfied and have a grievance against their own union if they are forced to work side by side with foreign labor receiving much more than they do. Thus, the construction claimed by the complainant here would result in a Roanoke workman receiving 75 cents an hour on the same work for which a New York workman was being paid $1.50 an hour. This may or may not be a wise provision; we express no opinion as to whether it, or indeed the section as a whole, contains requirements which are desirable or conducive to helpful labor relations. Decision on such matters is not our province. But we refer to these possible reasons as indicating that once the union had determined upon a policy requiring payment of a non-local wage to some workmen, it might well feel compelled to apply this requirement to all workers on the same job.

[*No Restraint of Interstate Commerce*]

Certainly on this record the complainant has not sustained its burden of showing that the union rule restrains interstate commerce. As said at page 640 of 96 N. J. Eq.: "The attack is aimed not at the combination, but at its effect upon the employers. This is unsound, both legally and economically. In the last analysis, the prime object of the rule attacked is to establish a standard of wages." And so at pages 17, 18, and 19 of 15 F. 2d 16: "The courts in the latter cases restate what is now settled law, that employers have no vested interest in the labor of workers and that their workers have a right, individually and collectively, to lay down terms on which they will sell their labor for the highest return they can obtain, and when not satisfied, they have a right to strike. So long as they do this in their own interest, not with the purpose of assailing others, and do it in a manner not in itself unlawful, the courts will not interfere [citing *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, and other cases]. * * * Without doubt a distant employer may be confronted by a practical difficulty when, away from home, he comes against the respondent's rules, and, concededly, the difficulty, when occurring, amounts to discrimination against him in some degree. Yet the complainant has not convinced us that such discrimination, in kind and degree, is so unreasonable that it is unlawful and that, in consequence, it calls for relief by injunction [citing *United States v. Addystone Pipe Co.*, 85 F. 271, 282, 29 C. C. A. 141, 46 L. R. A. 122; *The Standard Oil Company of New Jersey et al. v. The United States*, 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; and other cases]. Nor has the complainant persuaded us that the offending rules operate to injure the public in the legal sense of that term. Any action that arbitrarily or artificially raises the cost of a thing might be regarded as an injury to the consuming public; yet, when (as here) the injury to the public is too remote to follow and weigh, the law is not concerned with it."

[*Alleged Violations of Anti-Trust Laws*]

The confusion we find in the present record is indicated further by certain of the agreed facts relied on to show discrimination now directed particularly against the complainant. Thus it is stated that for many years prior to June 28, 1938, the complainant has employed members of the Brotherhood "exclusively" and has complied with all the agreed rules and regulations, "and has always paid the scale of wages which prevailed in the community where the job was located, the same scale applying to all contractors who did work in that locality." Whatever may be the force of these statements, we do not perceive their potency to render illegal a contract otherwise valid, whether it be an entirely new agreement or an old one only newly enforced against the complainant. Again there are statements in the agreed facts that one Walker, a contractor from Richmond working on the job, came from a district with a "higher" wage scale than that of Roanoke, but was "only required to pay the prevailing scale in Roanoke," and the defendants "have not demanded" that he pay more. Whether Walker had made a contract and was violating it, whether he had agreed to a closed or open shop, whether he was within the exception as to sign painters of Section 132, whether the defendants had simply failed to take advantage of their rights or had agreed not to—all these and similar questions are left unanswered in the record. Under these circumstances the complainant's point must come to this, that the defendants cannot call a strike against the complainant without calling strikes against all other contractors on the job, whatever may be their mutual relations, or else the anti-trust laws are violated. We doubt that these laws can or should be forced so far.

[*Conclusion*]

The order is reversed and the action is remanded to the District Court for the entry of a judgment declaring the rights of the parties in accordance with the views hereinbefore stated, and on the basis that Section 133 of the Brotherhood's constitution applies to all employees, local or non-local, requires the payment to them of the higher wage, whichever it may be, of either the contractor's home or the place of work, and does not offend the anti-trust laws.

Reversed with directions.

[¶ 55,232] Leon Goldsmith, Trading as Goldsmith's Cut Rate Store, v. Mead Johnson & Company.

Maryland Court of Appeals. Filed June 28, 1939.

Appeal from the Circuit Court of Baltimore City.

The constitutionality of the Maryland Fair Trade Act is upheld where the Act's authorization of price fixing between parties neither constitutes a deprivation of property without due process nor an unlawful delegation of legislative power, and its purposes do not further monopolistic practices.

Morton M. Robinson (Herman Samuelson and Jerome Robinson on the brief); Attorneys for Appellant.

Herbert Levy; Attorney for Appellee.

Before Offutt, Parke, Sloan, Mitchell, Shehan, Johnson and Delaplaine, J. J.

[*Nature of Proceedings*]

Delaplaine, J. This appeal questions the constitutional validity of the Fair Trade Act of Maryland (Acts of 1937, Ch. 239, as amended by Acts of 1939, Ch. 248).

[*Prohibition of Act*]

The act sanctions contracts establishing minimum retail prices on commodities, which bear trademarks, brands or names of the producers or distributors, and which are in free and open competition with commodities of the same general class produced or distributed by others. "Wilfully and knowingly advertising, offering for sale or selling any commodity" below the price stipulated in such a contract "is unfair competition and is actionable at the suit of any person damaged thereby," whether or not the person so advertising, offering for sale or selling is a party to the contract.

[*Statement of Case*]

A bill of complaint was filed in the Circuit Court of Baltimore City by Mead Johnson & Company, an Indiana corporation, praying for an injunction against alleged unfair competition of Leon Goldsmith,

a retailer. The bill alleges that the complainant manufactures articles of infant nutritional diet under its name, trade-marks, brands and labels; that it sells the products to wholesalers, who sell them to retail dealers; that the defendant is one of said dealers; that the complainant entered into a contract with approximately 179 dealers in Maryland to prevent "the injurious and uneconomic practice of price-cutting"; but that the defendant failed to execute the contract. The bill further alleges that in June, 1938, the defendant was selling the products below the established prices; and that, although a warning was thereupon sent to him, he was continuing to sell wilfully and knowingly in violation of the statute.

[*Proceedings in Court Below*]

After a temporary injunction was granted, the defendant demurred to the bill. The Court passed an order overruling the demurrer, and from that order appeal was taken.

[*Fair Trade Legislation*]

The Fair Trade Act has been enacted in forty-four States, including Maryland. In all the States in which the constitutionality has been tested, it has been held valid. *Max Factor & Co. v. Kunsman,* 5 Cal. (2d) 446, 55 P. (2d) 177; *Pep Boys v. Pyroil Sales Co.,* 5 Cal. (2d) 784, 55 P. (2d) 194; *Seagram-Distillers Corp. v. Old Dearborn Distributing Co.,* 363 Ill. 610, 2 N. E. (2d) 940; *Joseph Triner Corp. v. McNeil,* 363 Ill. 559, 2 N. E. (2d) 929; *Bourjois Sales Corp. v. Dorfman,* 273 N. Y. 167, 7 N. E. (2d) 30; *Johnson & Johnson v. Weisbard,* 121 N. J. Eq. 585, 191 A. 873; *Weco Products v. Reed Drug Co.,* 225 Wis. 474, 274 N. W. 426.

[*Constitutionality*]

The validity of this legislation has also been sustained without dissent by the United States Supreme Court. The Illinois act was upheld in the cases of *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.,* and *McNeil v. Joseph Triner Corp.,* 299 U. S. 183, 81 L. Ed. 109; the California act in *Pep Boys v. Pyroil Sales Co.,* and *Kunsman v. Max Factor & Co.,* 299 U. S. 198, 81 L. Ed. 122.

Accordingly, in Pennsylvania the constitutionality of the Fair Trade Act is now accepted without question. *Shryock v. Association of United Fraternal Buyers,* 5 A. (2d) 581.

[*Issue of Constitutionality*]

Nevertheless, the appellant contends that the act is invalid on the ground that it violates the Declaration of Rights and Constitution of Maryland.

[*Contentions of Appellant*]

The appellant contends that the act conflicts with Art. 23 of the Declaration of Rights, which provides that no man ought to be "deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land." But the "Law of the Land," as used in our Declaration of Rights, has the same significance as "due process of law," as used in the Fourteenth Amendment to the Constitution of the United States. *Public Service Commission v. Northern Central Rwy. Co.,* 122 Md. 355. In construing this article of the Declaration of Rights, the decisions of the Supreme Court on the Fourteenth Amendment are "practically direct authorities." Niles, Md. Constl. Law, 48. And in the *Old Dearborn* case, Justice Sutherland said:

"In respect of the due process of law clause, it is contended that the statute is a price-fixing law, which has the effect of denying to the owner of property the right to determine for himself the price at which he will sell. * * * But the decisions referred to deal only with legislative price fixing. They constitute no authority for holding that prices in respect of 'identified' goods may not be fixed under legislative leave by contract between the parties. * * * We are here dealing not with a commodity alone, but with a commodity plus the brand or trade-mark which it bears as evidence of its origin and of the quality of the commodity for which the brand or trade-mark stands. * * * The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with."

[*Monopoly Alleged*]

The appellant also contends that the act is repugnant to Art. 41 of the Declaration of Rights, which says: "That monopolies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered." In an opinion of the Supreme Court, Chief Justice Fuller cited Lord Coke's definition: "A monopoly is an institution, or allowance by the King by his grant, commission, or otherwise to any person or persons, bodies politique or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politique or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawfull trade." *United States v. E. C. Knight Co.,* 156 U. S. 1. In recognizing this definition, our Court has said: "To constitute a monopoly within the meaning of this definition, there must be an allowance or grant by the State, to one or several of a sole right—that is a right to the exclusion of all others than the grantee or grantees."

Wright v. State, 88 Md. 436, 41 A. 795. So, it has been held that exclusive control constitutes monopoly in the economic sense. *Raney v. Montgomery County,* 170 Md. 183, 183 A. 548. The Fair Trade Act does not abolish competition. This is made plain by Justice Sutherland:

"Where a manufacturer puts out an article of general production identified by a general trade-mark or brand, the result of an agreement fixing the subsequent sales price affects competition between the identified articles alone, leaving competition between articles so identified by a given manufacturer and all other articles of like kind to have full play. In other words, such restraint upon competition as there may be is strictly limited to that portion of the entire product put out and plainly identified by a particular manufacturer or producer."

[*Delegation of Power*]

The appellant further contends that the act delegates legislative power in derogation of Art. 3 of the Constitution which vests this power in the General Assembly. This argument likewise has been answered by the Supreme Court:

"It is clear that this section does not attempt to fix prices, nor does it delegate such power to private persons. It permits the designated private persons to contract with respect thereto. It contains on element of compulsion but simply legalizes their acts, leaving them free to enter into the authorized contract or not as they may see fit. * * * We find nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others * * * ."

[*Title of Act*]

The appellant finally contends that the act fails to comply with Art. 3, Sec. 29, of the Constitution, which requires that "every law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." However, the title of the act designates the proper location of the statute in the Code (Art. 83, title "Sales and Notices"), as did the title for the previous act (Acts of 1935, Ch. 212), which has been repealed. It also discloses its purpose, namely the "correcting, clarifying and amplifying" of the Act of 1935; so that the constitutional requirement is more amply gratified. *Fowler v. Harris,* 174 Md. 398. Moreover, it explains that its object is "to protect trade-mark owners, producers, distributors and the general public against injurious and uneconomic practices in the distribution of competitive commodities bearing a distinguishing trade-mark, brand or name, through the use of voluntary contracts establishing minimum resale prices." But the appellant complains that the words "through the use of voluntary contracts" are deceptive and misleading, because there is a possibility that some dealers may not enter such contracts. That objection is answered by the explanation that these words merely describe the method by which the desired protection against price-cutting is to be obtained, for without the voluntary contracts no price restriction is binding upon any one. The provisions of the act are sufficiently described in the title. *Worcester County v. School Commissioners,* 113 Md. 305.

[*Sufficiency of Complaint*]

The appellant further says that, even though the act be valid, the bill of complaint is insufficient. He says the bill does not allege that he acquired the goods after he received knowledge of the price restriction. He says the United States Supreme Court did not decide whether a retailer is bound when he had no knowledge of price restriction at the time he acquired the goods. Whatever may be the ruling under such circumstances, the burden of proving lack of knowledge should be placed upon the retailer "as a matter of convenience in facilitating enforcement." 52 *Harvard Law Review,* 293. Even where exceptions are expressly made in the provisions of a statute, it is held in Maryland that it is not necessary for a pleader either at law or in equity to negative the exceptions in advance, but it is for the opposite party to show them. *Carroll v. Waring,* 3 G. & J. 491. A demurrer is founded upon some point of law which goes to the absolute denial of the relief sought, and asks the Court to determine whether the defendant should be compelled to answer the complainant's bill. Fletcher, *Eq. Pl. & Pr.,* 233. So a demurrer in equity in this State is founded exclusively upon the matter apparent upon the face of the bill, and admits the truth of the complainant's whole case, and denies that he is in equity entitled to relief, even supposing all the facts stated to be true. Barroll, *Md. Chan. Pr.,* 111. Matters of defense not affirmatively appearing on the face of a bill should be taken advantage of by answer, rather than by demurrer. *Riley v. Hodgkins,* 57 N. J. Eq. 278, 41 A. 1099; *Fenwick v. Sullivan,* 102 Vt. 28, 145 A. 258.

[*Conclusion*]

This Court holds that the Fair Trade Act is valid, and that the bill of complaint in this case is sufficient. The Court below was correct in overruling the demurrer.

[*Order Affirmed*]

Order affirmed, with costs.

[¶ 55,233] Justin Haynes & Company, Inc. v. Federal Trade Commission.

United States Circuit Court of Appeals, Second Circuit. Decided July 10, 1939.

Appeal from Federal Trade Commission.

False and deceptive advertising of a medicinal remedy constitutes unfair competition within the prohibition of the Federal Trade Commission Act and justifies the enforcement of a cease and desist order of the Federal Trade Commission where the falsity of the representations and the existence of competition are established by substantial evidence.

Affirming the order of the Federal Trade Commission of April 21, 1938, Dkt. No. 2743.

Munn, Anderson & Liddy (Orson D. Munn and John H. Glaccum, of counsel); Attorneys for Petitioner.

W. T. Kelley, Chief Counsel, Federal Trade Commission; Martin A. Morrison, Assistant Chief Counsel, S. Brogdyne Teu, II, Reuben J. Martin and James W. Nichol, Special Attorneys; Attorneys for Respondent.

Before SWAN, AUGUSTUS N. HAND and CLARK, Circuit Judges.

[*Statement of Case*]

SWAN, Circuit Judge: The petitioner is a New York corporation which sells and distributes in interstate commerce under the trade name of Aspirub a medical preparation for external use containing 1.5 per cent of aspirin. It has advertised the curative properties of its preparation in glowing terms, placing special stress upon the aspirin constituent. In March 1936 the Commission filed a complaint against the petitioner charging that its advertising was false and deceptive and constituted unfair methods of competition in commerce contrary to the provisions of the Federal Trade Commission Act, 15 USCA § 45. The gravamen of the complaint is that Aspirub has no therapeutic value as aspirin because of its negligible asprin content and because aspirin cannot be absorbed into the body through the skin. After extensive hearings an order was entered on April 21, 1938 which in substance forbids the petitioner to use the trade name Aspirub and to represent that its preparation accomplishes to any substantial extent the beneficial effects of aspirin or is absorbable through the skin in an amount sufficient to produce any beneficial therapeutic effect. This order the petitioner asks us to set aside, its main contention being that the Commission's findings of fact in support of the order are not sustained by any substantial evidence.

[*Support for Findings*]

The essential findings are that only an insignificant amount of the aspirin in the petitioner's compound is absorbed into the human body when applied dermally (fols. 107, 111) and that it is of little or no therapeutic value for the various pains and ailments which it is represented to relieve (fol. 110). These findings are supported by the testimony of the three expert witnesses called by the Commission; and in the light of such testimony there can be no doubt that the petitioner's advertisements were grossly exaggerated and misleading. It is true that these witnesses had no personal experience with Aspirub and based their opinions upon their general medical and pharmacological knowledge. They were, however, well-qualified expert witnesses, and the fact that other experts called by the petitioner expressed a contrary opinion and testified to experiments cannot enable the petitioner to contend successfully that there was no substanial evidence to support the Commission's findings. That this court is not permitted to pass upon the weight of the evidence is too well established to require the citation of authorities.

[*Findings of Competition*]

The petitioner also contends that Aspirub is the only medical preparation for external use containing aspirin and is therefore not in competition with any other product in interstate commerce. But the Commission's finding as to competition is supported by evidence. Witness Manss of the Bayer Company testified that in so far as Aspirub is recommended as a relief for aches and pains and as an alleviant for colds he regards it as in competition with his company's product Aspirin, as well as in competition with other preparations offered for external or internal use. Indeed, that it actually or potentially competes with other aspirin products seems self evident; the petitioner itself advertises its preparation as a "new convenient way to use aspirin." *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, is distinguishable, since there no proof was given as to competition.

[*False Advertising Within Act*]

Finally, it is urged that the Commis-

sion's order does not restrain "unfair methods of competition" but is directed against conduct which is, at most, only "misbranding," contrary to the Pure Food and Drugs Act, USCA Title 21. The 1938 amendment to section 5 of the Federal Trade Commission Act expressly includes "unfair or deceptive acts or practices in commerce." This amendment was approved March 21, 1938, which was after the hearings in the case at bar had closed but before the Commission had issued its order. In favor of the petitioner we shall assume that the amendment is not applicable; therefore, if the order is to be supported, it must be as a restraint of "unfair methods of competition in commerce." But we entertain no doubt that false and deceptive advertising of an article in competition with other articles in commerce falls under that definition and was within the Commission's jurisdition. See *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483; *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212.

[*Conclusion*]

Order affirmed.

[¶ 55,234] United States of America v. Imperial Wood Stick Company, Inc., Hardwood Products Company, Setter Brothers, Inc., Morgan-Hitchcock Company, C. B. Cummings & Sons Company, Saunders Brothers, Maine Skewer & Dowel Company, L. B. Hanafee, William F. Robbins, Fred B. Chadbourne, Philip H. Chadbourne, E. S. Cummings, Clifford P. Setter, Warren Saunders, A. L. Saunders, Edgar D. Cartwright, and Metta Cartwright.

United States District Court, Southern District of New York. Filed June 6, 1939.

Dissolution of a candy stick manufacturers' sales' agency is ordered under a consent decree where the allotment of production quotas to the manufacturers in proportion to their stock holdings in the sales agency, which determined and maintained prices pursuant to the agreement of the parties, constitutes a combination in restraint of trade in violation of the Sherman Anti-Trust Acts.

John T. Cahill, U. S. Attorney for the Southern District of New York; Thurman Arnold, Assistant Attorney General; Berkeley W. Henderson, Special Assistant to the Attorney General; Attorneys for Petitioner.

George Feldman, Attorney for Defendants.

Before CLANCY, District Judge.

Decree

CLANCY, D. J.: This cause coming on to be heard on the 6th day of June 1939, and the defendants having accepted service of process and having appeared and filed their answers herein,

[*Consent of Parties*]

And counsel for the petitioner and the defendants having consented to the making and entering of this decree,

Now, therefore, without taking any testimony or evidence and in accordance with said consent of counsel, it is hereby

ORDERED, ADJUDGED, AND DECREED as follows:

[*Jurisdiction*]

I. That the Court has jurisdiction of the subject matter and of all the parties hereto; that the petition states a cause of action against the defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," and the acts amendatory thereof and supplemental thereto.

[*Conspiracy Restrained*]

II. That the corporate defendants, their officers, directors, agents, servants, employees, and representatives, as well as their successors and the individual defendants be, and they hereby are perpetually enjoined and restrained from in any way engaging in, continuing, or reviving, either directly or indirectly, in whole or in part, by any means whatsoever, the combination and conspiracy in restraint of trade and commerce in candy sticks, described in the petition herein, as follows:

[*Nature of Combination*]

10. Defendants Hardwood Products Com-

pany, C. B. Cummings & Sons, Maine Skewer & Dowel Company, Setter Brothers, Inc., and Morgan-Hitchcock Company (referred to together with Saunders Brothers in the petition as the manufacturing defendants) caused the organization of Imperial Wood Stick Company and incorporated it under the laws of the State of New York on or about January 1, 1933. The stock of Imperial was prorated among each of aforesaid defendants, the percentage of each being determined by the amount of his sales of candy sticks as compared to the total sales of all of said defendants.

[*Allotment of Quotas*]

11. At the same time, that is, on or about January 1, 1933, each of the manufacturing defendants entered into an agreement with Imperial, whereby Imperial was to act as sales agent for such defendant as well as for the other manufacturing defendants in the sale of candy sticks. Each of said defendants agreed to limit his production to a stated percentage of the total production, the percentage being the same as the percentage of stock held by the particular defendant in Imperial. The agreements further provided that the price to be charged for candy sticks was to be determined from time to time by Imperial. In the event one of the manufacturing defendants sold candy sticks to others than Imperial for more than the price fixed by Imperial, it paid the difference to Imperial, and if it sold for less to meet competition, it was reimbursed the difference by Imperial. It was further agreed that the officials of Imperial should have access at all times to such records of the other defendant companies as might be necessary to check quantities, inventories, shipments, sales, and payments.

12. On January 1, 1935, Saunders Brothers joined said conspiracy by executing a contract with Imperial containing all of the provisions of Paragraph 2 above, and the quotas of the other manufacturing defendants were reallotted so as to provide for the quota of Saunders Brothers.

[*Dissolution of Sales Agency*]

III. That Imperial Wood Stick Company, Inc., be dissolved forthwith and that the corporate defendants, their officers, directors, agents, servants, employees, and representatives, as well as their successors and the individual defendants be, and they hereby are, perpetually enjoined and restrained from acting in concert in the employment of any person, firm, or corporation to act as a common selling agent in the sale of candy sticks.

[*Future Conspiracy Restrained*]

IV. That the corporate defendants, their officers, directors, agents, servants, employees, and representatives, as well as their successors and the individual defendants be, and they hereby are, perpetually enjoined and restrained from in any way engaging in, either directly or indirectly, in whole or in part, by any means whatsoever, any combination, conspiracy, or restraint similar to the combination, conspiracy, and restraint described in Paragraph II above, and from hereafter entering into, or participating in, any agreement, arrangement, or understanding, express or implied, to fix or to maintain prices, to limit or to control production, or otherwise to eliminate or prevent free and unrestricted competition in the sale of candy sticks.

[*Availability of Records*]

V. That for the purpose of securing compliance with the decree authorized representatives of the Department of Justice shall, upon the request of the Attorney General or an Assistant Attorney General, be permitted access, within the office hours of the defendants, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or control of defendants, relating to any of the matters contained in this decree; that any authorized representative of the Department of Justice shall, subject to the reasonable convenience of the defendants, be permitted to interview officers or employees of defendants, without interference, restraint, or limitation by defendants; that defendants, upon the written request of the Attorney General, shall submit such reports with respect to any of the matters contained in this decree as may from time to time be necessary for the proper enforcement of this decree.

[*Retention of Jurisdiction*]

VI. That jurisdiction of this cause and of the parties hereto is retained for the purpose of giving full effect to this decree and for the enforcement of strict compliance therewith, and for the further purpose of making such other and further orders and decrees or taking such other action as may form time to time be necessary.

Dated: JUNE 6, 1939.

(s) JOHN CLANCY,
United States District Judge.

We hereby consent to the entry of the foregoing decree:

For the Petitioner:

(s) John T. Cahill, United States Attorney for the Southern District of New York.

(s) Thurman Arnold, Assistant Attorney General.

(s) Berkeley W. Henderson, Special Assistant to the Attorney General.

For the Defendants:

(s) George Feldman, Solicitor for the Defendants.

[¶ 55,235] Bayuk Cigars Incorporated, Petitioner, v. Federal Trade Commission, Respondent.

United States Circuit Court of Appeals, Third Circuit. Filed June 26, 1939.

A decree granting enforcement of an order of the Federal Trade Commission is vacated and a new order of enforcement entered requiring the cigar manufacturer to indicate the composition of its product and to inform the Commission of the manner in which compliance is rendered.

Vacating the Court's decree of May 8, 1939.

Per Curiam.

[*Vacation of Decree*]

Biggs, Jr., D. J.: And now, the 26th day of June 1939, upon further consideration, by consent of the parties, of the Decree entered in the above cause on November 21, 1930, and with the consent of said Bayuk Cigars Incorporated,

It is now ordered, adjudged and decreed by this Court that the Decree of May 8th, 1939 in the above entitled cause be and the same is hereby vacated and in lieu thereof it is Ordered, adjudged and decreed that Bayuk Cigars Incorporated, its officers, directors, agents, representatives, servants and employees, on and after two years from the date hereof, shall cease and desist, in connection with the sale or distribution of cigars from any of its factories in interstate commerce:

[*Terms of Order*]

(1) From using the trade mark or trade name "Havana Ribbon" as descriptive of cigars of the type and composition or substantially of the type and composition lately and now sold under the aforesaid trade or brand name;

(2) From using the word "Havana" or other word or words of similar import, alone or in conjunction with the word "Ribbon," or any other word or words, either as a brand or trade name or as descriptive of cigars unless such cigars are composed entirely or in substantial part of tobacco grown on the Island of Cuba; provided that if the cigars be composed in part only of such tobacco, that fact shall be indicated by the brand or trade name (if the word "Havana" or like word occurs therein) the words of which that are descriptive of tobacco content shall be of uniform size, together with such accompanying descriptive words as may be necessary clearly to indicate the true composition and character of said cigars. If the word "Havana" or like word is not used in the brand name, but only in descriptive words applied to cigars composed in substantial part of Havanna tobacco, such descriptive matter shall fairly indicate the true composition and character of the cigars. In all such descriptive matter the filler tobaccos used in said cigars shall be set forth in the order of their predominance by weight in letters of equal size and conspicuousness. Provided further that the words "Havana Filler" may, without other description, be applied, either as part of a brand name or otherwise, to cigars having a filler composed entirely of tobacco grown on the Island of Cuba.

[*Continuing Effect of Decree*]

It is further ordered, adjudged and decreed that pending the expiration of the said period of two years, the Decree of this Court entered November 21, 1930 shall remain in full force and effect save that Bayuk

Cigars Incorporated upon the adoption of some new brand name containing the word "Ribbon" but eliminating the word "Havanna" may during said period of two years but not thereafter accompany such new brand name with the words "Formerly Havana Ribbon" without the addition of the qualifying words prescribed in the aforesaid Decree of November 21, 1930; provided however that such accompanying words be in letters substantially smaller than the new brand name.

[*Original Order Retained in Part*]

It is further ordered, adjudged and decreed that the original Decree of June 14, 1930, entered in the above cause shall remain in full force and effect with respect to the brand and trade name M-APACUBA.

[*Notice of Compliance*]

It is further ordered, adjudged and decreed that within the period of two years and thirty days from the date of this decree, Bayuk Cigars Incorporated be and is hereby directed and ordered to file with the Federal Trade Commission, Washington, District of Columbia, a report in writing, setting forth with particularity the manner in which it has complied with the terms of this Decree.

[*Retention of Jurisdiction*]

Without withdrawing, limiting or otherwise disturbing the jurisdiction of the Federal Trade Commission over this case, the Court will retain jurisdiction of the case to act within its powers in any exigencies that may arise by reason of the premises.

[¶ 55,236] Wilson & Co. v. Jack Birl, as assistant business manager, et al.

United States Circuit Court of Appeals, Third Circuit. Filed July 10, 1939.

Appeal from the United States District Court, Eastern District of Pennsylvania.

Peaceful picketing to compel the adoption of a closed shop is not subject to injunctive restraint in the absence of violence or fraud where the evidence fails to support the findings requisite for injunctive relief under the Norris-La Guardia Act, whose limitation of Federal jurisdiction in labor disputes is not to be narrowed by constructions similar to those applied to the exemptions afforded labor under the Clayton Anti-Trust Act.

Affirming (1939) United States District Court, Pennsylvania.

Wm. A. Schnader; Pepper, Bodine, Stokes & Schoch, all of Philadelphia, Pennsylvania, Attorneys for Appellant.

Wm. A. Gray, Louis F. McCabe; Albert J. Bader, all of Philadelphia, Pennsylvania, Attorneys for Appellees.

Before MARIS, CLARK and BIDDLE, Circuit Judges.

[*Statement of the Case*]

BIDDLE, Circuit Judge: This is an appeal from an order of Judge Kirkpatrick denying a temporary injunction against the officers and agents of three labor unions. The question involved is whether the trial judge had power to issue the injunction under the provisions of the Norris-La-Guardia Act.[1]

The appellant, Wilson & Co., is engaged in the wholesale meat business, with a plant in Philadelphia, where it processes and stores meat, shipped to it in interstate commerce, and sells twenty-five per cent of its products in interstate commerce. There are three unions involved as defendants. Local 195, the meatcutters, includes all but five of appellant's production and maintenance employees. Local 107 the truckers, has all appellant's truckers; and the members of Local 18571 are the employees of a cold storage warehouse where appellant stores its products. On December 29, 1938, the meatcutters and truckers struck on account of the employment of the five non-union maintenance men, to force on the employer a closed shop, and have picketed Wilson's plant, and persuaded its customers not to accept deliveries of goods, threatening them with picketing, and in some instances picketing their places of business. It is clear from the record that these activities were the result of a concerted effort of the three unions to bring about a closed shop. Judge Kirkpatrick found that there had been little violence in general, and no evidence that the three or four instances of violence had been ratified. This finding is supported by the record. As a result of the unions' activities appellant's business is virtually at a standstill.

[1] 29 U. S. C. § 101-115.

[*Finding of Trial Court*]

The trial judge also specifically found that appellant had complied with § 8 of the Norris-LaGuardia Act[2] requiring that an employer make every reasonable effort to settle a labor dispute before being entitled to injunctive relief; that, with respect to § 7 of the Act,[3] greater injury would be inflicted upon the appellant by the denial of the relief asked for than upon the appellees by granting it; and that the appellant had no adequate remedy at law. Subsection (e) requires a finding that "the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection." As to this Judge Kirkpatrick said: "The picketing of the plaintiff's plant is being carried on under police supervision and control, and the police appear to have supplied protection against injury to physical property." He added that the plaintiff was not protected against loss of business with its customers. But it would be unreasonable to construe the subsection to include losses which the exercise of the powers of the police are hardly calculated to prevent. The words mean that only where the police can't or won't do their job of protecting physical property the court may step in. The act takes this executive function out of the courts, and leaves it to the appropriate executive officer, unless he fails to function. *Heintz Mfg. Co. v. Local No. 515,* 20 F. Supp. 116 (D. C. Pa.).[4] There is nothing in the record to show that the police did not have the situation under control. On this ground alone the injunction could have been refused. *Krupp Monarch Co. v. Anderson,* 7 F. Supp. 332, 337 (D. C. Ill.).[5]

[*Alleged Unlawful Acts*]

Section 7 makes one other prerequisite before an injunction can issue—that unlawful acts have been threatened or committed. Appellant argues that the acts of the union are unlawful under Pennsylvania law—striking for a closed shop, coercion of appellant's customers not to deal with it, the acts of violence (even though none were proved to have been authorized), picketing in greater numbers than calculated merely to publish the existence of the dispute. It is not necessary for us to discuss whether or not Pennsylvania law condemns these activities, although it may be pointed out that the legality of the closed shop is established by statute,[6] and the propriety of a strike to enforce

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[2] 29 U. S. C. § 108 "Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

[3] 29 U. S. C. § 107 "No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

[4] "The act of Congress was based upon a recognition of the fact that the preservation of order and the protection of property in labor disputes is in the first instance a police problem, belonging to the executive rather than the judicial side of the government, and its whole intent and purpose was to remove the courts from that field, except in cases where the peace authorities failed or refused to act."

[5] ". . . it was the purpose and intent of Congress that, though all other jurisdictional and necessary facts be present, a federal court should not step in by injunction until it becomes apparent that the local authorities are actually unable or unwilling to protect plaintiff's property."

[6] Pennsylvania Labor Relations Act, June 1, 1937, P. L. 1168, 43 P. S. 211.6 (c) ". . . Provided, That nothing in this act, or in any agreement approved or prescribed thereunder, or in any other statute of this Commonwealth, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in this act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employes, as provided in section seven (a) of this act, in the appropriate collective bargaining unit covered by such agreement when made." This subsection is copied, nearly *verbatim,* from § 8 (3) of the National Labor Relations Act, 29 U. S. C. 158 (3).

it was recently recognized by our court.[7] For, as pointed out by the court below, § 4 of the act enumerates certain acts not subject to injunctive relief. The test is objective; not the purpose or intent of the acts sought to be restrained, and not even their illegality; but whether they come under § 4.

[*Limitation on Injunctive Relief*]

This section provides that no United States Court shall have jurisdiction to enter injunctions in labor disputes to prohibit persons from doing "whether singly or in concert" certain specified acts. These acts are classified under nine subsections ((a) to (i) inclusive); but we need consider only those which are applicable to the particular activities in this case. They are:

[*Strike Cannot Be Enjoined*]

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment." A strike, therefore, cannot be enjoined. Whether or not the strike in this case is illegal, because of its purpose, as argued by appellant, is therefore beside the point. The test is no longer given the uncertain elasticity of "illegality." The statute, dealing strictly with procedure, nowhere attempts to define as lawful the acts which it says may not be enjoined. The purpose of the act to remove the jurisdiction of the courts to enjoin strikes as such is emphasized in § 9[8] which defines the manner in which the court shall make its findings. The injunction "shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint . . . and as shall be expressly included in said findings of fact . . ." A strike is not the type of specific act contemplated by the exception, which looks to a particular action of an individual, whether singly or in concert with another. We are of the opinion that Federal courts may no longer issue general injunctions against striking, but only to restrain specific acts of individuals, which we shall presently discuss.

[*Peaceful Picketing Cannot Be Enjoined*]

The picketing here complained of averaged ten to fifteen persons at a time, and on one occasion rose to ninety-seven. The subsections dealing with picketing, found in (e) and (f), are as follows:

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute".

Again, the uncertain test, expressed in the word "lawful" (picketing) is not employed.[9] If the picketing is peaceful, unaccompanied by acts of violence, irrespective of whether it may be mass picketing, and therefore according to appellant's argument illegal in Pennsylvania, it cannot be enjoined by a Federal court. Strikes and picketing are general acts, involving concerted efforts; the narrow limit of federal restraining power, under this act, is confined to forbidding defined acts of individuals.

It is true that the picketing ("assembling peaceably") referred to in (f) is "in promotion of their interests in a labor dispute." Obtaining a closed shop is clearly in furtherance of the interests of the strikers—an effective step towards a more cohesive and powerful organization.

[*Secondary Boycott Cannot Be Enjoined*]

Three other subsections of § 4 may be considered together:

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this chapter."

The language of these subsections, and of (e), is broad enough to include the other acts of the appellees exerted against the appellant and its customers—following its delivery trucks, and persuading its cus-

[7] *Apex Hosiery Co. v. Leader*, 90 F. (2d) 155, 160, reversed on other grounds *Leader et al. v. Apex Hosiery Co.*, 302 U. S. 656.

[8] 29 U. S. C. § 109. "Granting of restraining order or injunction as dependent on previous findings of fact; limitation on prohibitions included in restraining orders and injunctions. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein."

[9] The provisions of the Norris-LaGuardia Act, so far as they are applicable, displace Sec. 20 of the Act of October 15, 1914, known as the Clayton Act, which amended the Sherman Anti-Trust Act, 29 U. S. C. § 52. The second paragraph of this section in defining acts which shall not be restrained uses the word "lawfully" twice, and the word "lawful" three times.

tomers by threats of picketing and actual picketing to reject its goods. Where no violence or fraud is involved a district court is without jurisdiction to enjoin members of a labor union from inducing contractors and owners of buildings not to let subcontracts to members of an employers' association which favored an open shop. *Levering & Garrigues Co. v. Morrin*, 71 F. (2d) 284 (C. C. A. 2), cert. den. 293 U. S. 595. As found by the trial judge, the appellees' acts did not involve fraud or violence. Such pressure on others often loosely termed a "secondary boycott," falls within the sections and cannot be enjoined. Carrying placards stating that Wilson & Co. was unfair to organized labor may have been misrepresentative. It was not fraudulent.[10]

["*Unlawful Acts*"]

Moreover, the words "unlawful acts" in Section 7 (a), which must be alleged in the complaint and included in the findings, cannot be read separately from the rest of the section, and assume appropriate meaning only when we consider the section as a whole. Irreparable injury to the complainant's property, which has no police protection, is an essential averment and finding; and the "unlawful acts" do not constitute a general reference to anything that may be considered illegal, but specifically to the acts of violence which the authority of the executive is calculated to control.

[*Conclusion*]

When the Sherman Act was amended in 1914 by the Clayton Act, § 6 of the latter provided that labor unions should not "be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws,"[11] and § 20 regulated the granting of injunctions in cases between employer and employees, and exempted certain acts from restraint. The language would appear to differentiate labor unions from trade combinations, and to exclude them from the operations of the Act. Yet the decisions have emptied the words of significance other than the affirmation of what the law had been for a long time—that labor unions are not in themselves unlawful.[12] The act had little effect in narrowing equity jurisdiction in labor disputes.[13] We believe that the Norris-LaGuardia Act was adopted to prevent a similar construction.[14] The purpose of the Act, to quote the trial judge, was "to take the Federal courts out of the business of granting injunctions in labor disputes, except where violence or fraud are present."

Judgment affirmed.

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[10] *Cinderella Theater Co. v. Sign Writers' Local Union*, 6 F. Supp. 164.

[11] 15 U. S. C. § 17. "Antitrust laws not applicable to labor organizations. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

[12] *Stephens v. Ohio State Telephone Co.*, 240 Fed. 759.

[13] *Duplex Co. v. Deering*, 254 U. S. 443. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184. Section 20, said the court, "introduces no new principle into the equity jurisprudence of those (Federal) courts," and "is merely declaratory of what was the best practice always." *Bedford Co. v. Stone Cutters Association*, 274 U. S. 37.

[14] *New Negro Alliance v. Grocery Co.*, 303 U. S. 552, 562. "The legislative history of the act demonstrates that it was the purpose of the Congress further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by federal courts and to obviate the results of the judicial construction of that Act."

[¶ 55,237] **Port Chester Wine & Liquor Shop, Inc., and Joseph Gioffre, Respondents, v. Miller Bros. Fruiterers, Inc., Appellant.**

New York Court of Appeals. Decided July 11, 1939.

Appeal from the Supreme Court, Appellate Division, Second Judicial Department.

Resale by a non-contracting retailer of branded liquors at prices below the minimum established by fair trade contracts under the New York Fair Trade Act constitutes a violation of the statute, enjoinable at the suit of a contracting retail competitor, where the goods are purchased for resale with knowledge of the existing resale price restrictions.

Affirming (N. Y.; 1938) 253 App. Div. 188.

Miner W. Tuttle, Walter C. Lundgren and John E. Haigney; Attorneys for Appellant.

Benjamin I. Tunick; Attorney for Respondents.

Thomas Kiernan, Orison S. Marden and Ezra Cornell; Attorneys for Seagram Distillers Corporation and Calvert Distillers Corporation, *amici curiae.*

CRANE, C. J., LOUGHRAN, LEHMAN, HUBBS, FINCH and RIPPEY, JJ., concur; O'BRIEN, J., takes no part.

[*Nature of Proceeding*]

LOUGHRAN, J. This case presents questions as to the construction and application of the Fair Trade Act of the State (Laws of 1935, ch. 976).

[*Statutory Provisions*]

The statute is entitled, "An Act to protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade mark, brand, or name." Section 1 provides in part: "No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of New York by reason of any of the following provisions which may be contained in such contract: (a) That the buyer will not resell such commodity except at the price stipulated by the vendor * * *." Section 2 provides in part: "Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section one of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

[*Prior Construction of Act*]

Other provisions of the statute which exclude several situations from its operation are unrelated to the present case. In *Bourjois Sales Corp. v. Dorfman* (273 N. Y. 167) this court surrendered its view that section 2 is essentially obnoxious to the due process clauses.

[*Statement of Case*]

Plaintiffs do business in the village of Port Chester as vendors of alcoholic beverages at retail for off-premises consumption. Pursuant to the Fair Trade Act, they agreed not to resell specified branded liquors which were within the purview of the statute, except at prices stipulated by the distillers thereof. With knowledge of these agreements, the defendant, a competitor of the plaintiffs, acquired liquors of the same brands and resold them at retail at prices less than the retail prices stipulated by the distillers. These admitted violations of the statute having been enjoined by a judgment granted to the plaintiffs on the pleadings, the defendant now appeals to this court by leave of the Appellate Division. Precisely stated, the issue for determination is whether a violation of section 2 by a non-signatory retail reseller is actionable at the suit of a signatory competitor.

[*Retail Resellers Bound*]

Before the Fair Trade Act had become part of our statutes, it had been said in this court: "The law endeavors to protect the interest of parties in existing contractual relations from intentional and wrongful interference by strangers. The principle constitutes a limitation upon the doctrine of freedom of contract, which courts have imposed in an attempt to promote justice and fair dealing and to prevent wrongs." (*Reiner v. North American Newspaper Alliance,* 259 N. Y. 250, 254.) Section 2 of the statute is an extension of this principle. Conscious disregard of price maintenance provisions by non-signatories is made a tort ("unfair competition") and is made "actionable at the suit of any person damaged

thereby." This last phrase must, we think, be taken to include a retail reseller who is bound to abide by the resale price restrictions of a fair trade agreement.

[*Injunction Proper*]

Our conclusion is that the relief awarded to the plaintiffs by the courts below had clear warrant in the statute.

[*Question Not Determined*]

We express no opinion as to whether a reseller must observe resale price restrictions laid down after he acquired the commodity. (*Cf. Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 194.)

[*Conclusion*]

The judgment should be affirmed, with costs.

CRANE, Ch. J., LEHMAN, HUBBS, FINCH and RIPPEY, JJ., concur; O'BRIEN, J., taking no part.

[*Judgment Affirmed*]

Judgment affirmed.

[¶ 55,238] H. N. Heusner & Son, a corporation, v. Federal Trade Commission.

United States Circuit Court of Appeals, Third Circuit. Filed August 10, 1939.

On petition to review and modify an order of the Federal Trade Commission.

Qualification of a misbranded domestic cigar label is ineffective to remove the false implication that the product contains "Havana" tobacco, but an extension of time for altering the label is warranted where the misleading brand has been employed over a thirty-seven year period.

Affirming as modified the order of the Federal Trade Commission Dkt. 2355 of May 29, 1937.

Before BIGGS, MARIS, and CLARK, Circuit Judges.

[*Nature of Product*]

CLARK, Circuit Judge. The "harmless drudges" (as Dr. Johnson defined them) who have busied themselves "in tracing the original, and detailing the signification of words," are in agreement that a "Havana" cigar is one made from Cuban tobacco, *New Century Dictionary*, Vol. 1, p. 719; *Webster's Universal Dictionary* (1936), p. 772. Such, too, is the understanding of the trade, *Tobacco Manual*, p. 19, and we are told:

> "The tobacco leaf of Cuba is world famous for its aroma and makes the finest of all cigars."
> The Wide Realm of Lady Nicotine, 8 *Compton's Encyclopedia*, p. 3509.

Hence, the implicit misrepresentation in selling Cuban tobaccoless cigars under the label "Havana" hardly merits comment. The judicial reaction to that practice may be observed in two fields: suits for trademark infringement, and the review of orders by an administrative agency pledged to extirpate "unfair methods of competition," 15 U. S. C. A. sec. 45. It has met with unanimous condemnation in both.

[*Unclean Hands Doctrine*]

The doctrine of unclean hands as applied to the protection of trade-marks and names has been thoroughly elucidated in the text books and law reviews, Derenberg, *Trade-Mark Protection and Unfair Trade*, pp. 659 *et seq.*; Nims, *Unfair Competition and Trade-Mark* (Third Edition) pp. 977 et seq.; 31 *Harvard Law Review* 889 (note); 21 *Yale Law Journal* 426 (note): 15 *Yale Law Journal* 309 (note); 32 *Halsbury's Laws of England*, pp. 657-658. Suffice it to say that misrepresentation as to ingredients, *Worden v. California Fig Syrup Co.* ("Fig Syrup" without figs), 187 U. S. 516, and as to the place and manner of manufacture, *Manhattan Medicine Co. v. Wood*, 108 U. S. 218 (Moses Atwood, of Georgetown, Mass., for Manhattan Medicine Company, N. Y.), *Kosofsky v. Silbert*, 123 Misc. (N. Y.) 638 (Hudson Bay Fur Company without furs from Hudson Bay), have prevented the traders who used them from securing equitable relief. As early as 1867 the Supreme Court of Pennsylvania (wherein is situated Constatoga, birthplace of the stogy) invoked the doctrine in connection with domestic cigars mislabeled "Havana". Not even deigning to stress the misdescription of ingredients, the learned Court described that practice as:

> "* * * a falsehood as to the place where his goods are manufactured in order to have the benefit of the reputation which such goods have acquired in the market". *Palmer v. Harris*, 60 Pa. 156, 158.

Other courts followed suit, *Newman v. Pinto*, 4 R. P. C. 508; *Solis Cigar Co. v. Pozo*, 16 Colo. 388.

[*Rulings of FTC*]

The work of the Federal Trade Commission has been along similar lines, Derenberg, *Trade-Mark Protection and Unfair Competition*, pp. 190 *et seq.;* Henderson, *The Federal Trade Commission,* p. 182. Here the public has been protected, affirmatively rather than negatively, from misrepresentation of ingredients, *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 466 ("natural wool" for cotton); *Federal Trade Commission v. Agloma Lumber Co.*, 291 U. S. 67 ("California white pine" for yellow pine); *Procter & Gamble v. Federal Trade Commission,* 11 F. (2d) 47 ("Naptha soap" without naptha); *Marsland Duraleather Co. v. Federal Trade Commission,* 34 F. (2d) 733 ("Duraleather" without leather); and of the place and method of manufacture, *Federal Trade Commission v. Bradley,* 31 F. (2d) 569 ("English tub soap" made in America); *Lighthouse Rug Co. v. Federal Trade Commission,* 35 F. (2d) 163 ("Lighthouse" rugs not made by blind men). By the same token, the Commission will not countenance "Havana", "Cuban", "Tampa", and "Wheeling" cigars which are geographically or analytically unworthy of the name. See 105 *Commerce Clearing House Trade Regulation Service,* sec. 505.4465-75; 106 *Commerce Clearing House Trade Regulation Service,* secs. 9100, 9745. [CCH TRADE REGULATION REPORTS, 10th Edition, ¶ 5091.151].

[*Relief Sought*]

Accordingly, the petitioner, a Pennsylvania manufacturer of cigars which contain only Pennsylvania tobacco, but are branded "Havana Smokers", has been ordered to cease and desist from using the word "Havana" to designate its product. We are asked to modify this order so as to permit the retention of the word "Havana" with an appropriate "qualification", i. e., the legend:

"NOTICE
THESE CIGARS
ARE MADE IN
THE UNITED
STATES AND
ONLY OF UNITED
STATES TOBACCO"

[*Falsity of Description*]

The difficulty of petitioner's position lies in the fact that the implication of the word "Havana" is totally false. The purchaser can be guided by either label or legend, but not by both. This circumstance came before the Court of Appeals for the District of Columbia in a recent case. After a carefully considered review of the authorities the learned court concluded:

"* * * But the phrase 'Army and Navy' in the name 'Army and Navy Trading Company' makes the single representation that at least the major portion of the merchandise offered for sale is in some sense Army and Navy goods. This single representation being untrue, it cannot be qualified; it can only be contradicted. The cases urged by the Trading Company and above discussed justify qualification of a trade name where qualification is possible; they do not justify contradiction". *Federal Trade Commission v. Army and Navy Trading Co.,* 88 F. (2d) 776, 780.

We doubt if petitioner would accede to a true qualification—"Fake Havana Smokers".

[*Length of Period of Use*]

It appears, however, that the cigars in question have been branded "Havana Smokers" since 1902. This, we think, calls two mitigating factors into play. First, the sudden elimination of the word "Havana" might cause confusion, or even consternation, among the devotees of petitioner's cigars, as well as substantial loss to petitioner, *cf. Marsland Duraleather Co. v. Federal Trade Commission,* 34 F. (2d) 733. Second, it is possible, although the point is not reflected in the findings of the Commission, that the long misuse of the word "Havana" has lent that term a species of secondary meaning in connection with petitioner's cigars. See Notz, Unfair Commercial Practices in International Trade, 23 *Bulletin of American Trade-Mark Association (New Series)* 79. Courts of equity now tend to take this fact into account before applying the doctrine of unclean hands in the manner above referred to. As a leading text writer has put it:

"They are now chiefly concerned with whether in the case of particularly well known marks and names, the public has become accustomed to associate a product with a definite taste, appearance, smell, etc. without in the least being deceived by a product which does not contain exactly what it professes to, but which is the identical article which had previously satisfied them." Derenberg, *Trade-Mark Protection and Unfair Trading,* p. 670.

See *Coca-Cola Co. v. Koke,* 254 U. S. 143; *Le Blume Import Co. v. Coty,* 293 Fed. 344.

[*Period for Compliance*]

We feel that these considerations, although without bearing on the propriety of the Commission's order, may well influence the method whereby it is to be enforced. As a consequence, petitioner will be allowed two years within which to eliminate the word "Havana" as prescribed in our recent decree in *Bayuk Cigars, Inc. v.*

Federal Trade Commission, 106 *Commerce Clearing House Trade Regulation Service*, par. 25290 [1932-1939 TRADE CASES ¶ 55,235], and see 14 *Federal Trade Commission Reports* 708.

[*Conclusion*]

The order of the Federal Trade Commission is modified in accordance with the views set forth in this opinion and its enforcement as so modified will be decreed.

[¶ 55,239] Ostler Candy Company, a corporation, v. Federal Trade Commission; Glade Candy Company, a corporation, v. Same; Shupe-Williams Candy Company, a corporation, v. Same.

United States Circuit Court of Appeals, Tenth Circuit. Decided August 30, 1939.

Petitions to review orders of the Federal Trade Commission.

Ascertainment by the Federal Trade Commission, prior to the beginning of proceedings, of the existence of unfair methods of competition in the sale of "chance" candy and that advancement of the public interest will follow from the institution of cease and desist proceedings is not required where preliminary correspondent with the respondent manufacturer supplies the Commission with all essential factual material.

A cease and desist order of the Federal Trade Commission prohibiting the sale or distribution by manufacturers of candy so packed that retailers may dispose of the product through lottery methods is not overly broad in scope where application of the order is limited to candy packaged so as to be especially suited for unfair retail distribution.

The 1938 amendment of Sec. 5 of the Federal Trade Commission Act does not, by providing for the final effect of cease and desist orders at the expiration of the period allowed for petitions for review, in the absence of such petitions, constitute an unconstitutional delegation of judicial power where the amendment relates solely to the remedy and does not affect the due process afforded by judicial review.

H. L. Mulliner (J. R. Mulliner and H. H. Halliday on brief), 145 Continental Bank Building, Sale Lake City, Utah; Attorneys for Petitioners.

Martin A. Morrison, Assistant Chief Counsel (W. T. Kelley, Chief Counsel, P. C. Kolinski and James W. Nichol, Special Attorneys, on brief); Attorneys for Respondent.

Before PHILLIPS, BRATTON and HUXMAN, Circuit Judges.

Affirming the orders of the Federal Trade Commission issued August 4, 1938, FTC Complaint Nos. 2708, 2837, 2848.

[*Nature of Proceedings*]

BRATTON, C. J.: Ostler Candy Company, Glade Candy Company, and Shupe-Williams Candy Company, each engaged in the manfacture of candy in the State of Utah and in the sale and distribution of it in intrastate and interstate commerce, seek to have reviewed and set aside orders of the Federal Trade Commission entered under the provisions of section 5 of the Federal Trade Commission Act, 15 USCA 45, separately requiring them to cease and desist from certain trade practices which were found to constitute unfair competition in commerce. The proceedings are here on separate petitions to review, but the material facts are substantially alike and the questions presented are identical.

[*Findings of Commission*]

The Commission found in each proceeding that the company was in active competition with others engaged in the manufacture of candy and in the sale and distribution of it in interstate commerce; that several of its assortments of candy are composed of bars of candy, together with a device commonly called a "pushcard"; that the pushcard has partially perforated discs which are effectively concealed; that when a push is made and the disc separated from the card a number or legend is disclosed; that sales are five cents each; that the card bears a statement informing prospective and actual customers that each number or legend pushed entitles the person pushing it to receive one bar of candy but that certain numbers entitle the persons pushing them to one or more additional bars; that the card also bears a legend stating that the person making the last push will receive a specified number of additional bars; that the company also distributes assortments composed of a number of packages of candy of varying size, together with a device commonly called a "punchboard"; that the punchboard has a number of holes in which slips of paper

containing numbers are secreted; that when a punch is made and the slip separated from the board the number is disclosed; that punches are five cents each; that the board has printed thereon statements or legends informing prospective and actual purchasers that those punching certain numbers are entitled to specified packages of candy; that the packages of candy are distributed in accordance with such statements or legends; that candy assortments involving such lot or chance features are generally called "chance candy" and that assortments without the lot or chance features are called "straight goods"; that the company sells its chance candy to jobbers and retailers; that the jobbers resell to retailers; that the retailers display it for sale as packed by the company and it is sold to the consuming public in accordance with the sales plans of the company; that such candy is so packed and assembled as to involve and is designed to involve the use of a lottery scheme when sold and distributed to the consumers thereof; that the sale and distribution of chance candy through such methods constitutes a lottery or gaming device which is contrary to public policy, as morally bad and encouraging gambling, as injurious to the candy industry because it results in the merchandising of a chance or lottery instead of candy, and as providing retail merchants with a means of violating public policy and the laws of the several states; that it is injurious and prejudicial to the public and to the competitors of the company; and that it is a restraint upon and a detriment to the freedom of fair and legitimate competition in the candy industry.

[*Cease and Desist Orders*]

Each order requires the company in the sale and distribution of candy in interstate commerce, to cease and desist (1) from selling and distributing to wholesale dealers and jobbers, for resale to retail dealers direct, candy so packed and assembled that sales to the public are to be made, or may be made, by means of a lottery, gaming device, or gift enterprise, (2) from supplying to or placing in the hands of retail and wholesale dealers and jobbers assortments of candy which are used, or may be used, without alteration or rearrangement of the contents thereof, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy contained in such assortments to the public, (3) from supplying to or placing in the hands of retail or wholesale dealers and jobbers assortments of candy, together with a pushcard or punchboard for use, or which may be used, in distributing or selling such candy to the public at retail, and (4) from furnishing to retail and wholesale dealers and jobbers pushcards or punchboards, either with packages or assortment of candy or separately, bearing a legend or statement informing the purchasing public that the candy is being sold by lot or chance, or in accordance with a sales plan which constitutes a lottery, gaming device, or gift enterprise.

[*Constitutional Issue*]

The constitutionality of section 5 of the statute, as amended by the Act of March 21, 1938, 52 Stat. 111, is challenged. It is argued that the amendment gives to an order to cease and desist from a trade practice the full force and effect of a judgment or decree of a court, thus vesting judicial power in the Commission. The amendment provides that the order shall become final upon the expiration of the time allowed for the filing of a petition for review, if no such petition has been filed within that time. The change relates solely to the remedy of the Government for its enforcement; it does not transform the order into the equivalent of a legislative act or a judgment or decree of a court; and the provision for judicial review meets the requirements of due process. The statute is not open to attack for want of constitutional validity. *National Candy Co. v. Federal Trade Commission*, 104 F. (2d) 999.

[*Jurisdictional Issue*]

The jurisdiction of the Commission is attacked. The contention is that as a prerequisite to jurisdiction to issue a complaint, the Commission must first determine whether there is reason to believe that one has been or is using an unfair method of competition in interstate commerce; that after determining such question in the affirmative the Commission cannot proceed further unless it further appears that the proceeding would be in the interest of the public; and that the Commission did not acquire jurisdiction here because no unfair method of competition existed in that chance candy is not sold at retail in competition with straight candy. It is well settled that in order to initiate such a proceeding the Commission must first ascertain that an unfair method of competition in commerce has been or is being used, and, if so, that a proceeding would be in the interest of the public. *Federal Trade Commission v. Raladam Company*, 283 U. S. 643. But here the correspondence passing between the Commission and the companies shows clearly that the Commission was thoroughly conversant with the material facts bearing upon the manner in which the chance candy was packed, distributed, and ultimately sold at

retail to the consuming public. A further investigation would have been idle and useless. A court on petition to review a cease and desist order cannot inquire into the *quantum* or sufficiency of the factual information on which the Commission made its initial determination that an unfair method of competiton was being used and that a proceeding would be in the public interest. That is a matter for the Commission. Where the Commission acts on some information, the scope of judicial review begins with the filing of the complaint. We do not explore the question whether a cease and desist order may be attacked on review for want of any evidence on which the Commission made its initial determination as no such situation is presented.

[*Consideration of Public Policy*]

The statute condemns any method of competition in interstate commerce which is contrary to public policy. *Federal Trade Commission v. Beech-Nut Packing Co.,* 257 U. S. 441; *Wholesale Grocers' Association v. Federal Trade Commission,* 277 F. 657; *Walter H. Johnson Candy Co. v. Federal Trade Commission,* 78 F. (2d) 717; it interdicts any system of competitive merchandising in such commerce which uses or employs a lottery, gaming device, or gift device. *Federal Trade Commission v. Keppel & Bro.,* 291 U. S. 304; and pushcards and punchboards are within that class, *Hofeller v. Federal Trade Commission,* 82 F. (2d) 647; *Federal Trade Commission v. F. A. Martoccio Company,* 87 F. (2d) 561; *Federal Trade Commission v. Charles N. Miller Co.,* 97 F. (2d) 563; *Helen Ardelle, Inc. v. Federal Trade Commission,* 101 F. (2d) 718; *Bunte Bros. v. Federal Trade Commission,* 104 F. (2d) 996; *National Candy Co. v. Federal Trade Commission, supra.*

[*Conclusiveness of Findings*]

It is urged that the jurisdiction of the Commission is restricted to methods of competition as they affect competitors and the public; that it has no independent police powers; and that these proceedings should have been dismissed for the reason that the sale of chance candy at retail does not constitute competition with the sale of straight candy. The essence of a proceeding of this kind is the forbidding of the continued use of an unfair trade practice in commerce in competition with others. It necessarily follows that where it appears in the course of such a proceeding that competition does not exist the proceeding should be dismissed. But the Commission found that the sale and distribution of chance candy in commerce and its sale at retail does come into competition with that of straight candy; that it diverts trade in volume from business enterprises not using such methods; and that it is prejudicial to the public. That finding is conclusive on review if it is supported by substantial evidence. *Federal Trade Commission v. Winsted Hosiery Co.,* 258 U. S. 483; *Federal Trade Commission v. Algoma Lumber Co.,* 291 U. S. 67; *Federal Trade Commission v. Standard Education Society,* 302 U. S. 112. It would not serve any useful purpose to detail the evidence at length. It suffices to say that there was substantial evidence to show that while generally there are differences in the types of customers for the two kinds of candy, the sale of chance candy does reduce the sale of straight candy. As the diversion of a substantial part of trade from straight candy to chance candy constitutes competition, the finding is supported by adequate evidence and therefore cannot be overthrown on review.

[*Scope of Orders*]

The remaining contention which merits consideration is that the orders are too broad. It is said that the first and second paragraphs are broad enough to include any candy which might be sold at retail through means of a lottery, gaming device, or gift device, even though the company did not intend or contemplate at the time of its sale and distribution to jobbers or retailers that it should be retailed through such methods; and that unless the orders are limited they will effectively forbid the sale and distribution in commerce of any candy whatsoever. The first paragraph forbids the sale and distribution of candy so packed and assembled that sales are to be made, or may be made, by means of a lottery, gaming device, or gift device; and the second paragraph prohibits the supplying or placing in the hands of dealers and jobbers assortments which are used, or may be used, without alteration or rearrangement of the contents thereof to conduct a lottery, gaming device, or gift device in the sale or distribution of the candy contained therein. The Circuit Court of Appeals of the Seventh Circuit limited an order quite similar to these in a manner equivalent to striking from the first paragraph of these orders the words "or may be made", and to striking from the second paragraph the words "or which may be used". *Federal Trade Commission v. McLean & Son,* 84 F. (2d) 910. The First Circuit took like action, citing with approval and resting its decision upon the *McLean* case. *Federal Trade Commission v. Charles N. Miller Co., supra.* The Ninth Circuit did likewise, citing both the *McLean* and the *Miller* cases.

Helen Ardelle, Inc. v. Federal Trade Commission, supra. But the Seventh Circuit concluded in the recent case of *National Candy Co. v. Federal Trade Commission, supra,* that its action in the *McLean* case was not well taken. The court said that more deliberate consideration convinced it that the language of the order, in the light of the allegations of the complaint and the findings, could not reasonably be construed to have application to straight candy; that it applied only to candy which carried an unfair appeal to retail dealers and retail purchasers on account of the element of chance involved in the sale of it. Giving the order that construction, the court declined to restrict it. These orders must be construed in the light of the allegations contained in the complaint and the findings of the Commission. And when construed in that manner it is reasonably clear that the first and second paragraphs apply exclusively to candy which is so packed or arranged as to be especially suited to sale at retail in a manner which makes an unfair appeal to retail dealers and retail purchasers on account of the element of chance involved, and to candy which is peculiarly adapted in some other manner to sale at retail by chance method. With these paragraphs thus construed, the orders are not objectionably broad in scope and effect.

[*Conclusion*]

The petitions to set aside the orders are severally denied.

[¶ 55,240] State of New Jersey, on complaint of Harry Lief, v. Packard-Bamberger & Co., Inc., a New Jersey corporation.

New Jersey Supreme Court. Filed September 16, 1939.

Enforcement of the New Jersey Fair Sales Act is denied as a deprivation of property without due process of law where the extension of the prohibitions of the statute beyond sales affected with a public interest, and the failure of the Act to exhibit a purpose of accomplishing any valid object, render the Act an arbitrary and non-beneficial restriction upon trade.

Affirming (N. J.; 1939) 2 Atl. (2d) 599.

Pesin & Pesin, Esqs., 361 Central Avenue, Jersey City, New Jersey; Attorneys for Prosecutor.

Losche & Mounier, Esqs., 210 Main Street, Hackensack, New Jersey; Attorneys for Respondent.

Before CASE, DONGES and PORTER, JJ.

[*Nature of Proceeding*]

DONGES, J. A writ of certiorari was allowed to review the action of the District Court of the Third Judicial District of the County of Bergen in dismissing a complaint alleging violation of Section 2 of Chapter 394 of the Laws of 1938 (P. L. 1938, p. 976) entitled:

"An act to insure and protect fair trade practices in distribution, defining such practices, prohibiting the advertisement, offer for sale or sale of merchandise at less than cost, and fixing penalties for the violation thereof."

Section 2 provides:

"It is hereby declared that the advertisement, offer for sale, or sale of any merchandise at less than cost by retailers is prohibited."

[*"Cost to Retailer"*]

The act defines cost to the retailer in the first section thereof as follows:

"(a) 'Cost to the retailer' shall mean the total consideration necessary for the replacement of the merchandise to the retailer at the retail outlet, such consideration to be determined by applying to said merchandise the same cost per unit as the last quantity purchased by the retailer prior to the sale of the said merchandise would have cost per unit if bought at the most favorable market price available to the retailer at any time within thirty (30) days prior to the said sale less any customary trade discounts, but exclusive of discounts for cash, display allowances and unearned discounts for volume."

"(c) 'Cost to the retailer' and 'cost to the wholesaler' must be bona fide costs and sales to consumers, retailers and wholesalers at prices which cannot be justified by existing market conditions within this State shall not be used as basis for computing costs wtih respect to sales by retailers and wholesalers."

"(d) 'Sell at retail' and 'sales at retail' shall mean any transfer of title to tangible personal property for a valuable consideration where such property is to be used by the purchaser for purpose other than resale, manufacture or further processing. The above terms shall also include any such transfer of property where title is retained by the seller as security for the payment of the purchase price."

"(f) 'Retailer' shall mean and include every person, firm, corporation or association engaged

in the business of transferring title within this State to tangible personal property for a valuable consideration where such property is to be used by the purchaser and is not to be resold or used for the purpose of manufacture or further processing."

[*Exempted Sales*]

In the eighth section, certain kinds of sales are exempted from the provisions of the act. These are, with the exception hereafter noted, clearance sales, sales under judicial proceedings and for charity. The act applies to all other sales of merchandise by retailers.

[*Lower Court Determination of Constitutionality*]

Respondent asserts and the court below held the act to be unconstitutional. No statement of facts appears in the record. The motion was addressed to the sufficiency of the complaint as having no valid statute to support it. The complaint alleges that defendant did "on or about the 7th day of July, 1938, and at other times subsequent thereto, violate Section 2 of Chapter 394 of the Pamphlet Laws of 1938 of the State of New Jersey, in that they did on or about such date advertise, offer for sale and sell merchandise consisting of groceries at less than cost to them, within the meaning and intendment of said law."

Regarding the propriety of the action of an inferior court such as the District Court in declaring a statute unconstitutional, we direct attention to the statement of Mr. Justice PARKER in *Legg v. County of Passaic*, 122 N. J. Law 100, as the guide for courts of inferior jurisdiction. However, because of the importance of the matter to the public, we pass all other questions raised and take up the question of the validity of the statute.

[*Application of Act*]

It will be observed that the statute is very broad in its application to sales of merchandise. By its terms, it applies to every person or group "engaged in the business of transferring title to personal property for a valuable consideration where such property is to be used by the purchaser." Costs to such retailer are established in subdivision (a) of section 1, with limitations in subdivision (c). An exemption in section 8 is created where the price of merchandise is made to meet the "legal price" of a competitor.

In *Wilentz, Attorney-General, v. Crown Laundry Service, Inc.*, 172 Atl. Rep. 331, Vice-Chancellor Bigelow admirably stated the law. He said:

" 'Statutes in derogation of common law rights are to be strictly construed, and we are not to infer that the legislature intended to alter the common law principles further than is clearly expressed, or than the case absolutely required.' *Tinsman v. Belvidere Delaware R. R. Co.*, 26 N. J. Law 148, 167, 69 Am. Dec. 565. No common-law right has been more firmly established or more treasured than the right of the individual to sell his goods or his services at whatever price he and the purchaser might agree upon. Indeed, a few years ago every court in the land would have held that a statute abrogating that right, except in the case of a business or property affected with a public interest, would deprive the individual of his property without due process of law, and therefore be void. *Tyson v. Banton*, 273 U. S. 418, 47 S. Ct. 426, 71 L. Ed. 718, 58 A. L. R. 1236; *Ribnik v. McBride*, 277 U. S. 350, 48 S. Ct. 545, 72 L. Ed. 913, 56 A. L. R. 1327; *Williams v. Standard Oil*, 278 U. S. 235, 49 S. Ct. 115, 73 L. Ed. 287, 60 A. L. R. 596. Doubtless judicial conceptions of the power of the Legislature to restrict the individual's liberty of contrast have been undergoing a change in recent years. *Nebbia v. People of State of New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469. Doubtless legislative power, usually dormant, may be recalled to activity by the stress of the times. *Home B. & L. Association v. Blaisdell*, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481. But, even granting to the Legislature the utmost power which has been claimed for it, it must still be conceded that the exercise of such power requires explicit, unambiguous language. * * * 'Fair competition,' the only authorized subject of the code, may be taken as the opposite of 'unfair competition,' a term which has long been employed by the courts. It has generally been understood to mean a form of competition involving deception of the public as by the imitation of trade-names, labels, etc. The United States Supreme Court, referring to the Federal Trade Commission Act (15 USCA para. 41 *et seq.*), has said: 'The words "unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.' *Federal Trade Commission v. Gratz*, 253 U. S. 421, 40 S. Ct. 572, 575, 64 L. Ed. 993; *Federal Trade Commission v. Raymond Bros.-Clark Co.*, 263 U. S. 565, 44 S. Ct. 162, 68 L. Ed. 448, 30 A. L. R. 1114. Price cutting, by itself, has never been considered unfair competition. *Sears Roebuck v. Federal Trade Commission* (C. C. A.) 258 F. 307, 6 A. L. R. 358."

[*Act Not Limited to Public Interest*]

In the act under consideration there is no limitation to transactions which involve commodities affected with a public interest, or those which may be designed to injure competitors or destroy competition. In this enactment, we find an absolute prohibition of sale "below cost," with punishment

therefor, regardless of intent, purpose, or effect upon fair trade. Just how that cost is to be determined under this act is not clear. Indeed, subdivision (a) of article 1 attempts to establish a standard for determining cost, and subdivision (c) of the same article withdraws that standard by declaring that "prices that cannot be justified by existing market conditions shall not be used." By what rule justifiable market conditions are to be determined does not appear. As above stated, section 8 provides: "The provisions of this act shall not apply to sales at retail or sales at wholesale * * * (e) where the price of merchandise is made to meet the legal price of a competitor for merchandise of the same grade, quality and quantity." How a person is to determine the legality of the price of a competitor is not declared, and the impracticability, if not the impossibility of determining the "legality" of a competitor's price is obvious.

[*Constitutional Guarantees*]

The constitutional guarantees of our Bill of Rights give to every one the right of acquiring and possessing the absolute title to property, with all rights incident thereto, and, as an incident of personal liberty, the right to dispose of such property in such innocent manner as he pleases, and to sell it at such price as he can obtain in fair trade. *State v. Ruback*, 281 N. W. 607.

[*Indefiniteness of Prohibition*]

Keeping in mind the undoubted right to possess and fairly dispose of property, and that the sale of groceries herein involved is in no manner affected with a public interest, does this act define an offense? What is sought to be accomplished by this act? There is no requirement of criminal or illegal intent or purpose. Indeed, the act may be violated without guilty knowledge. A retailer may not only ordinarily not sell below cost to him, but, if he seeks to meet competition, he must expertly study and determine that he is buying under market conditions that are justified, or that the price of a competitor, which he must meet, is "legal." It is apparent that the statutory inhibitions are uncertain and indefinite. The elements of the proscribed conduct it attempts to penalize are not so clearly expressed that a person is informed of the course it is lawful for him to pursue. Action against an alleged offender thereunder would be arbitrary and unreasonable.

In *Fairmount Creamery Co. v. Minnesota*, 274 U. S. 1, 10, 47 S. Ct. 506, 508, 71 L. Ed. 893, 52 A. L. R., it was said:

"It is not permissible to enact a law which, in effect, spreads an all inclusive net for the feet of everybody, upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught.

"As the inhibition of the statute applies irrespective of motive, we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce, but also as beneficial to the public."

In *Connelly v. General Construction Co.*, 269 U. S. 385, 46 S. Ct. 126, it was said:

"The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon one conception of its requirements and the courts upon another.

"In creating an offense which was not a crime at common law, a statute must of course be sufficiently certain to show what the legislature intended to prohibit and punish, otherwise it will be void for uncertainty. Reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible; but when the legislature declares an offense in words of no determinate signification, or its languague is so general and indefinite that it may embrace not only acts commonly recognized as reprehensible but also others which it is unreasonable to presume were intended to be made criminal, the statute will be declared void for uncertainty." 16 C. J. 67.

"The test to determine whether a statute defining an offense is void for uncertainty (1) is whether the language may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts. *Czana v. Board of Medical Supervisors*, 25 App. D. C. 443. (2) The dividing line between what is lawful and what is unlawful cannot be left to conjecture. *United States v. Capital Traction Co.*, 34 App. D. C. 592, 19 Ann. Cas. 68; *United States v. Washington R. & E. Co.*, 34 App. D. C. 599." 16 C. J. 68.

[*Cases Distinguished*]

The California case of *Wholesale Tobacco Bureau v. National Candy & Tobacco Co.*, 82 Pac. Rep. 2nd 13, is cited and relied upon by prosecutor, but we think the reasoning of that case is inapplicable because of a material difference between the California statute there under consideration and our statute. The California statute prohibited the sale of articles at less than cost or the giving away of articles "for the purpose of injuring competitors and destroying competition," and the court held that this intent

clause applied to both sales and gifts of articles. The court said "It must be borne in mind that this statute does not regulate the selling of commodities—it is the predatory trade practice of selling below cost with intent to injure competitors which the legislature on reasonable grounds has determined is vicious and unfair that is prohibited." And further "The statute embodies the concept that sales made at a loss to the seller, when made for the purpose of injuring or destroying competition, are predatory and anti-social in character. The economic wisdom of such a concept may be debatable, but being debatable, the legislature is empowered to choose between its acceptance or rejection. The statute, so far as the facts here involved are concerned, goes no further than reasonably necessary to effectuate that choice." The court further said: "It would certainly add to the weight of appellant's argument on the main issue if the statute omitted intent as an integral part of the act prohibited. It is one thing, from a legal standpoint, to prohibit sales below cost engaged in for the purpose of injuring competitors and destroying competition, and quite another to merely prohibit all such sales regardless of intent. It may well be that an absolute prohibition regardless of intent would be unreasonable." Citing *Fairmount Creamery Co. v. Minnesota, supra.*

Prosecutor also relies upon *Rust v. Griggs,* (Sup. Ct. of Tenn.) 113 S. W. (2nd) 733, but in that case the statute was upheld because it was designed to prohibit only sales made with wrongful purpose or with intent to destroy competition and injure competitors. Likewise, in *State v. Langley,* 84 Pac. (2nd) 767, the Supreme Court of Wyoming, in passing upon a statute of that state, dealing with a plea of guilty to a sale of merchandise below cost for the purpose of injuring a competitor and with the intent to stifle competition, put its decision upon the ground that the statute "condemns acts committed with intent (a) to injure competitors and (b) to destroy competition."

The case of *State v. Ruback,* 281 N. W. 607, is more nearly like the instant case. There the Supreme Court of Nebraska declared void a statute making it a misdemeanor to sell or give away, or advertise for sale any article at a price which "may lessen, injure, destroy or prevent, hinder or suppress the competition of competitors." The court held that there was "no definition of criminal intent, or of evil or criminal purpose or of guilty knowledge."

[*Uncertainty of Offense*]

In the case presently pending, there is no definition of wrongful intent or purpose to limit fair competition or to inflict injury upon anyone. Indeed, intent or motive or the existence of injury to anyone are not essential to punishment under this act. As above stated, guilt may obtain without knowledge of the violation of any of its provisions. A person might believe he was complying with the provisions of this act in all respects, and find himself guilty of its violation because he purchased goods at a price not justified by market conditions, of which he was unaware, or that he met the price of a competitor, believing such price to be a lawful one, when it was not a "lawful price."

[*Conclusion*]

We conclude that the legislative act under consideration does not relate only to the sale of commodities affected with a public interest, as in *Nebbia v. New York, supra,* and other decisions of various courts; that it does not define any public harm or damage to be averted, such as the giving of trade inducements or committing other acts to lessen competition or injure competitors or the stifling of fair competition by other forms of price discrimination. It does not anywhere exhibit a purpose to accomplish a valid object. It arbitrarily imposes restrictions upon trade, when no injury is inflicted thereby and without resultant benefit to any one.

[*Enforcement Unconstitutional*]

To give effect to this act would be to deprive the respondent of its property without due process of law, in violation of its constitutional rights.

[*Discharge of Writ*]

The writ is discharged, with costs.

[¶ 55,241] George F. Ringsby and J. W. Ringsby, Plaintiffs in Error, v. Tony C. Timpte and Clemens A. Timpte, d/b/a Timpte Brothers, and Robert Eagle, Defendants in Error.

Colorado Supreme Court. Decided September 11, 1939.

Error to the District Court of the City and County of Denver.

Breach of representations as to profit to be derived from a contract for hauling products of packers affords no ground for damages where the required purchase of hauling equipment from the exclusive contracting agent of the packers, a hauling equipment manufacturer, as a condition to the letting of contracts renders the agreement void as a violation of the Clayton Anti-Trust Act.

Messrs. Moffett & Hitchcock; Attorneys for Plaintiffs in Error.

Mr. Clarence Eynon; Attorney for Defendants in Error.

HILLIARD, C. J., BAKKE and BURKE, J. J., concur.

[*Statement of Proceedings*]

BAKKE, J.: Plaintiffs in error brought action for damages for breach of contract in connection with the purchase by them from defendants in error of certain transportation equipment which purchase was induced, as plaintiffs in error allege, by certain fraudulent representations made to them by defendants in error. At the close of plaintiffs' case, on motion of defendants, the action was dismissed. Reversal is sought on application for supersedeas, and because of the apparent correctness of the disposition of the case by the trial court we proceed to an affirmance of the judgment promptly, although basing our conclusions upon a different ground than that announced by the trial court.

[*Representations Involved*]

The representations upon which plaintiffs relied for recovery and which they asserted had no basis in fact, were as follows:

1. That certain large packers, to wit: Swift & Co., and Armour & Co., and others, were at the time of said representations desirous of employing private parties such as the plaintiffs, under contract for the regular hauling of their products.
2. That in order to secure such a contract the said packers were at that time requiring such parties to purchase and use the type of refrigerator equipment manufactured only by Timpte Brothers, the defendants.
3. That defendants had previous to the time of the said negotiations, made certain connections and that certain understandings and agreements were then in existence between them and the said packers respecting the employment of purchasers of Timpte Brothers Equipment.
4. That by virtue of their connections and agreements with the said packers, Timpte Brothers were at that time authorized by the said packers to act as their agents, and to negotiate contracts and to execute contracts on behalf of the said packing companies for such regular hauling between Chicago and Denver, and between Denver and California and intervening points, and for return loads from such points.
5. That in specifying the particular type of equipment recommended to the plaintiffs, and concerning which said negotiations were made, and in contracting with the plaintiffs for such hauling employment, the defendants were acting within their authority and as agents of the said packers.
6. That such hauling contracts could not at that time be had nor in anywise be procured without purchasing the specified equipment manufactured by Timpte Brothers.
7. That the hauling jobs were being furnished with and as a part of the purchase of the equipment.
8. That the defendants had previously secured the authority to complete the contracts for such hauling, and that such contracts could be and were being given to the plaintiffs with the purchase of the equipment on completing the arrangements therefor and procuring the necessary licenses and permits.
9. That the defendants had previously fully investigated the conditions of the hauling contracts and were familiar with the requirements of the service and the expenses and the profits under such hauling contracts, and that from their knowledge and by reason of their authority they could and did assure the plaintiffs of such immediate hauling contracts with regular and steady employment thereunder, with an assured profit in a substantial sum, to wit, the sum of fourteen hundred dollars per month.

[*Existence of Monopoly*]

These statements show that the alleged contract would clearly be violative of section 2, Title 15, Commerce and Trade, U.S.C.A., which is as follows:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, § 2, 26 Stat. 209)." See *Swift & Co. v. United States,* 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518.

[*Violation of Anti-Trust Act*]

There is nothing in the record to nullify the alleged representations as to the required exclusive use of Timpte Brothers equipment by the packers in their transportation activities, or to indicate that such requirement, if present, was not wholly arbitrary or that the named equipment was the only procurable one which would serve the needs of the packing companies. This being true, the alleged agreement unquestionably would be in violation of the provisions of the federal act above quoted. See *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518.

[*Conclusion*]

It follows that the agreement, if executed, would be illegal and void, and no action would lie for a violation of its terms.

[*Dismissal Affirmed*]

Judgment affirmed.

[¶ 55,242] The Great Atlantic & Pacific Tea Company v. Federal Trade Commission.

United States Circuit Court of Appeals, Third Circuit. Filed September 22, 1939.

On Petition for Review of an Order of the Federal Trade Commission.

Brokerage payments to field buying agents of a customer are held to be prohibited by the Robinson-Patman Act when the field buying agents acted as agents of the customer and such services as they rendered to sellers were purely incidental to their representative capacity.

The prohibitions of the Robinson-Patman Act with reference to payment of brokerage fees are to be read independently of subsection (a), prohibiting price discrimination only if it lessens competition or tends to create a monopoly.

The provision of the Robinson-Patman Act prohibiting payment of brokerage fees in certain instances is held to be a valid exercise of Congressional power to regulate commerce.

Affirming Federal Trade Commission Order No. 3031.

Before BIGGS and MARIS, Circuit Judges, and KALODNER, District Judge.

[*Petition to Set Aside FTC Order*]

BIGGS, Circuit Judge.—The petitioner, The Great Atlantic & Pacific Tea Company, seeks to have this court set aside an order of the Federal Trade Commission entered on January 25, 1938, requiring the petitioner to cease and desist from certain alleged violations of Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, Act of June 19, 1936, c. 592, Section 1, 49 Stat. 1526 (15 U. S. C. A. 13(c)). The order referred to is set out as an appendix to this opinion.

[*Assignments of Error*]

The petitioner relies on three assignments of error. These are as follows: (1) that the Commission erred in finding that "No brokerage or selling services whatsoever, or any other form of services in connection with the purchase of supplies by, or the sale thereof to, the Respondent are intended to be or are rendered to sellers by the Respondent or by any agents or employees of the Respondent"; (2) that the Commission erred as a matter of law in holding that the petitioner is not entitled to an allowance or discount reflecting alleged savings to sellers of brokerage or services in lieu of brokerage; and (3) that the Commission erred in finding ". . . that the acceptance of discounts in lieu of brokerage by the Respondent tends to injure competition between the Respondent and its competitors, and does injure competition between sellers who grant such discounts and allowances to the Respondent and those who do not".

[*Whether Findings of Fact Are Supported*]

Since questions of fact as well as law are presented for our consideration, we will deal first with the facts. There is no doubt, as this court stated in *Federal Trade Commission v. Artloom Corporation*, 69 F. (2nd) 36, 37, 38, that "The fact findings of the Commission, if supported by testimony, shall be conclusive." See *Federal Trade Commission v. Algoma Lumber Company*, 291 U. S. 67, 73; *Federal Trade Commission v. Standard Education Society*, 302 U. S. 112, 117, and *Minter v. Federal Trade Commission*, 102 F. (2nd) 69, 70. It is also the law that the ". . . weight to be given to the facts and circumstances admitted,

as well as the inferences reasonably to be drawn" from such facts and circumstances are for the Commission, *Federal Trade Commission v. Pacific States Paper Trade Association,* 273 U. S. 52, 63, and that courts will not ". . . pick and choose bits of evidence to make findings of fact contrary to the findings of the Commission," *Federal Trade Commission v. Standard Education Society, supra,* at p. 117. The duty of this court, therefore, in examining the findings of fact of the Commission is to ascertain whether or not such findings have support in the record before the Commission.

The Facts

The petitioner is engaged in the retail grocery business and in conjunction with its affiliates operates more than 14,800 retail grocery stores located throughout the United States. Naturally, it competes with other chain grocery stores and with individuals or corporations operating grocery stores locally within the areas where the petitioner does business. The petitioner has divided the country into six geographical divisions. Each division in turn is divided into a number of units. Each unit contains a warehouse. Each division has a purchasing director. Each warehouse also employs a purchasing director or buyer. The purchasing directors and the warehouse buyers have the authority to purchase the commodities and products required by the petitioner to maintain its many stores.

In addition to the foregoing, the petitioner maintains a number of central buying offices. These are located in key cities, as, for example, in New Orleans, Baltimore and San Francisco. These central buying offices are in charge of agents of the petitioner. The salaries of these agents are paid by the petitioner as are the expenses of maintaining the offices. The Commission found as a fact that the duties of these agents consist of continuously searching for and finding sources of supply for the petitioner's stores, of furnishing the petitioner with market information, and of purchasing commodities for the petitioner.[1] The field buyers have no authority to make purchases except upon the instructions of the purchasing directors and the warehouse buyers. The field buyers are constantly in touch with these officers however. The Commission also found as a fact that prior to June 19, 1936, the petitioner designated these agents as "brokers"; next referred to them as "purchasing agents"; next as "field buying agents" or simply as "buyers".[2] They are in fact field contact men who are and remain in touch with sellers and prospective sellers of commodities. Their duties in no wise changed with their change of name.

It is in respect to the duties, obligations and labors of these buyers or field buying agents that the controversy at bar arises. The petitioner points out that the field buyers furnish sellers with certain services. For example, the record shows that they exchange information as to market conditions with sellers. They visit manufacturing establishments and advise managers as to methods whereby the quality of commodities may be improved. They also advise manufacturers as to the sizes of containers. They furnish sellers with traffic information as to the routing of commodities purchased by the petitioner. When sellers are threatened with a glut of commodities which may break the market, the field buying agents call the existence of such conditions to the attention of the divisional purchasing directors who endeavor to relieve the glut by buying commodities.

The petitioner contends that these services are of great value and exceed those customarily rendered by brokers, and takes the position that these field buying agents "perform substantially the same services and functions as a broker, namely, to bring buyer and seller together; to act as intermediary and to serve both" and that sellers did not sell "to the field man but *through* him, and that, in consequence, their sales to the petitioner were not *direct* sales."[3] The petitioner also contends that one of the outstanding services rendered by the field buying agents is in preventing sellers from selling their products or commodities at too low a price. The Commission found as a fact, however, that "the loyalty and allegiance" of the field buying agents "are due solely to the Respondent and in all matters and transactions participated in by said field buying agents relative to or in connection with the business of Respondent or the purchase of commodities by or the sale thereof to the Respondent, said field buying agents devote their loyalty and allegiance solely to the Respondent."[4]

It is clear that prior to June 19, 1936, the effective date of the Robinson-Patman Act, the sellers paid brokerage to the field buying agents of the petitioner in the same amounts as were paid by the sellers to brokers acting as agents for such sellers. Such brokerage was received by the field buying agents on behalf of the petitioner and was paid by them to the petitioner.

Within a comparatively short time after June 19, 1936, the petitioner issued new instructions to its field buying agents. These instructions provided that the field buyers should accept no further brokerage from the sellers on purchases of commodities and should make all future purchases for the petitioner on one of three bases. These bases required the field buying agents to adopt one of the following methods in dealing with sellers: (1) to purchase commodities and products for the petitioner for a net price which was to reflect a reduction from the sellers' prices to other customers or from the general market price, this reduction reflecting in amounts brokerage paid by the sellers to the field buying agents of the petitioner prior to June 19, 1936, being also amounts equivalent to amounts currently paid by the sellers to brokers; (2) to execute "quantity discount agreements" with the sellers, these agreements providing for payment to the petitioner monthly as a "quantity discount" an amount equal to the brokerage paid monthly by the sellers to the field buying agents prior to June 19, 1936; and (3) if the sellers were unwilling to sell on the conditions imposed by (1) and (2) above, to make an agreement with sellers whereby the sellers were to keep a

[1] Paragraph Five of the Findings of Fact.
[2] Paragraph Six of the Findings of Fact.
[3] Petitioner's brief, at page 10.
[4] Paragraph Nine of the Findings of Fact.

record of the brokerage which they would have paid to the field buying agents prior to June 19, 1936 and to pay into escrow or to set up in "abeyance accounts" on their books sums equivalent to such brokerage until the legality of making payments covering such amounts should be determined in the light of the Robinson-Patman Act.

The record shows the purchase by the petitioner of commodities in interstate commerce on each of the three bases enumerated. In respect to basis (2), supra, it also appears that some agreements were made to operate retroactively from the dates of execution to June 19, 1936. It further appears that while the quantity discount agreements purported to require the petitioner to purchase specified quantities of commodities in order that the discount might be earned, there is evidence that the petitioner received discounts whether the quantity purchasing provisions of the contracts were fulfilled or not.[5]

Other findings of fact of the Commission must be referred to briefly. The Commission found that from the net prices at which the field buying agents purchased commodities for the petitioner subsequent to June 19, 1936, the field agents deducted from the sellers' current prices to their customers an amount equal to the brokerage which would have been paid to the field buying agents by the sellers prior to the passage of the Robinson-Patman Amendment. As to purchases under the quantity discount agreements, the amounts of the discounts were paid by the sellers to the petitioner. These amounts were substantially equivalent to the sums paid by these sellers to the field buying agents prior to June 19, 1936.[6] In respect to purchases not made for net prices or under quantity discount agreements, petitioner required the sellers to pay the brokerage into escrow or set up abeyance accounts made by the field buying agents for the petitioner.[7] The net prices at which the field buying agents purchased commodities for the petitioner did not precisely reflect exact amounts of brokerage because such would result frequently in a sale price involving fractions, contrary to the usages of the trade. The Commission found as a fact that the petitioner "instructed its field buying agents to avoid the use of such fractions wherever possible in agreeing upon the net price to be paid for commodities by the Respondent so that said net prices would not appear to involve any allowance in lieu of brokerage".[8] The Commission also found that with "extremely few exceptions" the petitioner was the only customer of such sellers to whom such sellers sold commodities upon the bases indicated above.[9]

The Commission also found that when the field buyers purchased commodities from sellers brokerage services were neither used nor invoked by either the sellers or the petitioner; that the sellers did not receive the benefit of brokerage services, but that nonetheless the petitioner "obtains, receives and accepts the equivalent of brokerage currently paid by sellers to their brokers for brokerage services actually rendered to said sellers by their said brokers in selling commodities for said sellers." [10] The Commission also found that when services are performed by brokers representing sellers, viz., finding customers for such sellers, brokers act under the control of the sellers and sell commodities to the customers for such sellers and that brokers' functions as selling agents and the services rendered by them are a selling service for those by whom they are employed.[11] The Commission also found that in all matters and transactions whereby the field buying agents purchased commodities for the petitioner or dealt with sellers in connection with the purchase of commodities, the services of the field buying agents were intended to be and were in fact rendered to the petitioner solely and that the field buying agents are subject to the sole control of the petitioner and do not represent or purport to represent themselves to be agents for the sellers nor render any brokerage or selling service to the sellers.[12]

The Commission also found that subsequent to June 19, 1936, the petitioner purchased commodities through its field buying agents upon the bases indicated in (1) and (2) supra, and has received and accepted allowances and discounts in lieu of brokerage.[13]

Concluding its findings of fact the Commission states, "The effect of the receipt of allowances and discounts in lieu of brokerage by the Respondent has been, and will continue to be, to cause substantial injury to competition between those sellers who have granted and paid such allowances and discounts to the Respondent and those sellers who have refused to do so, in that there has been and there will continue to be a diversion of Respondent's business from the latter to the former, and the effect of the receipt of allowances and discounts in lieu of brokerage by the Respondent has a direct and immediate tendency substantially to injure, destroy and prevent competition between Respondent and Respondent's competitors in the resale of commodities upon the purchase of which the Respondent receives discounts and allowances in lieu of brokerage in that the Respondent, by the receipt of such discounts and allowances in lieu of brokerage, is enabled to and does purchase commodities at prices substantially lower than the prices at which its competitors can and do purchase the same commodities from the same sellers and the Respondent is thereby enabled to resell said commodities at prices substantially lower than the prices at which its competitors can resell such commodities".[14]

The petitioner takes the position that two issues of facts are presented by the pleadings. The first is whether or not the petitioner through its field buying agents rendered services to sellers in connection with the purchases of commodities by the petitioner. The second is whether or not the petitioner received net prices, allow-

[5] Paragraph Fourteen of the Findings of Fact.

[6] Paragraphs Fourteen (b), Nineteen, and Twenty-five, *Idem.*

[7] Paragraphs Fourteen (c) and Sixteen, *Idem.*

[8] Paragraph Seventeen of the Findings of Fact.

[9] Paragraph Eighteen, *Idem.*

[10] Paragraph Nineteen, *Idem.*

[11] Paragraph Twenty-one, *Idem.*

[12] Paragraphs Twenty-two and Twenty-three of the Findings of Fact.

[13] Paragraphs Twenty-four and Twenty-five, *Idem.*

[14] Paragraph Twenty-six of the Findings of Fact.

ances or discounts in lieu of or as the equivalent of brokerage resulting in discriminatory prices prohibited by the Amendment.

As to the first question, it is the petitioner's position that the net prices, allowances and discounts received by the petitioner from the sellers as arranged by its field buying agents or sums now held in escrow or upon abeyance accounts upon the books of the sellers, were for services rendered by its field buying agents to such sellers. Therefore, says the petitioner, it is not within the prohibition of section (c) of the Amendment. The difficulty presented by the petitioner's position, however, is that the evidence in no wise supports its contention that the net prices, allowances, discounts, escrow sums or abeyance accounts received by or made available to the petitioner by the sellers were made available or paid to the petitioner because of the alleged services rendered by its field buying agents to sellers. The great weight of the evidence indicates the contrary. The net prices, discounts and allowances received by the petitioner, the setting up of abeyance accounts and escrow sums for its benefit are nothing more than devices put into effect by the petitioner in attempted avoidance of the prohibitions of the Robinson-Patman Act. It would be fruitless to pursue this issue of fact further.

In respect to the second question, the petitioner contends that the net prices given to it by sellers were possible because of saving of brokerage; that in addition to brokerage other savings were effected to which the petitioner became entitled because of the contact maintained by the field buying agents with the sellers. The petitioner points out that the sellers were saved traveling expenses, salesmen's salaries and commissions, telephone and telegraph charges, the expense of correspondence with brokers and salesmen. Therefore, says the petitioner, the prices paid by it were not discriminatory, since reductions in price were paid for by valuable services. Inherent in these very arguments which the petitioner makes is the inescapable conclusion that the sums "saved" to the sellers allegedly because they were not compelled to pay brokers, were not saved to them at all, but were merely translated into another form to the financial benefit of the petitioner. In regard both to net prices and quantity discounts, the Commission found as a fact that "some sellers effect savings other than brokerage on purchases made for the Respondent by the Respondent's field buying agents, but the only savings represented by the net prices and quantity discounts . . . were brokerage savings accruing to sellers as a result of having themselves made sales to the Respondent without invoking or using the selling or brokerage services of another, and no savings other than brokerage services were intended to be, or were, passed on by sellers to the Respondent or received by the Respondent from sellers.[15]

We entertain no doubt that the petitioner's receipts of net prices, allowance and discounts in lieu of brokerage injured competition.

In conclusion we state that we have carefully examined the findings of the Commission and the record. Not only are the findings of fact made by the Commission supported by the evidence, but we state as our opinion that the Commission properly could have reached no other conclusions than those expressed.

The Law

The petitioner presents three questions of law which it contends must be decided in its favor. We will deal with these questions in the order which seems most convenient.

Section 2 (c) of the Robinson-Patman Amendment provides that

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

[*"Services Rendered"*]

1. Subsection (c) contains an absolute prohibition of payments or allowances of brokerage or sums in lieu of brokerage from sellers to buyers.

The petitioner contends that the "services rendered" clause of paragraph (c), supra, provides an exception to the prohibition expressed in the paragraph by reason of which "a commission, brokerage, or any allowance or discount in lieu thereof" may be paid lawfully to a buyer upon purchases made by him. We are of the contrary opinion and believe that paragraph (c) expresses an absolute prohibition of the payment of brokerage or compensation in lieu thereof to the buyer upon the buyer's own purchases. If the contention of the petitioner be accepted, all the words employed by Congress in the paragraph after the "services rendered" clause become meaningless and unnecessary. The Circuit Courts of Appeals for the Second and Fourth Circuits respectively have passed upon this question in the cases of *Biddle Purchasing Company v. Federal Trade Commission*, 96 F. (2nd) 687, certiorari denied 305 U. S. 634, and *Oliver Brothers v. Federal Trade Commission*, 102 F. (2nd) 763.

In the *Biddle* case, at page 691, the Court of Appeals of the Second Circuit states:

"Congress must have intended that payments by sellers should not be made to buyers through any one acting as agent for the buyer . . . if buyers' agents or intermediaries are excepted for services rendered, so too are the buyers

[15] Paragraph Twenty of the Findings of Fact.

themselves. The intent of Congress must be recognized and applied and this may best be given effect by a construction of the phrase 'except for services rendered' that will harmonize with the remainder of the section. As the House and Senate Committee said, the intermediary is entitled to nothing more than 'appropriate compensation by the one in (whose) interest he so serves' and one who acts in such capacity may not receive fees from the seller when he is under contract and does in fact turn over such fees to the buyer."

In the *Oliver* case the Circuit Court of Appeals for the Fourth Circuit stated,

"We come . . . to the . . . question . . . whether the brokerage commissions here involved come within the exception contained in Section 2 (c), i. e., are they paid for services rendered to the sellers? A sufficient answer to the question is found in the fact that the commissions are received by the buyers and not by Oliver, and that there can be no contention that any services are rendered by the buyers to justify the payment of compensation to them.

. . . "If (services rendered) were a sufficient basis to bring the allowance of the brokerage commissions within the exception of the Section, every purchasing agent for a chain of stores might lawfully receive such commissions; for he does for the stores of his chain precisely what is done by Oliver for the subscribers to its services and benefits the sellers in making sales in precisely the same way. We have no doubt that it was just this sort of thing that it was the purpose of the Act to prevent.

. . . "Because of the buying power possessed by purchasing agents, whether representing chains or independent dealers, sellers may be willing to allow them brokerage commissions and may consider such commissions earned in the sense that the sellers are thus enabled to sell goods without resorting to other sales devices; but the fact remains that the buyer who receives the brokerage allowed his purchasing agent receives an advantage, and a concealed advantage, which the buyer who purchases directly with the dealer does not receive. It was this sort of discrimination, we think, which it was the purpose of this Section of the Act to forbid."

The facts of the *Biddle* and *Oliver* cases are very similar to those of the case at bar. In the *Biddle* and *Oliver* cases, the seller-respondents were required by the Commission to cease the payment of brokerage intended for transmission to the purchasing companies, and the Biddle and Oliver Companies were required to cease accepting such brokerage. As we have stated, in the case at bar the petitioner contends that services of such a character were rendered by the petitioner's field buying agent to the sellers as to justify the payment of compensation to the petitioner. We have indicated heretofore our estimation of the true value of such services, but assuming them to be of the nature and character which the petitioner alleges, nonetheless the consideration received by the petitioner from the sellers on account of them is within the prohibition of the statute which is absolute.

We are required to give full effect to the words employed in the Amendment. We refer to House Report No. 2287, 74th Congress, Second Session, at page 3, and to the same report, at page 15. It is there stated that paragraph (c)

"permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage *except for services rendered. It prohibits its allowance by the buyer direct to the seller or, the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary in fact for or in behalf, or subject to the direct or indirect control of the other.*"

We have italicized the words of particular import in the language quoted. Language employed in Senate Report No. 1502, 74th Congress, Second Session, is to similar effect.

At each stage of its enactment, paragraph (c) was declared to be an absolute prohibition of the payment of brokerage to buyers or buyers' representatives or agents. Such is the plain intent of the Congress and thus we construe the statute. Any other result would frustrate the intent of Congress. Exceptions contained in statutes are to be construed strictly. *United States v. Scharton,* 285 U. S. 518, 521; *Spokane & Inland Empire R. Co. v. United States,* 241 U. S. 344; *Rochester Telephone Company v. United States,* 23 F. Supp. 634, affirmed — U. S. —.

The petitioner takes the position that its field buying agents may act properly both as agents for the petitioner and for those that sell to it; that is to say, may serve both as the agents of the vendee and the vendors. The question presented, however, is not one of propriety of agents serving in dual capacity. Such a course was not prohibited by the common law if the status of the dual agency was disclosed fully. The question presented for our consideration is simply whether or not the vendee may be compensated for services rendered by the vendee's agent acting as agent for the vendors. It is obvious that dual representation by agents opens a wide field for fraud and oppression. Conflicting interests are always engaged when an attempt is made by buyers and sellers to arrive at a market price for commodities. We entertain no doubt that it was the intention of Congress to prevent dual representation by agents purporting to deal on behalf of both buyer and seller. For this reason paragraph (c) is framed by disjunctives. The edge of the paragraph cuts

two ways, prohibiting the payment or receipt of commissions, discounts or brokerage to the adversary party by the other's agent. The phrase "except for services rendered" is employed by Congress to indicate that if there be compensation to an agent, it must be for bona fide brokerage, *viz.*, for actual services rendered to his principal by the agent. The agent cannot serve two masters, simultaneously rendering services in an arm's length transaction to both. While the phrase, "for services rendered", does not prohibit payment by the seller to his broker for bona fide brokerage services, it requires that such service be rendered by the broker to the person who has engaged him. In short, a buying and selling service cannot be combined in one person.

Paragraph (c) was intended to effect and did effect a change in the law. Congress had ascertained that trade practices such as those employed by the petitioner prior to June 19, 1936 resulted in unfair competition. Prior to the passage of the Robinson-Patman Amendment the petitioner received brokerage in monthly installments from sellers. Following the amendment, the petitioner inaugurated the three methods heretofore referred to to avoid that which the Act forbade. As we have stated the attempted avoidance is unsuccessful. The record clearly requires the conclusion that the field buying agents of the petitioner were the agents of the petitioner and that such services as were rendered by them to sellers were purely incidental to such representative capacity. For such incidental services, the petitioner may not be compensated.

[*Independence of paragraphs (a) and (c)*]

2. Paragraphs (a) and (c) possess separate significance and are independent of each other.

The petitioner contends that the Commission has treated paragraph (c) as a wholly independent statute which may not be construed in the light of the Amendment as a whole. What the Commission stated in respect to this issue is as follows: "Paragraph (c) is complete on its face. It contains no ambiguous language necessitating reference to paragraph (a) for the purpose of determining its meaning. It deals specifically with a particular trade practice which was regarded by Congress as an unfair method of competition, *per se* injurious to commerce, and therefore to be prohibited. The intention of Congress to treat paragraph (c) as independent of paragraph (a) is apparent from both the form of the Robinson-Patman Act and from its legislative history."

In its argument to this court and upon its brief, the petitioner states that it pleaded that if paragraph (c) of Section 2 of the Act ". . . was to be construed as standing alone and independent of any other provision of the Act and as simply preventing parties from making a contract which had no relation to discriminatory prices, or without regard to any injurious effect on competition, it was unconstitutional."[16] Actually, however, the petitioner pleaded that paragraph (c) ". . . was unconstitutional and void, because . . . it deprives persons of the right to contract irrespective of the effect of such contracts on commerce and seeks to make unlawful an agreement between persons with respect to the payment for services without regard to the effect on interstate commerce of such services . . .". The petitioner now contends, however, that net prices, allowances and discounts may be passed on to buyers under the cost differentials proviso in paragraph (a).[17]

It would be well at this point we think to discuss briefly Section 2 as a whole.

[16] Petitioner's brief, page 2.

[17] Paragraph (a) provides:

"(a) Price; selection of customers. It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein con-

Paragraph (a) deals with the selection of customers and provides that it shall be unlawful to discriminate in price between them. Then follow the cost differential provisos upon which the petitioner relies. Paragraph (b) provides that the burden of rebutting a prima facie case of discrimination rests upon the person charged with a violation of the Section. Paragraph (c) prohibits the payment or acceptance of commission or brokerage or other compensation, except for services rendered, as we have indicated. Paragraph (d) provides that it shall be unlawful to pay or contract for the payment of anything of value for services or facilities unless such payment or consideration is available on proportionally equal terms to all other customers competing in distribution of such products or commodities. Paragraph (e) prohibits the furnishing of services or facilities for processing or handling upon terms not accorded to all purchasers on proportionally equal terms. Paragraph (f) prohibits persons from knowingly receiving a discrimination in price prohibited by Section 13.

Section 3 of the Clayton Act as amended by the Robinson-Patman Act (15 U. S. C. A. 13a), to which the petitioner specifically refers, makes it unlawful "to be a party to, or assist in" a purchase or sale "which discriminates to his knowledge against competitors of the purchaser" by means of "any discount, rebate, allowance or advertising service charges" not available to those in competition with such purchaser, or to sell at a lower price in one territory than another, or to sell at an unreasonably low price for the purpose of destroying competition or eliminating a competitor.

Relying upon the foregoing, the petitioner contends that the legislative intent was to prevent price discriminations having a prejudicial effect on competition or which tended to lead to monopoly. We are of the opinion that this was the intention of Congress and the Act as a whole represents such legislative intent. We also conclude that paragraph (c) must be construed in the light of the Act and the evils which the Act was intended to remedy. The petitioner, however, takes the position that the language of paragraphs (a) and (c) is intended to be read together. If it be the case that the cost differentials provisos of paragraph (a) become part of and must be read into the language of paragraph (c), then it is obvious that the petitioner is entitled to the relief it seeks from this court for the complaint of the Commission against the petitioner in this case is based on the proposition that an offense prohibited by the Act is made out by the petitioner's acceptance of allowances and discounts in lieu of brokerage. As the petitioner says, no other allegation is made. In other words, if the allowances and discounts in the case at bar be deemed to be permissible by reason of the cost differential provisos of paragraph (a), it is clear that the petitioner is entitled to have the cease and desist order of the Commission set aside.

This precise question was raised in the *Biddle* case. The Court there stated (p. 690):

"It is argued that Section 2 (c), 15 U. S. C. A. § 13 (a), under which this proceeding is brought, is to be construed in the light of section 2 (a), and that, so construed, the payment or receipt of the brokerage is illegal only when it has such effect upon competition as is provided in section 2 (a). The argument is that the receipt of brokerage here would be illegal only if it restricts competition or restrains trade or injures a competitor. But no complaint is made against Biddle Company or the other petitioners for this reason. The complaint here is under the provisions of Section 2 (c) and not Section 2 (a) of the statute. The validity of the order entered is dependent entirely upon the legality of section 2 (c)."

A similar contention was made in the *Oliver* case. The court there stated (pp. 766, 767):

"The argument is made that the provisions of Section 2 (a) with respect to limitation of competition or tendency to create monopoly must be read into Section 2 (c) . . . Must the Robinson-Patman Act be so construed . . .? We think that (the question) must be answered in the negative.

"The Robinson-Patman Act . . . was an amendment of the Clayton Anti-Trust Act . . . Section 2 of the Clayton Act, which was the section amended, merely forbade discrimination in price when the effect of such discrimination was to substantially lessen competition or tend to create monopoly. The Robinson-Patman Act broadened the scope of this provision, conferred upon the Federal Trade Commission power to establish quantity differentials . . . and cast the burden of proof upon one charged with discrimination to justify any discrimination shown. Receipt of price discrimination was made unlawful for the first time, section 2 (f) . . . and three specific matters were forbidden as unfair trade practices by subsections (c), (d) and (e), viz.: the granting of commission or brokerage

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tained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

or any allowance in lieu thereof, to the other party to the transaction or his agent, the making of discriminatory payments by seller to buyer for services rendered by the latter and discrimination by the seller in the rendering of services to the buyer. It is perfectly clear that all three of these practices were forbidden because of their tendency to lessen competition and create monopoly, without regard to their effect in a particular case; and there is no reason to read into the sections forbidding them the limitations contained in section 2(a) having relation to price discrimination, which is an extremely difficult matter to deal with and is condemned as unfair only in those cases where it has an effect in suppressing competition or in tending to create monopoly. The forbidding of specific practices because of their tendency toward a general result, also forbidden, is familiar legislative practice; and no reason suggests itself why the limitations and provisions relating to one should be read into those relating to the other."

We will state briefly our reasons for reaching a similar conclusion. An examination of paragraph (a) shows that it deals with discriminations in price generally. Paragraph (c) upon the other hand deals in particular with a trade practice which has frequently resulted in price discriminations and unfair competition. It is obvious that by its express language paragraph (c) must be applied only to transactions occurring in the course of interstate commerce. Paragraph (a) prohibits price discriminations "where either or any of the purchases involved in such discrimination are in commerce." In this connection the House Committee [18] stated that the clause just quoted is of "first importance in extending the protections of this bill against the full evil of price discrimination, whether immediately in interstate or intrastate commerce, wherever it is of such a character as tends directly to burden or affect interstate commerce." Paragraph (a) is plainly directed toward price discrimination, no matter how arising, so long as it injures competition or affects the stream of commerce. Paragraph (c), upon the other hand, deals with one particular subject, viz., allowances and discounts in lieu of brokerage or brokerage of such nature and kind that commerce generally is affected thereby. In other words, paragraph (c) constitutes a specific prohibition of a specific act and the acts committed by the petitioner are within such prohibition. To read the words of paragraph (a) into paragraph (c) destroys the Congressional intent.[19] For example the language of paragraph (b) relates to proceedings brought pursuant to the provisions of paragraphs (a) and (e) but are not applicable to proceedings instituted under paragraphs (c) or (d). Thus viewed, the provisions of all the paragraphs of Section 2 are consistent and deal logically with their respective subjects. The respective paragraphs must be read with due regard for the provisions of each.

[*Constitutionality*]

[3] If Paragraph (c) be Construed as an Absolute Prohibition of Payment or Allowance of Brokerage or Sums in Lieu of Brokerage to Buyers, it is Nonetheless Constitutional.

As was stated in *Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548, 570, the power of Congress "to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection and advancement' . . . to adopt measures 'to promote its growth and insure its safety' . . . to 'foster, protect, control and restrain' ". The plenary power of Congress to such ends is subject solely to the limitations imposed by the Constitution. It is not the duty of the courts to inquire into the policy of the law making body. Congress determines the evil to be attacked and supplies the remedy. As was stated by the Supreme Court in *Old Dearborn Distributing Co. v. Seagram-Distillers Corporation*, 299 U. S. 183, 196, if "the question may be regarded as fairly open to differences of opinion . . . . the legislative determination . . . is conclusive."

The Fifth Amendment to the Constitution does not serve to prohibit the exercise by Congress of its power under the Commerce Clause. Liberty of contract may be so limited. *Tagg Brothers & Moorhead v. United States*, 280 U. S. 420; *Chicago B. & Q. R. R. Co. v. McGuire*, 219 U. S. 549; *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Association*, 276 U. S. 71; *Highland v. Russell Car & Snow Plow Co.*, 279 U. S. 253; *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*, 282 U. S. 251; *Hardware Dealers Mutual Fire Ins. Co. v. Glidden*, 284 U. S. 151; *Nebbia v. New York*, 291 U. S. 502. Moreover, Congress is not required to limit the exercise of its power under the Commerce Clause upon the effect of forbidden acts in particular instances. It may proceed generally for the protection of commerce in general, expressing its disfavor of certain acts as hurtful to competition in such terms as it sees fit so long as it does not transgress the boundaries imposed by the

[18] House Report No. 2287, 74th Congress, Second Session, at p. 8.

[19] Senate Report No. 1502, 74th Congress, Second Session, at page 5.

Constitution. See *Reid v. Colorado,* 187 U. S. 137; *Champion v. Ames.* 188 U. S. 321; *United States v. Delaware & Hudson Co.,* 213 U. S. 366; *United States v. Delaware, L. & W. R. R. Co.,* 238 U. S. 516; *Hipolite Egg Co. v. United States,* 220 U. S. 45; *Clark Distilling Co. v. Western Md. Ry. Co.,* 242 U. S. 311; *Oregon-Washington R. & N. Co. v. Washington,* 270 U. S. 87; *Kentucky Whip & Collar Co. v. Illinois Central R. R. Co.,* 299 U S. 334; *United States v. Carolene Products Co.,* 304 U. S. 144; *Mulford v. Smith,* — U. S. —; *United States v. Swift & Co.,* 286 U. S. 106; *Electric Bond & Share Co. v. Securities & Exchange Commission,* 303 U. S. 419; *Central Elevator Co. v. People,* 174 Ill. 203 (1898); *Crescent Oil Co. v. Mississippi,* 257 U. S. 129; *Paramount Pictures v. Langer,* 23 F. Supp. 890.

The practice of paying brokerage, or sums in lieu of brokerage, to buyers or their agents by sellers was found by Congress to be an unfair trade practice resulting in damage to commerce. Paragraph (c) prohibits such practice. We conclude that Congress has properly exercised its power to the end that the named abuse may be done away with. We refer also to the conclusions expressed in the decision in the *Biddle* case, p. 692, and in the *Oliver* case, p. 769.

[*Order Affirmed*]

A decree will be entered affirming the Commission's order and commanding the petitioner to obey it. See 15 U. S. C. 45 as amended.

APPENDIX

Order to Cease and Desist

UNITED STATES OF AMERICA

Before Federal Trade Commission

At a regular session of the Federal Trade Commission held at its office in the city of Washington, D. C., on the 25th day of January, A. D., 1938.

COMMISSIONERS: GARLAND S. FERGUSON, JR., Chairman, CHARLES H. MARCH, EWIN L. DAVIS, WILLIAM A. AYRES, ROBERT E. FREER.

Docket No. 3031.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of The Great Atlantic & Pacific Tea Company, Respondent, testimony and other evidence, taken before William C. Reeves, an Examiner for the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed in support of said complaint and in opposition thereto and the oral arguments of J. J. Smith, Jr., counsel for the Commission, and Caruthers Ewing, counsel for the Respondent, and the Commission having made its Findings as to the Facts and its Conclusion that the said Respondent has violated, and is now violating, the provisions of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes" as amended by an Act of Congress approved June 19, 1936, entitled "An Act to amend Section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes' approved October 15, 1914, as amended (U. S. C. Title 15, Sec. 13) and for other purposes";

IT IS ORDERED that in purchasing commodities in interstate commerce from sellers who are engaged in selling commodities in interstate commerce to the Respondent, The Great Atlantic & Pacific Tea Company, and to purchasers thereof other than the Respondent, the said Respondent, The Great Atlantic & Pacific Tea Company, do forthwith cease and desist from:

1. Making purchases of commodities, and the policy and practice of making purchases of commodities, at a so-called net price, and every other price, which reflects a deduction or reduction, or is arrived at or computed by deducting or subtracting, from the prices at which sellers are selling said commodities to other purchasers thereof any amount representing, in whole or in part, brokerage currently being paid by sellers to their brokers on sales of said commodities made for said sellers by, or by said sellers through, their said brokers, and:

2. Accepting, and the policy and practice of accepting, on its purchases of commodities from sellers any so-called quantity discounts and payments of all kinds representing, in whole or in part, brokerage currently being paid by sellers to their brokers on sales of said commodities made for said sellers by, or by said sellers through, their said brokers, and:

3. Accepting, and the policy and practice of accepting, on its purchases of commodities from sellers prices reflecting, and all allowances and discounts representing, brokerage savings effected by sellers on their sales of commodities to the Respondent.

4. Accepting, and the policy and practice of accepting, on its purchases of commodities all allowances and discounts in lieu of brokerage, in whatever form said allowances and discounts may be allowed, granted, paid or transmitted to the Respondent.

IT IS FURTHER ORDERED that the Respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

By the Commission.

OTIS B. JOHNSON,
Secretary.

(Seal.)

[¶ 55,243] Eli Lilly & Company v. L. S. Saunders, d/b/a Saunders Drug Store.

North Carolina Supreme Court. Decided September 27, 1939.

The North Carolina Fair Trade Act is upheld as a constitutional exercise of the legislative power where the self-limiting restrictions of the statute, which affects only trade marked products in competitive fields, remove the Act from the class of monopolies prohibited by the State Constitution and the statute, whose operation is accompanied by no violation of "due process" or by any unlawful delegation of power, is not special legislation within the prohibition of the State Constitution.

Carr, James and Le Grand, Wilmington, N. C.; J. C. B. Ehringhaus, Raleigh, N. C.; Charles Aycock Poe, Raleigh, N. C.; Walton M. Wheeler, Jr.; Attorneys for Plaintiff.

Kellum and Humphrey, Wilmington, North Carolina; Attorneys for Defendant.

By SEAWELL, J.; BARNHILL, J., dissenting.

[*Nature of Proceedings*]

The plaintiff, a manufacturer of pharmaceutical and biological commodities, which it sells and distributes under its own identifying brands, brought this action under Chapter 350, Public Laws of 1937, known as the "North Carolina Fair Trade Act", to restrain the defendant, a retail druggist, from reselling these products at cut rate prices, in violation of the statute. The case was heard before Stevens, Jr., J., at March Term, 1939, New Hanover Superior Court, upon an agreed statement of facts, without the intervention of a jury.

[*Applicable Statute*]

The Act under consideration aims at the maintenance of resale prices and purports to protect manufacturers, producers, and the general public against "injurious and uneconomic practices in the distribution of competitive commodities bearing a distinguishing trade-mark, brand or name". For convenient reference and understanding of its effect pertinent parts of the statute are reproduced here:

"Sec. 2. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others, shall be deemed in violation of any law of the State of North Carolina by reason of any of the following provisions which may be contained in such contract: (a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller. (b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller. (c) That the seller will not sell such commodity: (1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or (2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price."

"Sec. 6. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

[*Contentions of Defendant*]

The defendant insists that this statute is contrary to common law and public policy, as an attempted restraint of trade, and that it is void for unconstitutionality, as contravening Article I, Sections 1, 7, 17, and 31, and Article II, Section 29 of the State Constitution.

[*Fair Trade Contracts*]

It appears from the stipulations that the plaintiff had entered into a substantial number of contracts of the nature designated in the Act with various dealers in the State of North Carolina, under which its products were sold and distributed. The defendant was not a party to any of these contracts, but knew of their existence and purport and the resale prices fixed therein, and, claiming to do so as a matter of right, dealt in and resold products of the plaintiff, bearing its distinguishing brands, at prices lower than those so fixed. These commodities were not acquired under any of the exceptive provisions of the Act set out in section five.

[*Products Involved*]

The products put upon the market by plaintiff and sold at retail by defendant, under the conditions above named, are di-

vided, for the purpose of convenient consideration, into three classes:

CLASS I. Products falling within this class are those which are not protected by any patent but which are marketed by the plaintiff in common with many other manufacturers of pharmaceutical and biological products. In this classification the products produced by plaintiff are sold in North Carolina and throughout the United States in free and open competition with identical or substantially identical commodities produced and distributed by others, and each manufacturer is free to establish and does in fact establish its own selling prices for such commodities.

For example, "Hepicoleum" is a trademark which identifies a concentrate of Vitamins "A" and "D" manufactured and sold by the plaintiff. There are eight or more preparations of this character manufactured and sold by various other manufacturers and commonly known to the medical and pharmaceutical professions. They are used where deficiencies of Vitamins A and D are indicated, and a large number of other producers are engaged in marketing concentrates of Vitamins A and B independently of the plaintiff.

CLASS II. Products falling within this class are those which are marketed exclusively by the plaintiff under patents owned or controlled by the plaintiff or under which plaintiff has been granted an exclusive license. Products in this class are not in competition with identical products produced by other manufacturers. They are, however, sold in North Carolina and throughout the United States in free and open competition with comparable products produced by other manufacturers, and each of said manufacturers is free to establish and does in fact establish its own selling prices for such products.

As an example, from the agreed facts, 'Amytal" is a trademark which identifies iso-amyl ethyl barbituric acid manufactured and sold by the plaintiff exclusively under a patent owned by it. It is one of fifteen or twenty commercially available compounds derived from barbituric acid known to the trade as barbituric acid derivatives. They are sedatives and hypnotics and are sold by all the producers for the same therapeutical purposes.

CLASS III. Products falling within this class are those which are marketed by a restricted number of manufacturers pursuant to the terms of patent licensing agreements. The products of any given manufacturer which fall in this class are sold in North Carolina and throughout the United States in competition with the identical product or products sold by other licensed manufacturers. In some instances, products in this classification are also in competition with unpatented products which are represented, advertised, and sold for the same conditions, indications, and purposes as the patented products are advertised, represented, and sold.

[*Damages*]

Other stipulations relate to the damage to plaintiff's business either accrued or likely to accrue because of the alleged unlawful practices of defendant and their threatened continuance.

[*Lower Court Determination*]

The trial judge did not give consideration to the application of the statute to the several classes of commodities thus described but declared the law to be unconstitutional and void, and declined to enjoin the defendant from the cut rate practices declared therein to be unlawful. From this, the plaintiff appealed.

[*Federal Price Maintenance*]

SEAWELL, J: The endeavor to secure favorable recognition by the courts of agreements looking to the maintenance of resale prices, unaided by positive legislative enactment, may be said to have culminated in *Dr. Miles Medical Co. v. John D. Park Sons & Co.*, 220 U. S., 373, 55 L. ed., 502, in so far, at least, as federal action was concerned. In that case such contracts were held to be invalid at common law and under the Sherman Anti-Trust Act.

[*Criticism of Decision*]

The opinion in that case has been criticized for its want of reality in approach,—in not making a sufficient analysis of economic conditions involved in the factual situation presented, in which it was thought there might be found some basis for exception to the legal categories applied. *Harvard Law Review,* Vol. 49, p. 811; Kale's *"Contracts and Combinations in Restraint of Trade"*, Chap. 4; "The Maintenance of Uniform Resale Prices", 64 *U. of Pa.* L. R., 22. In this connection see dissenting opinion of Justice Holmes.

[*Vulnerability of Good Will*]

If the transfer included no more than a mere commodity, involving nothing in which the seller had any further property or interest, the doctrinal aspects of voluntary sale might be satisfied in the expression of the court: "The complainant having sold its

product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic". But the fact is that the producer, along with the commodities sold, must, perforce, permit the use of the good will of his business and his brand, and also their abuse, if the law can go with him no further. He is under the compulsion to sell under inadequate protection or withdraw from the market altogether. This good will is as much property as is coal or pig-iron or wheat, subject to audit, appraisal, taxation, purchase and sale, and is the most valuable asset of many businesses. But, unlike the tangibles mentioned, it is vulnerable to assault through the brand which symbolizes it, since it is built up principally through reputation and may be destroyed by its loss.

[*State Legislation*]

But the *Dr. Miles Medical Co.* case dealt only with contract and did not discourage legislative action in reaching the desired result. Such statutes have been enacted in most of the States, at least forty-three in number. As these came up for review there followed, of necessity, a re-orientation of the subject in the courts; consideration was shifted from the validity and effectiveness of contract to the power of the States to enact laws having a like purpose and effect. These laws are similar in expression and practically identical in principle and have been sustained uniformly by the courts of last resort in the respective states of enactment, where tested. The single exception, our research discloses, is found in *Bristol-Myers Co. v. Webb's Cut Rate Drug Co.*, 188 So. 91 (Fla.). There the Act was stricken down because it did not conform to Section 16, Article III of the Florida Constitution, in that the text of the law was not disclosed in the title. Those which have reached the Supreme Court of the United States have been upheld. *Max Factor & Co. v. Kunsman,* 5 Cal. (2d) 446, 55 P. (2d) 177, 299 U. S., 198, 81 L. ed., 122; *Pyroil Sales Co. v. The Pep Boys, etc.*, 5 Cal. (2d) 784, 55 P. (2d) 194, 299 U. S., 198, 81 L. ed., 122; *Seagram Distillers Corp. v. Old Dearborn Distributing Co.*, 363 Ill., 610, 2 N. E., (2d) 940, 299 U. S., 183, 81 L. ed., 109, 106 A. L. R. 1476, (see annotations); *Houbigant Sales Corp. v. Ward's Cut Rate Drug Store,* 123 N. J. E. 40, 196 Atl. 683; *Bourjois Sales Corp. v. Dorfman,* 273 N. Y., 167, 7 N. E., (2d) 30, 110 A. L. R. 1411; *Weco Products Co. v. Reed Drug Co.*, 255 Wis., 474, 274 N. W., 426, are typical and leading cases. They by no means exhaust the list.

[*Constitutionality of Similar Statute*]

The Illinois Fair Trade Act, identical in many respects with the North Carolina Law, and similar in principle throughout, was upheld in *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 292 U. S., 183, 81 L. ed., 189, 106 A. L. R., 1476, and the opinion of the Court, *per* Justice Sutherland, distinguishes the *Dr. Miles Medical Co.* case and pictures it as forecasting judicial approval when the Court should have before it appropriate legislation.

Courts were quick to realize that the enactment of Fair Trade Acts rendered obsolete the reasoning of many of the prior decisions. Formerly, in the absence of legislative determination, most courts had pronounced such trade agreements contrary to public policy. But, under the Fair Trade Acts, the public policy of such agreements received express approval from the legislatures. No longer were the courts compelled to face the difficult task of determining public policy. The task of the courts became the relatively simple one of deciding whether legislatures have power to validate resale price maintenance contracts.

[*Change in Judicial Attitude*]

But in some important respects the final protection accorded to trademarked goods marks a more fundamental change in attitude than might be involved in a mere acceptance of a statutory declaration of public policy,—a break with accepted theory in which many of the stricter doctrines now urged upon us have been modified or abandoned. It is simply one of those situations in the law which, with some emphasis, marks today from yesterday. Not that the change in the attitude of the courts has been arbitrary,—on the contrary, the intervening period has been one of rational adjustment, in which we are compelled to recognize a degree of perpendicular thinking as contrasted with the parallelism of precedent, which, ordinarily, rides decorously with the stream and, dispensing with unnecessary judicial travail, nicely carries the burden of decision. In such a broad field the effect of judicial policy, inevitably developed, cannot be ignored. In a number of jurisdictions resale price contracts had been upheld, but there is no doubt that *Dr. Miles Medical Co. v. John D. Park Sons & Co. supra,* represented the prevailing judicial attitude toward the subject. The dissenting opinion of Justice Holmes in that case put the spotlight on the pivotal principle: "The most enlightened judicial policy is to let people manage their own business in their own way, unless the ground of interference is very clear".

[*Economic Factors*]

A statement of the situation which invited this reaction suggests the basic principles of court approval.

"There is nothing immoral in resale price maintenance. It is one of those policies that happen to be arbitrarily prohibited by the Government. The whole foundation of trade is in maintaining stabilized prices. While it may be to the temporary advantage of a department store to increase its own sales of unbranded merchandise by using trademarked merchandise as a leader at a cut price, yet the ultimate repercussions on commerce are of the most serious character. This has resulted in grave injury to the development of trademarked merchandise upon which the country's commercial scheme of doing business has been largely founded. Trademark merchandising means merchandise that is extensively advertised, and being extensively advertised, must live up to high quality. There must be quantity production to support the expenditure of advertising with a correspondingly relatively low, but stabilized price. This gives labor steady and gainful employment, results in large purchasing power and places the stamp of identification of the trademark of the manufacturer on the goods with the resulting requirements of integrity in production and honor in selling for public protection. To permit the ultimate distribution of such merchandise to wreck the entire foundation of this business structure for a temporary personal profit is a shortsighted policy that should be condemned and prohibited in the strongest terms." Toulmin, *Trade Agreements and the Anti-Trust Law*, 1937.

Statements and counter statements make a voluminous record. See hearings before Committee on Interstate and Foreign Commerce in House of Representatives on H. R. 13,305, (63rd Congress, 2nd and 3rd Sessions); H. R. 13,568, (64th Congress, 1st and 2nd Sessions).

[*Issues for Judicial Determination*]

The courts may not dispute with the legislature any conclusion it has reached upon evidence *pro* and *con*, with regard to the verity of the economic conditions thus pictured. They are only concerned with finding whether these furnish reasonable grounds for the distinctions on which the statutes are made to depend. There seems to be little divergence of opinion on this point.

[*Principles Involved*]

Outstanding in the rationale of the cited cases upholding Fair Trade Acts are certain key principles: The validity of the distinction between the trademarked commodity and a commodity as such in relation to freedom of trade; the persisting property right in good will and brand after the producer has parted with the commodity; the involvement of these in resale transactions, and the paramount necessity of their protection; and the limitations in the Act itself preserving competition.

We have made this approach to the case at bar because we recognize as true a celebrated expression: "Upon this point a page of history is worth a volume of logic". Mr. Justice Holmes in *New York Trust Co. et al. v. Eisner*, 256 U. S., 345, 349, 65 L. ed., 963.

[*Effect of Miller-Tydings Act*]

The later enacted Miller-Tydings Act, (August, 1937), which amends the Sherman Anti-Trust Act and the Federal Trade Commission Act, (Section 5), by removing resale price contracts of the nature here considered from the prohibition of the Sherman Act and declaring them not to be an unfair method of competition, renders academic any discussion of the effect of *Old Dearborn Distributing Company v. Seagram Distillers Corp. supra*, on interstate transactions, if it has any. But in sustaining the Illinois Fair Trade Act in that case the court dealt with many questions arising under the Fourteenth Amendment and Due Process Clause of the Federal Constitution practically identical with those which have been raised in the case at bar under our own Constitution, and resolved them against the contentions of the defendant.

[*Constitutional Issue*]

First in importance of these questions concerns the Anti-Monopoly Clause of the State Constitution: Does the North Carolina Fair Trade Act create or tend to create a monopoly such as is declared in Article I, Section 31 of the Constitution, to be against the genius of a free people and not to be allowed?

[*Analysis of Monopoly*]

The Constitution speaks of monopoly,—the accomplished fact,—and not of the means by which it may be created. As to the former, when it is shown to exist, there can be no difference of opinion as to the duty of the Court; as to the latter, it is obvious that discriminating intelligence is required to draw the line beyond which private activity encroaches upon public convenience. A similar difference exists between the Sherman Anti-Trust Law and the Clayton Amendment. The former deals with consummated combinations and considers the purpose, reasonableness, and effect of agreements, whether offending the law. The latter denounces acts which Congress assumes may lead to such monopolies and is made effectual by the simple process

of tagging. Thornton, *"Combinations in Restraint of Trade"*, p. 836; *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S., 346; *Hopkins v. United States*, 171 U. S., 578, 42 L. ed., 290; *United States v. Standard Oil Co.*, 17 Fed. 177, 221 U. S., 1, 55 L. ed., 619.

[*Definition of Monopoly*]

What is monopoly? Definitions in this field are evolved under the necessity of administration and the term has been uniformly regarded as descriptive rather than precisely definitive. Without reference to the historical common law definition this Court, in *State v. Atlantic Ice & Coal Company*, 210 N. C. 742, 747, has given, by adoption and approval, two consistent definitions which we repeat: "A monopoly consists in the ownership or control of so large a part of the market supply or output of a given commodity as to stifle competition, restrict the freedom of commerce, and give the monopolist control over prices". Black's Law Dictionary, (3d Ed.), p. 1202. "In the modern and wider sense monopoly denotes a combination, organization, or entity so extensive and unified that its tendency is to suppress competition, to acquire a dominance in the market, and to secure the power to control prices to the public has with respect to any commodity which people are under a practical compulsion to buy". *Commonwealth v. Dyer*, 243 Mass., 472. Definitions, similar in content, are numerous.

[*Restraint of Trade Not Monopolistic*]

Restraint of trade is, in many instances, no doubt, an instrument of monopoly, but it is not monopoly. Both the economic and legal history of the subject refute the assumption that any and all restraint either constitutes monopoly or necessarily leads to it. *Max Factor & Co. v. Kunsman, supra.*

[*Fair Trade Act Not Monopolistic*]

The self limiting character of the restrictions imposed by the Act under review takes it out of the class of restraints which may lead to monopoly. If we concede that the term "monopoly", as used in the Constitution, covers substantial and comprehensive general control of commerce in necessary commodities, to the injury of the public, and that this may result from an unreasonable restraint of trade, we are still far from bringing the statute within its necessary condemnation, since it is lacking in the outstanding essentials of monopoly as above defined; a sufficiently extensive control of general commerce in such commodities and the resulting injury to the public; nor does it deny to any member of the public a free and equal opportunity to do anything which he might theretofore have done as a matter of common right. The freedom to do as one may wish with the good will, brand, or trademark of another has never been conceded by the law.

[*Scope of Act*]

The agreements authorized by the law are vertical,—between manufacturers or producers of the particular branded commodity and those handling the product in a straight line down to and including the retailer; not horizontal, as between producers and wholesalers or persons and concerns in competition with each other in dealing with like commodities. The law does not authorize cross agreements between competitors. Whatever agreements are permitted, all face one way; they apply only to commodities produced by the manufacturer, bearing his trademark, brand, or name, and then only if they are in free and open competition with commodities of the same general class produced or distributed by others. The incidence of the law on trade, therefore, affects only that portion of the commodity in which the producer has already a lawful monopoly of ownership, and which goes into distribution in a volume which may be fairly measured by the popularity which the good will and identifying name have achieved, but which can never amount to the whole. *Old Dearborn Distributing Co. v. Seagram Distillers Corp., supra; Joseph Triner Corp. v. McNeil*, 363 Ill., 559, 2 N. E. (2d) 929, 104 A. L. R., 1435; *Max Factor & Co. v. Kunsman, supra.*

The proportion which the commodity affected bears to the whole is not a matter for our consideration where competition is substantial; but it must be remembered that the Act applies not merely to medicinal preparations, where producers may be few, but to all commodities identified by name or brand, as to which, in many instances, competitors must be numerous. In *United States v. American Tobacco Co.*, 221 U. S., 104, 55 L. ed., 663, and in *United States v. Standard Oil Company of New Jersey, supra*, the government had to be content with breaking up these monopolies into a comparatively few competitive concerns.

[*Intent of Act*]

It is not conceivable how any horizontal restriction of trade can be effected through the provisions of the statute. The restraint intended does not apply to the commodity, in its generic sense, upon which the manufacturer has expended his care and skill,—it is the commodity plus the brand which identifies it, guarantees it quality, and is

symbolic of the good will which rightfully belongs to the manufacturer. It is this alone which the statute desires to protect, and to the piratical use of which it applies restraint. As stated by Justice Sutherland in *Old Dearborn Distributing Co. v. Seagram Distillers Corp., supra;*

"The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with. Section 2 of the Act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods, at less than the price fixed by the ownership of the mark or brand is an assault upon the good will and constitutes what the statute denominates 'unfair competition'. See *Liberty Warehouse Co. v. Burley Tobacco Growers Assn.*, 276 U. S., 71, 91-92, 96-97. There is nothing in the Act to preclude the purchaser from removing the mark or brand from the commodity,—thus separating the physical property, which he owns, from the good will which is the property of another,—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end."

[*Public Policy in Price Fixation*]

The common law emphasis on forestalling, regrating, engrossing and conspiracy to raise prices must not lead us to infer that the sole objective of public policy was to obtain the lowest possible price to the consumer on every commodity. This is both an economic fallacy and a misconception of law. The public is more interested in fair and reasonable prices which preserve the economic balance in advantages to all those engaged in the trade, with due regard to the consuming public, than it is in securing the lowest obtainable prices, when the inevitable tendency is to degrade or drive from the market "articles which it is assumed to be desirable that the public should be able to get". (Justice Holmes, dissenting in the *Dr. Miles* case). On this phase of the subject the Supreme Court of the State of Washington in *Fisher Flour Milling Co. v. Swanson,* 76 Wash., 649, 137 Pa., 144, 151, observed: "Finally it seems to us an economic fallacy to assume that the competition which in the absence of monopoly benefits the public is competition between rival retailers. The true competition is between rival articles. Fixing the price on all brands of high grade flour is a very different thing from fixing the price on one brand of high grade flour. The one means destruction of all competition and of all incentive to increased excellence. The other means heightened competition and intensified incentive to increased excellence".

Our own laws implementing this section of the Constitution recognize that price-cutting, not born of fair or normal competition, may indeed be piratical, and a dangerous step toward monopoly. C. S. Chap. 53, sec. 2563; *State v. Atlantic Ice & Coal Co.*, 210 N. C., 742, 188 S. E., 412.

[*Common Law Protection of Good Will*]

No one has a vested interest in the common law. *Hurtado v. California,* 110 U. S., 516, 46 L. ed., 697. The common law, proceeding *ex proprio vigore,* prior statutes, and public policy growing out of them, all must yield to the superior authority of the later enacted statute. Nor do we think that any contribution which the common law has made to the constitution has given to the term "monopoly" a rigor inconsistent with the foregoing reasoning. Any definition of "monopoly" which may be built up by aid of the common law rules against restraint of trade must carry with it those exceptions favoring agreements for the protection of good will,—which had become an established doctrine of the common law long before our first Constitution was adopted,—and the concomitant principle that the reasonableness of the restraint must be measured by the adequacy of the protection necessary. even though it extends to the limits of the kingdom, if the good will has become national in extent. Thornton, *Combinations in Restraint of Trade*, pp. 60-71; *Leather Cloth Co. v. Lorsant,* L. R. 9, Eq. 345, 39 L. J. Ch. 62; *Maxim Nordenfeldt v. Nordenfelt,* L. R. 1, ch. 630, 651, 67 L. T. 177; Aff. A. C. 535, 63 L. J. 908, 71 L. T. 489; *Benjamin on Sale,* 7th ed. pp. 536-546. It is as well to observe that while these cases relate to the protection of good will upon alienation, the same principle may fairly be extended to the protection of that good will while in the enjoyment of the original owner. There is no sound reason why it should be called into service only when it might serve as an obituary to his possession, or merely as a more effectual means of delivery. The real purpose is to protect the owner of the good will against assault from the most dangerous quarter.

In this and other jurisdictions this doctrine of the common law has been invoked not infrequently to modify the rigor of antimonopoly statutes and to permit interpretation in the light of reason. *Marhoff Co. v. Rosenbacker,* 176 N. C., 330, 97 S. E., 169; *Morehead Sea Food Co. v. Way & Co.*, 160 N. C., 679, 86 S. E., 603.

[*Agency Contracts*]

The inconsequential margin over which the courts have battled is apparent on comparing the utmost this law can do with

what the courts have already approved. The cumbersome and ineffective device of agency contracts fixing prices of retail sale have usually been upheld by the courts on the *alter ego* doctrine, which makes the producer the final seller. *United States v. General Electric Co.*, 272 U. S., 476, 71 L. Ed. 362. The doctrine itself is impeccable, but the reality of the device when applied to a distribution which the parties probably regard as final between themselves, and certainly desire to be so, is open to challenge. The point is that such a transaction has precisely the same incidence on the freedom of trade as does the present Act since it monopolizes exactly the same commodity,—not merely in *quantum*, but in physical identity,—and is nearer to monopoly in principle because it concerns the commodity as such. It illustrates the triumph of form over substance and leads to the thought that the producer always might have had the relief sought if he could come into court clothed in more formal and traditional habiliments.

[*Competition Essential for Operation of Act*]

Perhaps the most direct answer to the charge of monopoly made against this statute is contained in the provisions of the statute itself, under which it automatically ceases to operate where there is no competition. In a late case, *Goldsmith v. Johnson & Co.*, Maryland Court of Appeals, June 28, 1939, decided since the case at bar was argued before this Court, this was thought to be a sufficient answer, and with this we agree.

[*Interpretation of Constitution*]

We are not unmindful of the constitutional imperatives upon which the defendant insists, but first it is necessary to understand what the Constitution requires. It is as little as we can do, out of respect to its framers, and the obvious purposes of such an instrument, to regard it as a forward-looking document, anticipating economic as well as political conditions yet to emerge. It is not a statute. Its concepts worthy of surviving are fundamentally stated and must be sufficiently generic and comprehensive to allow adjustment to the current needs of humanity. In this way only can we interpret it in terms of social justice so necessary to maintain its usefulness and to continue it in the public respect. The Anti-Monopoly Clause of the Constitution is couched in terms to meet this requirement. Like other clauses similarly phrased, it expects implementation by statute. Its terms are broad enough to afford recognition of the principles we have discussed, and the law is safely within the constitutional admonition.

[*"Due Process" Contention*]

Article I, Section 17, of the Constitution, provides: "No person ought to be . . . disseized of his freehold, liberties or privileges . . . or in any manner deprived of his life, liberty, or property but by the law of the land." It is contended that the statute delegates the power to fix the resale price on another's property, or directly or mediately fixes the price on a commodity at private sale with a like effect, in violation of this section. This is the objection repeatedly raised in the above cited cases under the similar provisions of the Federal Constitution. It had not received favorable consideration by the courts. *Old Dearborn Distributing Co. v. Seagram Distillers Corp., supra; Bourjois Sales Corp. v. Dorfman, supra; Pyroil Sales Co. v. The Pep Boys, etc., supra.*

The restriction is not imposed after the acquisition of the property, and is not in derogation of an existing or established right. Under the statute it was a condition that had already attached to the property. It was known to the prospective purchaser, and he was under no obligation to assume. Morally and legally he is presumed to have accepted the condition by his voluntary act of purchase.

[*No Delegation of Power*]

As to the delegation of power, we do not understand that it is contended there is any delegation of the legislative function. On the face of it such a contention is untenable. The statute was complete when it left the hands of the legislature. It required no person or group of persons or other external agency to further authorize it or put it in force. *Weco Products Co. v. Reed Drug Co., supra.*

But the law "delegates" nothing. At the most it lifts the ban supposed to exist by virtue, largely, of public policy, against contracts fixing the resale price, and permits this to be done by contract between the manufacturer or producer and the purchaser, and does this partly in recognition of the continuing property right of the producer in the good will of his business which is involved in the transaction through the use of the symbolizing brand and partly in the recognition of the rights of others, including the honest purchaser, who expects to put these to a legitimate use in the resale of the branded commodity and loses money when it is cheapened by use as a bait for

other sales. It is made binding on a purchaser who buys with a knowledge of the condition attached to the purchase.

"The statute is not a delegation of power to private persons to control the disposition of the property of others, because the restrictions already imposed with the knowledge of the prospective reseller runs with the acquisition of the purchased property and conditions it." 11 Am. Jur. p. 933; *Old Dearborn Distributing Co. v. Seagram Distillers Corp., supra; Joseph Triner Corp. v. McNeil, supra.*

[*Price Fixation Secondary*]

The resale price is not fixed on any commodity, as such, and with respect to these the traditional rules demanding freedom of trade remain uninvaded. It is placed only on the branded commodity; and this court, with the great majority of those which have preceded us in passing on similar laws, is of the considered opinion that the distinction is valid. Fixing the price, usually the most important incident of bargaining, and still so when the parties are equally related to the subject of the transaction is, in this instance, merely ancillary to the purpose of the law, which is to protect both the producer and the public—the one with respect to his good will, the other with respect to the quality and integrity of a desirable product. The restriction is imposed, as we have said, more with respect to the good will and brand than to the limited quantity of product, as such, which passes in the sale. A frank recognition of their relative importance demands that the minor consideration should give way, ***ut res magis non pereat.*** Laws protecting trademarks, trade-names and brands from piracy are of no avail whatever when the abuse of them by a purchaser of branded products is uncontrolled. The producer is less hurt by pilfering than he is by sabotage.

[*Prices Subject to Restriction*]

"There is nothing sacrosanct about price."

The right of the owner to fix a price on any commodity he sells is not absolute. To illustrate, if that was true the Second Section of the Robinson-Patman Amendment, standardizing prices by prohibiting discriminations, would array that Act against both the Fourteenth Amendment and the Due Process Clause of the Federal Constitution. It is a right created by law and subject to control by law when necessary to the just and orderly administration of government with due regard to constitutional guaranties. Price restrictions stand upon the same challenge before the law as any other restraint upon the use of property, and are concerned with the same con stitutional provisions.

Nebbia v. New York, 291 U. S., 502, 78 L. ed. 940, deals with governmental price-fixing and the fixing of that price on a general commodity having nothing to do with trademark or good will. But even so, the Court declined to limit the formula "affected with the public interest" to any business particularly constituted, as, for example, public utilities and the like, and held that a business was "affected with the public interest" when, for adequate reason, it was subject to control for the public good, making the final test to be whether the law was arbitrary in its operation and effect. See analysis of this case in Toulmin, *Trade Agreements and the Anti-Trust Laws,* p. 103. The marked tendency of the courts to discard the formula altogether as not being sufficiently definitive to distinguish the filed of application is noted in the annotation to *Miami Laundry Co. v. Florida Dry Cleaning and L. Bd.,* 119 A. L. R. 956, 985. The subject seems of little application here, since the same court in *Old Dearborn Distributing Co. v. Seagram Distillers Corp., supra,* held that the Illinois Act, which, as we have stated, is practically identical with ours at this point, does not constitute governmental price-fixing or, indeed, price-fixing in any sense offensive to the Constitution. By specific reference it distinguished from the case under consideration those cases referring to price restriction as an unconstitutional invasion of property right, holding that they had no application to the sale of branded commodities protected under the Act. *Old Dearborn Distributing Co. v. Seagram Distillers Corp., supra,* at page —.

Such a restriction is not confiscatory unless it is unreasonable or contrary to the principles of the Constitution reasonably interpreted; and one who invokes the aid of the Constitution in this respect must show that he has a title free from condition, at least with respect to the supposed invasion. This is not the position of the defendant.

[*Development of Judicial Outlook*]

We may concede that such a restriction upon the sale of a quantity of a commodity which has no distinction other than that it belongs to the seller, where the seller parts with everything he has in it, and the commodity merges indistinguishably in the stream of trade, has always been considered against public policy, unlawful, confiscatory, unconstitutional, or, to sum it up in traditional style, "odious." But surely we have come a long way on this road since the *John Dyer* case, (2 Henry 5, 5b, pl. 26), when the irate judge dismissing an action

on a bond given upon a contract in partial restraint of trade said of the plaintiff: *"Et pur Dieu si le plaintiff fut icy, il ira al prison tanque ill ust fait fine au roy."* Now the courts permit the law to do its own frowning, thus eliminating as a factor of decision the seductive influence of judicial pietism.

[*Effect of Trade Mark*]

Not arbitrarily, but on principle, they recognize the wide difference between the sale of a general commodity, around which the rules of law were originally built up, and the sale of a trademarked commodity, the very essence of which is the reputation of the product, the good will of the producer, the protection of which is necessary both to him, to the honest retailer, and equally important to the public, since under our highly developed long distance system of production and distribution it often affords the only available guaranty of quality. *Rabh v. Covington,* 215 N. C. 572. It is no longer a matter of trend—the thing lies within the beaten path of judicial decision. We are free to say that if the matter had been presented to us independently, without the aid of these authorities, we would not be disposed, in the face of the statute, to further adhere to a purely doctrinary point of view which now makes no contact with the subject otherwise than at very minor points of consideration, if at all. Forcing new situations into old categories is like putting new wine into old bottles. It strains the bottle.

In our opening analysis we stress the fact that the producer and seller of a branded commodity, along with the commodity itself, transfers the use of the good will, which use is made effectual by the use of the distinguishing brand or trademark. The quantity of commodity corporeally passed by the sale is always a relatively unimportant item, but the entire good will of the producer's business, with all of its force and effectiveness, is put behind the product in the hands of the retailer for use in inducing consumer purchase; and, conversely, the entire good will may be appropriated and prostituted by the cut rate dealer who uses it, not to promote the sale of the branded commodity, but to increase his sale in other commodities. In either case the entire good will is involved, and in a very real, if not technical, sense subjected to a servitude. On this principle there is no sound reason why, under favoring legislation, the parties should not be permitted to bargain with reference to the conditions upon which this servitude may be imposed, and none why this may not take the form of an agreement as to the resale price, the maintenance of which is to their mutual advantage. Some of the decisions find support for the provisions similar to those contained in Section Six in the principle that outside interference with such a contract is a proper subject for statutory prohibition since, in somewhat similar circumstances, the court itself has afforded relief.

In *Port Chester Wine and Liquor Shop, Inc., v. Miller Bros. Fruiters, Inc.,* decided by the Appellate Division of the New York Supreme Court on January 28, 1938, an action by a retail dealer against another retailer cutting resale prices was sustained under a similar act. Without deciding that particular question here, the situation is at least illustrative of the soundness of the law, and we may infer from the agreed facts here that a similar situation may exist among retailers who have complained to the plaintiff of the prevalence of this practice and threatened to discontinue handling the brands.

[*Prohibition of Special Legislation*]

The power of the legislature to pass a law of this nature has been questioned in view of Article II, Section 29, of the Constitution, reading in part: "The General Assembly shall not pass any local, private, or special act or resolution relating to . . . regulating labor, trade, mining or manufacturing . . ." It is contended that the exceptive provisions of Section 5 so reduce the field of its application as to make it a special act forbidden by this clause of the Constitution.

[*Prohibition Construed*]

The Constitution does not prohibit the legislature from regulating trade in any of its branches or regulating it in any particular. It merely forbids such regulation by private, special, or local law.

A general law is not rendered special because there has been excepted or excluded from its operation either persons or things to which, upon reasonable classification, according to the purposes of the law, it should not be applied. Such exceptions or exclusions must be germane to the purposes of the Act, be founded on reasonable distinctions, and must leave, as a properly distinguishable class, all those persons or things which in the reasonable exercise of legislative discretion ought to be included, leaving out only those persons or things which may, with the same propriety, be excluded. The classification degrades the law only when it has no basis in reasoning or, otherwise expressed, is arbitrary and capricious. This statute does not attempt to validate all contracts containing resale

price agreement, and it is just as assailable as a special law on that account as it is because of its express exclusions, if classifications are to be made by its antagonists on grounds even less reasonable than those which commended themselves to the legislature. The law was intended to apply only to contracts and sales of a certain kind which it is the business of the statute to define. It need not follow any particular formula in doing so. It must be considered as a whole and the exceptions, germane to the purpose of the Act and based on recognizable and reasonable distinctions, merely form a part of the process of classification. In our opinion they are so grounded. 59 C. J. pp. 732, 735, Sections 319, 322; *Scarbrough v. Wooten*, 170 P. 743, 23 N. M. 616; *State v. Atchinson P. & S. F. Ry.* 151 P. 305, 20 N. M. 562. The exceptions refer to conditions which the dealer is likely to experience if no such law was ever enacted, and the transactions are well outside of normal trade, to which the statute was intended to apply.

The violation of the law is made "actionable at the suit of any person damaged thereby." Under such general authorization an action to permanently restrain defendant from the practices complained of is proper, and the agreed facts afford sufficient ground for relief.

[*Absence of Estoppel*]

It has been suggested that the conduct of plaintiff in permitting a sale to the defendant, who refused to sign any contract fixing the resale price, is sufficient to estop it from equitable relief; but the evidence does not disclose that the plaintiff made any inducement to the defendant or gave him any reason to believe that the plaintiff intended to waive any of his rights under the law. It was optional with the plaintiff whether it obtained the contract or relied upon the statute, and the simple act of sale to defendant, without stipulating a resale price, did not carry with it an assumption that the defendant might violate the law or confer upon him the right to do so. If the law itself is valid, and we hold it to be so, it is a public statute which the defendant was bound to have in contemplation when he made the purchase.

In *Lentheric, Inc., v. Weissbards,* 122 N. J. Eq. 573, 195 Atl. 818, the argument was successfully made that where the plaintiff refused to sell to the defendant he was estopped in equity to assert his claim when defendant had obtained goods elsewhere. Here we are confronted with the direct opposite of that argument. In our opinion, neither has merit.

Rather much argument was addressed to the court on the contention that defendant was making a reasonable profit on the sale of the products listed in the agreed facts. However such circumstances might affect the result on a trial for violation of some anti-trust law, where the effect on the public might be an issue, it cannot be considered here in the face of the statute, which it would completely defeat. The standard set is not one of reasonable profit, but of resale price.

Nor is relevant the fact that prices on commodities described under Class III, which have been fixed by competing distributors, are within one cent of parity. In the absence of agreement to that effect this has not been considered by this court as sufficient even to support a charge of violating the Anti-Monopoly Statute. *State v. Oil Co.,* 205 N. C., 123, 126, 170 S. E., 134, and the Supreme Court of the United States is in accord. *United States v. American Tobacco Co., supra.* This might occur through an unlawful agreement, certainly, if at all, dehors the operation of this law, or it might be the result of close competition as is now the case with the price of gasoline by the major oil companies, or it might be a case of "follow the leader," and it is not a violation of any law to copy the prices of a competitor.

[*Legislative Discretion*]

We have nothing to do with the expediency of any economic experiment. Discussions of this subject, on which thousands of articles have been written and hundreds of arguments made, has left the law-making bodies and most of the courts convinced that there is a field here in which the protection of private right and the promotion of the public welfare are not in irreconcilable conflict. The statute represents an attempt of the General Assembly to harmonize and apply these principles. In our opinion the provisions of the Constitution called to our attention do not defeat that legislative power. The propriety of its exercise is within the legislative discretion.

[*Act Constitutional*]

We conclude, therefore, that the statute under review is a constitutional and valid expression of the legislative will, and as such must be enforced.

[*Conclusion*]

The plaintiff is entitled to the relief prayed for in its complaint and judgment in the court below will be entered in accordance with this opinion.

[*Reversal of Judgment*]

The judgment is reversed.

[Dissenting Opinion]

BARNHILL, J., dissenting:

The facts in this record, interpreted in connection with the legislation under consideration, are such that I find it impossible to concur in the majority opinion.

It is admitted that:

Plaintiff does not sell its commodities to retailers. It sells to wholesalers who in turn supply the retail dealers. It does not cater to the general retail trade in advertising its products to the consuming public, nor recommend nor encourage the resale of its products by retail druggists to members of the consuming public. Its policy of distribution is predicated upon the theory that medicinal products such as those manufactured, distributed and sold by the plaintiff should be used only under the supervision of a physician. It merely recognizes "the right of the retail druggist to resell certain of plaintiff's manufactured products directly to members of the public where not prohibited from making such sales by state or federal laws." Defendant was not guilty of any fraud or deception in acquiring the merchandise it retailed and it has not engaged in "price-cutting" as that term is ordinarily understood, but is making a reasonable profit. By the enforcement of the statute defendant will be required to increase the cost of the merchandise sold by it to the consuming public—arbitrarily and against its will—by at least eight per cent.

It further appears that: (1) Although the statute in question authorized it so to do, the plaintiff did not elect to bind itself to sell its commodities only to wholesalers who in turn contracted not to resell the same to retailers except upon contract to observe the stipulated minimum price. Instead plaintiff sold or permitted the sale of its commodities to the defendant knowing that the defendant had refused to enter into the stipulated contract or to regard the stipulated price. (2) Plaintiff undertook to classify customers in a manner not authorized by the statute and to make the contract apply to only a part of the purchasing public. (3) Defendant by conducting a "cash and carry" business and by other efficient business practices is conducting its business at a cost less than that incurred by the average retailer and is seeking to pass on some of the benefits to the consuming public.

Plaintiff now seeks to impose upon non-contracting retailers the duty to observe the minimum prices provided in its contract with certain retailers. It proceeds under the terms of Chap. 350, P. L. 1937, known as the Fair Trade Act. The majority approves as constitutional this statute which not only validates price fixing contracts between manufacturers and retail distributors, but likewise makes such contracts binding upon other retail dealers not parties to such contracts.

As a result of this decision retail distributors who by conducting a "cash and carry" business and by other expense reducing business methods and practices are conducting their business at a cost less than that incurred by the average retailer and who are able and willing and are seeking to pass on some of the benefits to the consuming public by offering its merchandise at a lower price are compelled to sell to the public at an artificial and higher price than that which normally would be fixed by the forces at work in a competitive commercial world. This is price pegging with a vengeance —and the consuming public is compelled to pay an additional tribute to the retailer which the retailer himself does not want. The effect of this act goes well beyond what has been called "predatory price-cutting" for it fixes prices irrespective of the motives or purposes of the retailer in reducing prices, by shaving his margin of profit or otherwise. It promotes the establishment of manufacturer monopolies and retailer combinations in restraint of competition. It penalizes the initiative and efficiency of alert retailers and rewards the imcompetent or inefficient. It increases prices demanded of the consumer. It aids one class of retailer against another competing class who through more efficient business methods are able to undersell—at a fair profit—their competitors. It is in a final analysis a shot aimed at a particular group of retail merchants—but unfortunately the load thereof strikes and inflicts a telling wound upon the mass of people who compose the consuming public. To the retailers it means elimination of price competition and better profits—to the consumer it means the loss of the benefits arising out of wholesale price competition, and it produces still higher cost of living.

Under an economic system founded upon competition every general restriction—that is, every restriction covering all or a controlling fraction of a given commodity—is essentially unreasonable, being neither fairly necessary to the protection of the manufacturer, who already has a monopoly, nor beneficial to the public, because it does not tend to create an incentive to increase the excellence of the product in order to maintain the better price.

Nor are these social, economic and political weaknesses of the statute the only objections. There are reasons, both legal and equitable, why the plaintiff may not maintain its action.

The plaintiff is not entitled to equitable relief.

The act is declaratory of the public policy of the state. Enforcement thereof rests upon the Attorney General and the solicitors of the State, except as otherwise expressly authorized in the act. It authorizes individual trademark owners to sue only in the event they are damaged by the action of a retailer in selling at less than the fixed price, and the plaintiff alleges no facts upon which the allegation that it has suffered damages may be predicated. It sells to wholesalers and not to retailers. So far as this record discloses, it is selling the same quantity at the same margin of profit as heretofore.

The statute does not authorize injunctive relief against threatened damage. In that connection plaintiff alleges that the contracting retailers are threatening to cancel contracts and it will thereby suffer irrevocable damages. Even if the plaintiff is authorized to seek injunctive relief this is a false promise as the contract expressly reserves in the retailer the right to cancel the contract. The cancellation thereof is the

exercise of a right and not the commission of a wrong. It gives no cause of action, but is *damnum absque injuria.*

A retailer who is not a party to a price fixing agreement between the manufacturer and other retail dealers, does not, by selling such manufacturer's products below the retail price designated in such agreement, induce such other retail dealers to breach their agreement, and, consequently, the manufacturer may not enjoin him on that ground. The defendant is merely selling products at prices lower than those agreed upon by the plaintiff and other retailers. The fact that incidental thereto some of the contracting retailers may breach their agreements in order to meet competition cannot be laid at the door of this defendant in an attempt legally to charge it with the result of such breach. *Coty v. Hearn Department Stores,* 284 N. Y. S. 909.

The contracting retailers voluntarily entered into the stipulations contained in the contract. They may voluntarily abandon such contracts whatever the motivating cause of such abandonment may be. The plaintiff cannot complain that retailers are exercising or threatening to exercise this right and it suffers no damage by reason thereof. There is no suggestion in the record that the plaintiff will not sell the same quantity of merchandise to wholesalers as heretofore or that it will be required to sell at a less price. Therefore, there is no threatened damage.

Plaintiff does not come into court seeking equity with clean hands, but has put itself in a position which is destructive of its right, if any existed, to appeal to a court of Chancery for relief.

It did not contract with retailers—as the act authorizes—that it would sell only to wholesalers who agreed to resell only to retailers who contracted to observe the stipulated price. It did agree to "use every reasonable means" permitted by law "to prevent the sale * * * at less than minimum resale price" by others. In violation of this agreement on its part, it put its commodity on the market for unrestricted sale and sold, or permitted the sale, to the defendant unconditionally, although it knew that the defendant had refused to sign the contract and had declined to agree to observe the stipulated price in the future. The defendant purchased plaintiff's commodities from recognized wholesale dealers in plaintiff's merchandise, which wholesale dealers the plaintiff could have bound—but did not—to sell only to those who agreed to observe the stipulated minimum price. Defendant purchased unconditionally under the circumstances indicated. It was guilty of no fraud or deception in the acquisition of title to the property. Necessarily, under the circumstances of this case, the plaintiff was a party to such acquisition in violation of its contract with other retailers. It was a party to the acquisition by the defendant of its commodities on an unconditional and unrestricted basis when the plaintiff had the right to contract not to sell to wholesalers who would resell to retailers who did not agree to observe the stipulated price, and it had the right in the first instance to sell only to those who agreed to observe such prices. Having been a party to the sale of the commodities to the defendant on an unrestricted basis in violation of the terms of its contract it should not now be heard in Chancery to insist that the defendant deal with such commodities on a restricted basis, or to assert that in fact the commodities were acquired by the defendant conditionally.

It may be argued that the defendant in the facts agreed has stipulated away its right to insist that plaintiff has no standing in a Court of Equity. As to that I take the position that equity jurisdiction was conferred upon the courts with the laudatory purpose to make it possible to render justice to a litigant in the absence of a statute protecting his rights, to the end that no wrong should exist without a remedy. It was never intended that equity should aid a litigant to obtain an unjust end and the court *sue sponte* should refuse to entertain a suit, as here, where the claimant has himself failed to do justly and his own contract has caused the condition about which he complains.

The Act constitutes an unlawful and unconstitutional delegation of authority to fix standards of fair practice.

Section 6 makes it an act of unfair competition for a retailer to sell a commodity at a price less than the minimum stipulated in a contract between some other retailer and the manufacturer or distributor. We merely look to the contract to determine what the standard of fair practice is below which the statute provides he shall not sell, and so, the standard is fixed by the manufacturer or distributor. Thus, noncompliance with the terms of the contract is made an act of unfair competition with the right in the manufacturer or distributor to set the standard of unfair competition. This is nothing more than a species of delegated authority.

Even if it be granted that the General Assembly may directly fix retail sales prices generally (an assumption not supported by the decided cases) it by no means follows that the General Assembly may delegate to private individuals the power to so affect the property rights of other retail dealers. Nor does it seem to me a sufficient answer to say that such a delegation of power merely permits the owner of a trademark or patent to protect his property by directing the resale thereof after he has parted with title thereto. As I later set out, it has long been settled that such a patent or trade-mark owner may stipulate only as to the first sale of his product, but thereafter he has lost possession of his product by releasing it into the channels of commerce generally. He may not control the manner in which, or the price at which, later sales of his product are to be made. *Bement & Sons v. National Harrow Co.,* 186 U. S. 70; *Motion Picture Patents Company v. Universal Film Mfg. Co.,* 243 U. S. 502, and cases therein cited.

The extent to which legislative power may be delegated has heretofore been ably discussed by the present Chief Justice who has defined, as clearly as the subject permits, the strict limitations imposed upon the General Assembly in delegating its powers. *Provision Co. v. Davies,* 190 N. C., 7. As developed in that case, the proposition that a General Assembly may not delegate its legislative powers is subject to three exceptions only; namely, (1) limited powers as to local legislation may be granted to municipal and quasi-municipal corporations; *State v. Simons,* 32 Minn. 540, 543; (2) limited powers to promulgate administrative regulations may be

granted to recognized governmental agencies and instrumentalities; *State v. Garner,* 158 N. C., 630; *State v. Railroad,* 141 N. C., 846; and (3) limited powers as to the finding of facts may be granted to recognized governmental agencies and instrumentalities where the determination of certain facts may be essential conditions precedent to the invocation of particular laws; *State v. R. R.,* 141 N. C., 846; *State v. Hodges,* 180 N. C., 751; *Morgan v. Stewart,* 144 N. C., 424; *State v. Dudley,* 182 N. C., 822; *Field v. Clark,* 143 U. S. 649. It is instantly apparent that the present case falls within neither of these three exceptions, as the delegation of the power to fix standards and prices here involved is made to private individuals, (*i. e.,* manufacturers and retailers) and not to any governmental agency or instrumentality.

The delegation of price fixing power fails for a second reason, *i. e.,* no standard or yardstick to be used in fixing the prices is laid down in the Act. Every delegation of power, to be upheld, must, in granting the power, lay down a "primary standard" (*Buttfield v. Stranahan,* 192 U. S. 470, 496; *Red "C" Oil Co. v. N. C.,* 222 U. S. 380, 394), or a "general rule" (*Union Bridge Co. v. U. S.,* 204 U. S. 364, 386) to be followed in discharging the delegated power. This "primary standard" or "general rule" serves a three-fold purpose; it clarifies the purpose and intent of the law, furnishes a measure of the power granted, and fixes the limits within which the power may be exercised. Nor have the requirements in this respect been recently relaxed. In *Panama Refining Co. v. Ryan,* 293 U. S. 388, 415, it was declared that, whenever there is an attempted delegation of power, the legislative body must "perform its function of laying down policies and establishing standards" where it attempts to leave to "selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply." There it was stated, at page 415, that the fatal weakness of the N. I. R. Act was that it was a grant of "unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down." The instant Fair Trade Act has a similar shortcoming. It grants to private individuals the right to fix prices without laying down any standard or fixing any limits regulating those prices, and, further, it leaves entirely to certain individuals the choice as to whether minimum resale prices shall be fixed or not—which right some of such individuals may choose to exercise while others decline to do so. The constitutional requirement that there shall be a "primary standard" or "general rule" was again affirmed in *Schechter Corp. v. U. S.,* 295 U. S. 495, 541, where it was declared that the attempted delegation of power was unsuccessful because the legislative body failed "to prescribe rules of conduct to be applied to particular states of fact determines by appropriate administrative procedure."

It may be said further that the statute is arbitrary, discriminatory and unreasonable as applied to one who not being a party to such a contract sells products of a manufacturer at a price lower than that designated by the manufacturer between it and other retailers, because it attempts to compel one not a party to a price fixing contract to sell at prices fixed by others. *Doubleday D. & Co. v. Macy & Co.,* 269 N. Y., 272, 103 A. L. R. 1325; *Seeck & Kade v. Tomshinsky,* 269 N. Y., 613; *Coty v. Hearn Department Stores,* 284 N. Y. S. 909.

In this connection, it may be noted that the act is objectionable for the further reason that it does not necessarily apply to all trade-mark owners, producers and distributors. It becomes operative only as to those who elect to contract —binding non-contracting retailers dealing in the same commodities. Likewise, it not only authorizes such trade-mark owners as elect to do so to contract to fix such standards, but they are authorized to change the standard from time to time, so that what constitutes unfair competition today may be the act of the distributor in reducing prices be perfectly lawful tomorrow. What is unfair competition may thus vary from time to time at the will of the distributor.

To restate concisely, this Act fails as an attempted delegation of power in that (1) legislative power may only be delegated to governmental agencies or instrumentalities, not to private individuals (as here attempted), and (2) a delegation of legislative power must always be accompanied by a statement of a "primary standard" or "general rule" regulating and limiting the exercise of such power, and such a "primary standard" or "general rule" is lacking here where there is a blanket grant of power to manufacturers and some retailers to fix prices which will be binding upon all retailers and consumers.

The act is essentially a price fixing statute.

If considered without regard to Section 6 thereof the Act might well be sustained on the theory that it merely changes the common law rule and makes unlawful contracts fixing minimum retail prices. When considered as a whole it goes far beyond this purpose and becomes essentially a price fixing statute. The non-contracting retailer is not required to sell at less than a stipulated price by reason of the contract. He is compelled so to do by the Act. We merely look to the contract to determine what the minimum price is, below which the statute provides he shall not sell.

If we consider the statute general in nature and of necessity all-embracing then it fixes, or permits the fixing of retail prices as well where the evils of price-cutting are absent as where they are present. Such a law which in effect spreads an all-inclusive not for the feet of everybody upon the chance that while the innocent will surely be entangled in its meshes some wrongdoers also may be caught is not permissible. *Tyson & Bro.—United Theatre Ticket Offices v. Banton,* 271 U. S. 418, 429.

The legislature is not only without authority to delegate to a private individual or a corporation the right to fix prices, it is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is "affected with a public interest." *Chas. Wolff Packing Co. v. Court of Industrial Relations,* 262 U. S. 522.

Legislative price fixing is an unconstitutional restriction upon the right of a private dealer to fix his own prices. *Fairmont Creamery Company v. Minn.,* 274 U. S. 1, 71 L. Ed. 893; *Williams v. Standard Oil Co.,* 278 U. S. 235, 73

L. Ed. 287; *Chas. Wolff Packing Company v. Court of Industrial Relations, supra; Ribnik v. McBride,* 277 U. S. 350, 72 L. Ed. 913; *New State Ice Co. v. Liebmann,* 285 U. S. 262, 76 L. Ed. 747.

By virtue of Sec. 6 of the Act, when a manufacturer and a single North Carolina retailer contract to maintain a price schedule for the resale of trademarked or identified products, such price schedules become binding upon all other North Carolina retailers of these products. Accordingly, A by contracting with B can compel C and D to sell A's goods at prices agreeable to A and B but not agreeable to C and D. Thus, A and B seek to achieve by mandate of law what they cannot achieve by contract with C and D. The effect of the Act is to extend the manufacturer's ownership of commodities marketed by it under a distinguishing trademark, brand or name after he has sold them into the normal channels of commerce, with the result that the dealer-purchaser loses the right to sell his goods bought for resale at figures of his own choosing. This right to fix the price at which one will sell his property is itself a well recognized property right. *Tyson & Brother-United Theatre Ticket Offices v. Banton,* 271 U. S. 418, 429; *Wolff Packing Co. v. Court of Industrial Relations, supra; Ribnik v. McBride, supra; Williams v. Standard Oil Co., supra; New State Ice Co. v. Liebmann, supra.* As these cases point out, this property right is one which a General Assembly may not destroy by fixing mandatory prices. Granted that such resale price maintenance contracts as here considered may be validated by the General Assembly as to the contracting parties, when the effect of the act (as here) is to make that price schedule binding upon other and non-contracting parties, as to these latter parties the Act constitutes price fixing by legislative mandate. Whether the prices are fixed by the Legislature directly or are made binding by Act of the Legislature in delegating the power to fix prices to private individuals, the prices when fixed become binding upon an unwilling citizen.

Under the doctrine of *Wolff Packing Co. v. Court of Industrial Relations, supra,* the power of a legislature to regulate prices was specifically limited to those businesses which are distinctly "clothed with a public interest." Further, as explained in *Nebbia v. New York,* 291 U. S. 502, 507, "clothed with a public interest" is synonymous with "affected with a public interest" and as such refers to those businesses so definitely tinged with a public interest that they are rendered subject to the exercise of the police power. As that case points out, there are but three types of businesses which may be termed "clothed with a public interest:" (1) Certain businesses which historically, and somewhat arbitrarily have long been so considered; (2) businesses operating under public grants and franchises imposing the duty to serve any member of the public demanding same; and (3) businesses which, by reason of their peculiar relation to the public, are regarded as having granted to the public extensive powers of regulation.

Since the instant Act is not limited to particular trades, but extends to all retailers selling goods bearing trademark, label or name, it is apparent that there was no legislative intent to limit the act to those businesses affected or clothed with a public interest. Since it does not appear that there was a legislative intent to declare any retail businesses clothed with a public interest and since it is impossible to determine from the Act which retail trades the legislature intended to be regarded as such, in my opinion, this court is without power to select the retail drug business (as would be necessary in the instant case) and pronounce it to be such a business, and the majority opinion does not undertake to do so.

To restate more concisely, this Act fails in that, (1) it destroys a property right of retail dealers, *i. e.,* the right to fix the prices at which they will sell their goods, and (2) it does not purport to declare any retail business clothed or affected with a public interest so as to justify price fixing within that business, and without such a declaration every price-fixing Act is invalid as being outside the constitutional exercise of the police power.

The statute is in conflict with N. C. Const., Art. I, Sec. 17.

As heretofore pointed out, the right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself.

The whole spirit and purpose of the Constitution is to protect the liberties and property rights of the citizens of the State. Any act which arbitrarily destroys or impairs the right of the individual to the free use and enjoyment of his property for the benefit of a special group in order to permit this group to fix prices is diametrically opposed to the genius of a free people and should not be allowed to stand. The act under consideration is an attempt by legislation to deprive the non-contracting retailer of this right to the free use and enjoyment of his property and is in direct violation of N. C. Const., Art. I, Sec. 17.

The act is a special act relating to trade.

N. C. Const., Art. II, Sec. 29, provides that: "The General Assembly shall not pass any * * * special act * * * regulating * * * trade * * * or manufacturing * * * any local, private or special act or resolution passed in violation of the provision of this section shall be void." The effect of this provision is to render void any act regulating trade or manufacturing which is not a general law. *State v. Dixon,* 215 N. C., 161. The word "trade" has been frequently defined by this Court and its legal significance is discussed in the *Dixon* case at page 164. It comprehends "not only all who are engaged in buying and selling merchandise, but all whose occupations or business it is to manufacture and sell the products of this plants. It includes in this sense any employment or business embarked in for gain or profit." *State v. Worth,* 116, N. C. 1007, 21 S. E. 204. As the present act seeks to regulate contracts and sales relating to retail trade in commodities not "affected with a public interest," the act, it seems to me, falls squarely within the constitutional prohibition, unless it can be held to be a general law. What, then, is a "special" law? It is one which does not include all of the persons within a given class, but relates to less than the entire class, or one which relates only to a particular section or class, either particularized by the express terms of the act or separated by any method of selection from the whole class to which the law

might but for such limitation be applicable. *Arps v. Highway Commission,* 90 Mont. 152, 300 P. 549; *City of Springfield v. Smith,* 322 Mo. 1129, 19 S. E. (2nd) 1; *State ex rel. Powell v. State Bank,* 80 A. L. R. 1494; *R. R. v. Cherokee County,* 177 N. C. 86. A law is a special law if it imposes particular burdens or confers special rights, privileges or immunities upon a portion of the people of the State without including therein and being applicable to all of the class throughout the State. *Matthews v. City of Chicago,* 342 Ill., 120, 174 N. C. 335.

Under the terms of the contract herein involved an effort is made to "peg" the minimum resale price of all of the manufacturer's identified or trade-marked commodities, but the Act itself exempts from this restriction (1) closing out sales, (2) sales where trade-mark, brand, etc., is obliterated, (3) sales where goods are secondhand or damaged, (4) judicial sales, (5) sales to religious, charitable, and educational institutions, and (6) sales to the State of North Carolina or any of its agencies or any of the political divisions of the State. The plaintiff by the contract here involved undertakes to add these further exemptions: Sales to (a) physicians, (b) dentists, (c) veterinarians, or (d) hospitals. In other words, even if it is admitted that resales of manufacturers' identified commodities constitutes a class of retail sales which may be made the subject of a general law, certainly when there is exempted from this general class of retail sales ten distinct subclassifications within the class, the law ceases to be a "general" law and becomes a "special" law which applies to some retail sales within the defined class and not to others. As such a "special" law "regulating trade" it is, in my opinion, declared void by the provisions of Art. II, Sec. 29, of the N. C. Constitution.

It was the evident intent of the legislature to make the contracts authorized by the act, when entered into, apply to all except those expressly excepted by the statute—which exceptions in themselves make the act special in nature. If, however, the act is to be given the interpretation apparently placed thereon by the plaintiff and authorizes the plaintiff and others in like situations to limit those to whom the stipulated price shall apply, then the act becomes even more obnoxious. It delegates to the contracting distributor the right to make any type of classification of ultimate purchasers it may elect. If it is not to be given that interpretation then the contract relied on is not in accord with the statute and is not protected by the terms thereof, and is an unwarranted attempt to regulate prices to the ultimate consumer without statutory authority.

The act under consideration violates the provisions of N. C. Constitution, Article 1, Sec. 31, relating to monopolies.

A monopoly denotes a combination, organization or entity so extensive and unified that its tendency is to suppress competition, to acquire a dominance in the market and to secure the power to control prices to the public harm with a respect to any commodities which people are under a practical compulsion to buy. It is "any combination, the tendency of which is to prevent competition in its broad and general sense and to control, and thus, at will, enhance prices to the detriment of the public." The common law monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public. Contracts having a monopolistic tendency have been held to "expose the public to all the evils of monopolies," to be "to the prejudice of the public," and to be "hostile to the rights and interest of the public."

The legislation under consideration permits the creation of a monopoly as thus defined in that it opens wide the door for the creation of retailer price-fixing combinations which will inevitably destroy price competition and enhance prices to the detriment of the public. But, says the majority opinion, in effect, we are not interested in legislation which merely permits the formation of a monopoly. It is only after the monopoly has been actually formed and is operating to the detriment of the public that there is any violation of the constitutional provision. With this I cannot agree.

It may be that the term "monopoly," as used at the time of the adoption of the Constitution, was not quite so comprehensive in meaning as present day conditions make it. Yet the term was used and the framers of the Constitution unquestionably intended to prohibit "any combination, the tendency of which is to prevent competition in its broad and general sense and to control, and thus, at will, enhance prices to the detriment of the public." When a statute has been enacted, the clear import of which is to authorize monopolistic combinations, the terms of Article 1, Section 31 of the Constitution have been violated. We are not required to stand by and await the actual formation of a monopolistic combination, and the defendant is not compelled to refrain from action until after he has been arbitrarily forced into such unlawful enterprise before appealing to the Court for relief.

Such monopolies, contracts in restraint of trade and contracts in restrain of competition (such as authorized by this statute) are unlawful at common law and are prohibited by the Constitution. Attempts to sell property for a full price and yet to place restraint upon its further alienation have been hateful to the law from Lord Coke's day to ours because obnoxious to public interest. *Strauss v. Victor Talking Machine Company,* 243 U. S. 490, 61 L. Ed. 866. Laws seeking this end are violative of the familiar rights attaching to ordinary ownership and are contrary to the public interest and to the security of trade. It is this type of law that our Constitution prohibits.

Viewing the legislation under consideration within the narrow confines of this case make it appear that only one distributor and one retailer are involved. Such is not the effect of the statute. Practically all commodities now sold on the market, from common place table salt to the most expensive luxury, including drugs, foods, clothing, groceries and practically every other article of merchandise, is sold under trademark, brand or name. Small groups of retailers, under authority of this statute, by contracting with their source of supply as to the various articles of merchandise offered to the general public may create, through the operation of the provisions of Section 6 of Act, ironclad price-fixing combinations which will enhance the price and operate to the detriment of the general public, as well as to completely destroy price com-

petition. That it has this latter effect—the destruction of price competition—is substantially admitted by the plaintiff in its legislation in the complaint that contracting retailers are threatening to breach their contracts to the end that they may meet the price competition offered by the defendant.

The majority view relies upon the absence of horizontal price maintenance pointing out that the vertical price maintenance achieved here standing alone without horizontal price maintenance is lawful. See quotation from *Triner Corp. v. McNeill,* 363 Ill. 559, this being one of the cases which the *Old Dearborn Distributing Co.* case affirmed. In the Illinois and the California Fair Trade Acts (the two Acts which have been upheld by the Supreme Court of the United States—see 299 U. S. 183 and 299 U. S. 198) only vertical price maintenance, *i. e.* through contracts down the line from manufacturer to wholesaler to retailer, was judicially approved as not being in conflict with the due process and the special privilege and immunities provisions of the Federal Constitution. In the instant Act not only is this vertical price maintenance permitted, but an extensive network of horizontal contracts is also permitted, as the vendor may agree with the vendee that he will not sell to any other wholesaler unless that wholesaler first agrees not to resell to any wholesaler, retailer, or consumer who will not carry out, by further contracts or otherwise, the price maintenance plan embodied in the first contract. This system of contracts, fixing minimum prices both vertically and horizontally, is a much more elaborate and more dangerous method of price-fixing than that which has heretofore received court approval; approving a net-work of contracts reaching out vertically and horizontally so as to cover with a latticework a well-nigh perfect control of the prices of a given product moves much more definitely in the direction of approval of a monopoly than does the bare approval of a short chain of minimum resale price contracts. This Court might, with mild misgivings, approve such Acts as the California and Illinois Fair Trade Acts, yet (by reason of Art. I, Sec. 31, declaring ". . . monopolies are contrary to the genius of a free state and ought not to be allowed.") strike down the so-called Fair Trade Act under consideration. It is interesting to note in passing that, although forty-four states are reported to have adopted Fair Trade Acts (6 *U. S. Law Week* 1250—May 9, 1939), apparently only nineteen of them (Norwood, *Trade Practice and Price Law,* 1938, p. 145-6) permit horizontal chains of contracts which cross and inter-lock with the links of the vertical chains, as allowed in the North Carolina Act.

Likewise, the majority opinion is bottomed on the conclusion that the statute provides protection for the goodwill of the manufacturer or distributor. In this I cannot concur.

The title of the Act recites that it is to "protect trade-mark owners, producers, distributors and the general public against injurious and uneconomic practices in the distribution of competitive commodities bearing a distinguishing trade-mark, brand or name, through the use of voluntary contracts establishing minimum resale prices and providing for refusal to sell unless such minimum resale prices are observed."

Thus, it indicates that the purpose of the Act is to eliminate "injurious and uneconomic practices" by voluntary contracts, with the right in the manufacturer or distributor to refuse to sell to those who decline to contract.

The Act itself authorizes contracts between manufacturers and distributors and wholesalers and retailers containing provisions cited in the statute, which provisions are violative of and radically change the common law. It then, in effect, in Section 6, prohibits any noncontracting retailer from selling such commodities at less than the stipulated minimum price. This is the full scope of the Act. There is nothing in respect to goodwill either in the caption or in the body of the Act. That the Act was intended to protect goodwill is a judicia deduction, which in my opinion is not warranted by the facts.

Good will is that intangible asset which an individual, or corporation, dealing with the public, acquires through its reputation for fair dealing and the excellence of service or commodity offered for sale. It is the advantage accruing from the probability that the customer—induced by the quality of the merchandise sold and the courteous service rendered—will go back to trade where he has been well treated. Other and more comprehensive definitions may be found in Story, *Partnership,* Sec. 99, 16 Am. Jur. 87; Callihan *Cyc. Dict.;* Words and Phrases; *Faust v. Rohr,* 166 N. C. 187; *Hilton v. Hilton,* L. R. A. 1918 F. 1174; *Bloom v. Holms Ins. Agency,* 121 S. W. 293, *Bouvier's Law Dict.*

While "goodwill" is a species of property, it evaporates and becomes non-existent so soon as a business ceases to operate as a going concern. I have never understood that the price at which a commodity is offered for sale aided in the creation of goodwill, except that an excessive price will discourage and eliminate purchasers and thus decrease the value of goodwill, and popular prices will attract and retain satisfied customers and thus increase the value of this recognized asset.

If a manufacturer may sell its commodity to a retailer and part with title thereto for a full price and yet retain an interest therein to be protected by legislation, that right still exists after the article finally reaches the ultimate purchaser. If it exists the mere sale by the retailer could not destroy it, and to say that the manufacturer still has a property interest in the hat that I wear because it was sold under, and has printed therein, the name "Dobbs," or to conclude that the tailor possesses a property interest is my suit of clothes because there is a label attached to the inside pocket requires a process of reasoning I am unable to follow.

Even when a commodity is sold under patent or copyright—and the act under consideration does not require that the trade-mark, label or name shall be patented or copyrighted—the patentee or copyright owner parts with its statutory protection under the Federal Law. A patentee cannot by virtue of his statutory monopoly impose conditions as to the resale price so as to render one who fails to observe them a contributory infringer of the patent. Cases cited in notes, 7 A. L. R. 477. After the right of the sale has been once exercised and the patentee receives his price, the article passes beyond the limits of the monopoly and, in considering the validity of the contractural re-

straint at a price at which the article is to be resold, either at common law or under an anti-trust act, the case is to be considered as if there were no patent. Cases cited in notes 7 A. L. R. 477. The same rule applies to copyright protection; *Bobbs-Merrill Co. v. Strauss*, 210 U. S. 339, 52 L. Ed. 1086, and to trademarked goods; *Ingersoll v. McColl*, 204 F. 147, and other cases cited in note, 6 A. L. R. 482; and to goods made by secret process; *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 55 L. Ed. 502. Certainly the manufacturer or distributor has no greater right in merchandise sold under trade-mark, label or name than it would have in merchandise which was patented or copyrighted or sold under registered trademark.

It is true that there has been a recent change in the trend of legislation, which, due to the reluctance of the courts to invalidate legislative enactments, has brought about a shift in the line of decisions on subjects such as the one under consideration. However, this new trend tends to, and will, if followed, lead to the inevitable curtailment and eventual destruction of fundamental rights of person and property guaranteed by the Constitution. Statutes such as this give evidence of the ability of organized minorities to procure legislation for their own advantage and enrichment at the expense of the unorganized purchasing masses. They have brought about a new "orientation" from the principle of individual liberty to the idea of regimentation and strict control of commerce and property. Here a manufacturer or distributor and one retailer is granted authority to fix, by contract, the price at which a commodity shall be sold by all other retailers without regard to local conditions, overhead expenses or other circumstance. The many must yield to the will of the few to the end that the few may make a larger profit and be enriched thereby. As I have heretofore stated, such legislation, in my opinion, violates the express terms of our Constitution.

Cases cited and relied on in the majority opinion are distinguishable.

The *Dearborn* and other U. S. Supreme Court cases deal only with Federal questions. In *Max Factor & Co. v. Kunsman* the defendant had surreptitiously acquired the commodities of the plaintiff and was selling them at greatly reduced prices, frequently below cost. In *Mills Co. v. Swanson* language similar to the terms of Section 6 of our Act was not involved or discussed. Similar differences, if space would permit, could be pointed out as to the other cases cited.

If, however, the constitutionality of the Act be conceded in every respect, it, in my opinion, does not apply to or authorize price-fixing contracts concerning the commodities listed in class 2. It is expressly stipulated that: "Products falling within this class are those which are marketed exclusively by the plaintiff under patent owned or controlled by the plaintiff or under which plaintiff has been granted an exclusive license." The statute authorizes contracts in respect to a commodity which is "in free and open competition with commodities of the same general class produced or distributed by others." Products in class II are not sold in competition with such designated commodities. To hold that they fall within the provisions of the statute is to say that the exclusive manufacturer of a product may fix the retail sale price thereof upon the theory that when sold by one retailer, it is in competition with the same product sold by another retailer. This does not seem to me to be within the intent or purpose of the statute.

For the reasons stated I am of the opinion that the judgment below should be affirmed.

[¶ 55,244] United States of America v. Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, et al.

United States District Court, Southern District of New York. Entered July 17, 1939.

Anti-Trust Laws.—Under the terms of a consent decree a labor organization and all persons acting on its behalf are permanently enjoined from restraining interstate commerce in violation of the Sherman Anti-Trust Act through the use of force, threats, violence, or injury to the operators and trucks of a motor vehicle carrier.

Final Decree

The United States of America having filed its petition herein on the 17th day of July, 1939, and each of the defendants having duly appeared by their respective counsel and filed their answer herein; and having consented to the entry of this decree, without contest and before such consent nor this decree shall be considered an admission or adjudication that any of said defendants (except defendants Campbell and Furey) have violated any statute; and the United States by its counsel having consented to the entry of this decree and to each and every provision thereof, and having moved the court for this injunction.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

I. That the Court has jurisdiction of the subject matter hereof and of all persons and parties hereto and that the petition states a cause of action against the defendants under the Act of Congress of July 2, 1890, commonly known as the Sherman Anti-Trust Act.

II. That the defendants and each and all of them and each and all of their respective officers, representatives, delegates, members, agents, servants, employees and all persons acting or claiming to act on behalf of the defendants or any of them be and they hereby are perpetually enjoined and restrained;

1. From carrying out or continuing to carry out, directly or indirectly, expressly or impliedly, the combination and conspiracy to restrain interstate trade and commerce alleged and described in the petition herein through the use of any one or more of the following means, to wit:

(a) Threatening physicial violence against shippers or persons, firms or corporations owning, operating or controlling over-the-road motor trucks, or their respective employees;

(b) Forcibly detaining or damaging or threatening forcibly to detain or damage over-the-road motor trucks engaged in conveying merchandise from shippers to consignees or others; or forcibly detaining or damaging or threatening forcibly to detain or damage the merchandise contained in such trucks;

(c) Assaulting operators of over-the-road motor trucks or their helpers;

(d) Forcibly preventing or obstructing deliveries of merchandise to consignees and pick-ups of merchandise for the return trips of over-the-road motor trucks;

(e) Any means similar to the foregoing which involve the use of force, violence or threats thereof.

2. From interfering, by any of the means described in sub-paragraphs (a) to (e) inclusive, of Paragraph 1, with the interstate trade and commerce described in the petition herein, in accordance with, or pursuant to any understanding or agreement between any of them;

(a) To prevent, hinder or restrain the operators of over-the-road motor trucks or their helpers from delivering merchandise to the places of business of the consignee to whom it has been shipped within the State of New York or from picking up merchandise within the State of New York for the return trip of said trucks, or from transporting or delivering the same to the consignees thereof in states other than the State of New York;

(b) To coerce or to compel the operators of over-the-road motor trucks or their helpers to conduct said trucks to terminals owned, operated or controlled by said shippers or operators or any of them or elsewhere within the State of New York and there to transfer, turn over and deliver said trucks or the merchandise contained therein to members of the defendant Union and to permit said members of defendant Union exclusively thereafter to conduct said trucks or the merchandise contained therein to the places of business of the various consignees to whom it had been shipped within the State of New York and in other respects to complete the transportation and delivery of said merchandise, and to pick up merchandise within the State of New York, for the return trips of said trucks and to conduct said trucks and the merchandise contained therein back to said terminals within the State of New York.

3. From coercing or compelling, by any of the means described in sub-paragraphs (a) to (e) inclusive, of Paragraph 1, any person, firm or corporation operating or controlling over-the-road motor trucks to employ any member or members of the defendant Union.

4. From coercing or compelling, by any of the means described in sub-paragraphs (a) to (e) inclusive of Paragraph 1, any persons, firms or corporations, or their respective representatives, to continue in effect agreements or understandings with the defendant Union or its representatives.

5. From coercing or compelling, by any of the means described in sub-paragraphs (a) to (e) inclusive, of Paragraph 1, any persons, firms, or corporations, or their respective representatives, to pay money to the defendant Union or to any of its officers, representatives, delegates, members, agents, servants, or employees.

6. From interfering with, impeding, hindering or restraining, by any means whatever, the entrance into New York City of over-the-road motor trucks, or the transporting of such trucks to the terminal or first place of consignment in New York City, or the unloading of merchandise from such trucks at such terminal or first place of consignment; provided, however, that the defendant Union may use lawful and peaceful means to secure or enforce general labor agreements or arrangements with owners, lessees, or operators of over-the-road motor trucks for the employment of members of the defendant Union or of an affiliated labor union, or to give otherwise lawful support to the lawful activities of other labor unions.

7. From aiding, abetting, inducing or assisting, individually or collectively, others to do any of the things which the defendants are herein restrained from doing.

III. That this decree shall not be construed to prohibit the defendants, their officers, representatives, delegates, members, agents, servants or employees, singly or in concert, from doing or performing:

(a) any or all of the acts described in sub-divisions (a) to (i) inclusive, of Section 104, chapter 6, Title 29 of the United States Code (said chapter containing the act commonly known as the "Norris-La Guardia Anti-Injunction Act"); or (b) any or all of the acts declared to be lawful in Section 52 of Chapter 5, Title 29, of the United States Code (being Section 20 of the Act commonly known as the "Clayton Act"); or (c) from seeking, securing, entering into or using lawful means to enforce

lawful agreements or arrangements with owners, lessees, or operators of over-the-road motor trucks or other motor trucks covering wages, hours and working conditions, or from lawfully seeking to bargain collectively or from lawfully bargaining collectively for employees, or from lawfully and peacefully picketing, lawfully striking or lawfully refusing to work; or (d) from otherwise lawfully seeking to attain or carry out the legitimate and proper purposes and functions of a labor union, provided, however, that nothing contained herein shall be construed to authorize any practice that would be unlawful but for the entry of this decree.

IV. That jurisdiction of this cause is retained for the purpose of enforcing or modifying this decree and for the purpose of granting such additional or supplemental relief as may hereafter appear necessary or appropriate.

V. That for the purpose of securing compliance with this decree, authorized representatives of the Department of Justice shall, at the request of the Attorney General, or an Assistant Attorney General, be permitted access, within the office hours of defendant Union, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or control of defendant Union, relating to any of the matters contained in this decree; and, any authorized representatives of the Department of Justice shall, subject to the reasonable convenience of defendant Union, be permitted to interview officers, employees or members of defendant Union with interference, restraint or limitation by defendant Union; and defendant Union, on the written request of the Attorney General shall submit such reports with respect to any of the matters contained in this decree as may from time to time be necessary for the proper enforcement of this decree.

VI. It is further ordered and decreed that plaintiff have and recover from the defendant Union its costs herein.

[¶ 55,245] Capon Water Company, Capon Springs Mineral Water, Inc., Louis L. Austin v. Federal Trade Commission.

United States Circuit Court of Appeals, Third Circuit. Filed October 9, 1939.

On petition for review from the order of Federal Trade Commission.

Enforcement of an order of the Federal Trade Commission limiting testimonials included in mineral water advertisements to statements by medical experts of the bottler, and prohibiting representations as to the varied curative powers of the product is granted where the curative value is a matter of dispute.

Joseph W. Henderson, Philadelphia, Pennsylvania; Phillip W. Austin, Washington, D. C.; Attorneys for Petitioners.

Wm. T. Kelley, Washington, D. C.; Attorney for Respondent.

Before MARIS, CLARK and BIDDLE, Circuit Judges.

Affirming the order of the Federal Trade Commission issued January 20, 1938, Complaint No. 2736.

[*Prior Proceeding*]

CLARK, C. J. This is the second visit of this particular mineral water to this court. Although that fact seems to have been ignored by all counsel, a search of the Federal Digest, under appropriate headings, revealed it. In 1930 the United States libeled "94 Dozen, More or Less, Half-Gallon Bottles Capon Springs Water" then claimed by Capon Water Company, the predecessor in title of the present petitioner. On representation of different counsel the learned district judge was persuaded to dismiss the libel, *U. S. v. 94 Dozen, More or Less, Half-Gallon Bottles Capon Springs Water,* 48 F. (2d) 378. The United States appealed but for some reason not disclosed did not bring up the three hundred and seventy-eight pages of testimony and our court accordingly sustained the dismissal, *U. S. v. 94 Dozen, More or Less, Half-Gallon Bottles Capon Springs Water (Capon Water Co., claimant),* 51 F. (2d) 913. We have examined that testimony, a public record, and we must say that we think it is more satisfactory than that now before us.

[*Therapeutic Value in Dispute*]

We are sustaining the particular order of the Commission solely because of its limited scope. We are not constrained to and therefore do not pass upon the wider controversy implicit in the subject. The dispute over balneal therapeutics has raged in the medical profession and inevitably, therefore, in the courts, ever since the Romans began "taking the waters", Valentiner, *Handbuch d. Balneotherapie; Dictionnaire des eaux minerales,* by MM.

Durand-Fardel; I. Burney Yeo, *The Therapeutics of Mineral Springs;* W. E. Fitch, *Mineral Waters of the United States and American Spas,* the author, a witness in the principal case. As we understand, it still rages and should, we think, be legally, at least, put to rest by a properly prepared case. Because if these so-called mineral waters are not of any independent therapeutic value, the public should be protected against assertions otherwise. If, on the other hand, they do possess separate curative properties, their use and so their advertising should be encouraged.

[*Judicial Precedents*]

The effect of the battle on the judicial laity is well illustrated in three opinions not cited but examined by us. The first is that of *U. S. v. Ninety-four Dozen Bottles C. S. Water, supra*, the second that of a distinguished Vice Chancellor of New Jersey, *Bear Lithia Springs Co. v. Great Bear Spring Co.,* 71 A. 383, and the third by a Justice of the Supreme Court of the District of Columbia. It will be noticed that in the second case one litigant complains of the lack of chemical analysis. We mention that because in the case at bar, the criticism is of reliance on such analysis and neglect of clinical experience. One can't please everybody. Our own associate in the Federal Judiciary expressed this opinion:

"Some of the literature put out by the claimants may be characterized as not only florid, but is almost laughable in its over statements. Every one has heard, however, of extravagant claims made by the advocates of a liberal use of ordinary drinking water. This is epitomized in the slogan 'flood your kidneys.' This has no reference to any particular drinking water, but applies to any water. All the extravagant claims made for drinking Capon Springs water are made for the liberal use of any drinking water. There is no reason to doubt that those who advocate the liberal use of drinking water honestly believe the practice to be beneficial. We are not prepared to make any finding that it is not, and we are far from finding that all the benefits claimed will be conferred. The point we have in mind to make is that the act of Congress does not interdict any one from advocating the liberal use of drinking water nor from enforcing the advocacy of it by extravagant predictions of the benefits which will follow. If this can be done in the case of water as water, we do not see how the claimants can be interdicted from saying the same thing about Capon Springs water." *U. S. v. Ninety-four Dozen Bottles C. S. Water*, 48 F. (2d) 378, 380-381.

The learned New Jersey equity judge, on the other hand, had these views:

"* * * The evidence shows, beyond doubt, that as long ago as 1893 the complainant's circular advertisements and all letterheads used by it contained the following representations referring to Bear Lithia Water: 'Nature's own remedy. Cures kidney and bladder troubles, uric acid, gout and rheumatism, phosphoric deposits, inflammation of the bladder, dropsical affections, brick dust deposits, gravel, and all forms of dyspepsia.'

* * * * * *

"The complainant produced some witnesses as experts who had no experience in the use of the water, but their testimony proves nothing beyond the claim that from a chemical standpoint the analysis was not inconsistent with the possibility that the water might have a beneficial effect upon the diseases it was claimed it would cure. One of the witnesses gave it as his opinion that 'its mineralization does not preclude its being of medicinal value,' and that the possibility would be enhanced if there was present a recently discovered agent, which he described as 'radio activity,' but there was no evidence that 'radio activity' was present in the water. The testimony of these experts as a display of learning is very interesting, but does not meet the question at issue, for none of the experts or physicians called by either side pretend that this water would cure any of the diseases named, except Dr. Smith, who did say that acute rheumatism, resulting from a gouty affection, might be cured by the use of a proper remedy, and that such a result might be reasonably expected from the use of this water, but that it would cure rheumatism generally he did not assert.

"The credulity of a court cannot be expected to extend beyond a reasonable limit, and when testimony is given which is opposed to common knowledge and the experience of mankind, as well as reliable medical evidence hypothetical testimony which seeks to lead to a contrary result must be rejected as of no value. It is testimony, but not evidence. That this water will not cure the ills it is promised by the complainant that it will is in accord with the evidence in this cause and with common sense. There may have been isolated cases where the user supposed his recovery was aided, or perhaps produced, by the use of this water, for conditions may have existed in some cases which made it appear to the person benefited that it was the result of the use of this water, but that is the case with every quack medicine, as the numerous testimonials obtainable and published in such cases testify, but that this water will cure all the human ills it is advertised to do no sane person can for a moment believe." *Bear Lithia Springs Co. v. Great Bear Spring Co.,* 71 A. 383, 386-387.

So, also, this tribute from the District of Columbia:

" 'For a person to obtain a therapeutic dose of lithium by drinking Buffalo Lithia Water he would have to drink from one hundred and fifty thousand to two hundred and twenty-five thousand gallons of water per day. It was further testified, without contradiction, that Potomac River water contains five times as much lithium per gallon as the water in controversy.' " Judge Gould, *U. S. v. Buffalo Lithia Springs Water, Cramp, Nostrums and Quackery,* p. 466.

[*Scope of Order*]

The Commission's order is surely the most gentle exercise of its power extant. It at most compelled the petitioners to cut

their advertisements to the testimony of their own physician experts. They were ordered to cease and desist from "representing directly or by implication that the use of said water *alone* either externally or internally will *cure*" 52 named diseases ranging from nephritis to chronic pneumonia (whatever that is) and from poison ivy to sterility.

[*Advertising Matter*]

Petitioners' advertising consisted in the main of a pamphlet or should we say brochure, which contained first, a touching account of the lowly redskins' interest in their Cacapaon (healing) waters; second, a suggestion that they are responsible for the vigor which enabled the Father of his country to assume that role; and third, both a summary of and quotations from the opinions of a series of physicians anent the therapeutic properties of the Capon (Anglicized) Springs. These last begin in 1870 and extend to the present. They vary in intensity of praise from the mild "applicable" of Dr. William P. McGuire, former President of the Medical Society of Virginia, to the violent "cures almost everything" of Dr. R. A. F. Penrose, former Professor at the University of Pennsylvania.

The present order of the Commission seems to us both inconsistent with what we know of their previous practice and open to the criticism we expressed in our recently filed opinion, *Belmont Laboratories v. Federal Trade Commission*, 103 F. (2d) 538. That comment referred to the fallacy of attempting to draw a "fine line" between remedy and cure. The present order seems to us to attempt an even more attentuated distinction. Under it, a bed manufacturer might advertise his products for the "cure" of pneumonia as long as he did not exclude the use of sulfapyridine. As the error is on the side of leniency petitioners should be pleased, not piqued.

[*Jurisdiction of Review Court*]

Although this may be our feeling about the order we are affirming, there does not seem to be anything we can do about it. Our function is, of course, not ***nisi prius***, and although not strictly appellate is confined by the statute to the enforcement of or refusal to enforce the Federal Trade Commission's orders. In the latter aspect, as the greater includes the lesser, we may modify. We cannot, however, ***sponte sua*** do what we have not been asked to do.

[*Refund Guaranty Effective*]

Even had this not been so, we should have preferred a different record. The Commission's experts seemed rather inexperienced in the particular branch and talked a good deal about Potomac River water. Petitioners' physicians, on the other hand, appeared to gather some of their clinical experience of Capon Springs Water from trying it on their dogs, Record p. 561, and wives, Record p. 546. For the future, if there is to be a future, we might call attention to one fact and one point of law. The chemical analysis of the water offered, and although criticized not rebutted, is substantially that of the *encyclopædia Britannica's* typical analysis of Mineral Waters, Vol. 15, 14th Ed., p. 530.[1] We do not believe that the money back guarantee has any bearing on the legal philosophy of the statute. Our bodies and not our pocketbooks are being protected. To restore the cash is not to restore the health.

[*Conclusion*]

The order of the Federal Trade Commission is affirmed.

[¶ 55,246] Opinion of Attorney General of Idaho.

Addressed to Harry Benoit, Attorney, Fred L. Viel, Grocery Association, and The Morrow Retail Stores. June 15, 1939.

Differences in cost price to large and small retail dealers permit variations in the bona fide resale price required under the Idaho Unfair Sales Act of 1939 and underselling by large dealers constitutes no violation of the statute where the retail sales are made at the required mark-up from "cost" price.

Gentlemen:

Re: *Chapter 209, 1939 Session Laws, p. 427 (Unfair Sales Act).*

[*Statement of Questions*]

This office has received several inquiries relative to the Unfair Sales Act passed by the recent legislature, some of which inquiries are overlapping. Therefore, we will attempt to answer all the questions propounded briefly set forth as follows:

1 May out of state wholesaler be com-

[1] See also, Bell, *Climatology and Mineral Waters of the United States*, p. 145; *The Propaganda for Reform in Proprietary Medicines*, Vol. 2, p. 160; Blumgarten, *Textbook of Materia Medica and Therapeutics, sub nomine, Saline Purgatives*, p. 218.

pelled to make the same prices as a resident wholesaler, or, if not, may the resident wholesaler meet his prices?

2. What minimum price must a retailer sell for?

3. Does the act affect drop shipments from out of the state?

4. Does the act apply to vegetables?

5. If a retailer buys direct from a manufacturer at 2% less than ordinarily, is he allowed to sell 2% cheaper?

6. What is the meaning of section 3 (subsection f), wherein it is provided "and purchases made by retailers and wholesalers at prices which cannot be justified by prevailing market conditions within this state shall not be used in determining cost to the retailer, and cost to the wholesaler"?

[*Interstate Competition*]

OPINION: In answer to question No. 1, section 3, subsection (b) paragraphs 1, 2 and 3 provide as follows:

"(b) When used in this Act, the term 'cost to the wholesaler' shall mean the invoice cost of the merchandise to the wholesaler, or the replacement cost of the merchandise to the wholesaler, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added

(1) freight charges, not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and

(2) cartage to the retail outlet in the absence of proof of a lesser cost, shall be deemed to be three-fourths (¾) of one per cent of the cost to the wholesaler as herein set forth after adding thereto freight charges but before adding thereto cartage and markup and

(3) a markup to cover a proportionate cost of doing business which markup in the absence of proof of a lesser cost, shall be two (2%) per cent of the cost to the wholesaler as herein set forth after adding thereto freight charges and cartage but before adding thereto the markup."

From the above cited provisions, it is obvious that the regulation reaches only resident wholesalers who must sell for cost as defined in the act less 10% trade discount but with a 2% markup, and therefore a resident wholesaler cannot meet the prices of an out of state wholesaler if his only protection in this connection is the act effective in this state. However, I will hereinafter discuss the relationship between the act of Idaho and the act of any other state wherein a wholesaler from that state ships into Idaho.

[*Minimum Resale Price*]

Answering question No. 2, it is provided in section 3, subsec. (2) as follows:

"Subsection (a). When used in this Act, the term 'cost to the retailer' shall mean the invoice cost of the merchandise to the retailer, or the replacement cost of the merchandise to the retailer, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added

(1) freight charges not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and

(2) cartage to the retail outlet if done or paid for by the retailer, which cartage cost, in the absence of proof of a lesser cost, shall be deemed to be three-fourths (¾) of one per cent of the cost to the retailer or herein defined after adding thereto freight charges but before adding thereto cartage and markup, and

(3) a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be six (6%) per cent of the cost to the retailer as herein set forth after adding thereto freight charges and cartage but before adding thereto a markup."

Thus the minimum price a retailer must sell for would be a 6% markup over his cost as defined in the act.

[*Drop Shipments*]

Answering question No. 3, it is to be noted that drop shipments go directly from the out of state wholesaler to the retailer upon an order of the resident jobber of wholesaler usually who never handles any part of the shipment although the out of state shipper bills the resident wholesaler or jobber, who in turn carries the credit of the retailer, yet under the terms of the act, and particularly section 3, subsec. (h) defining sales at wholesale, and subsection (j) defining a "wholesaler", I am of the opinion that the act does not adequately protect one within the state against drop shipments from without the state, no provision therefor being made in the act.

[*Vegetables Subject to Act*]

Answering question No. 4, the act became effective on the 8th day of May, 1939, and covers any "items of merchandise" (secs. 4 and 5) which includes vegetables.

[*Purchase below Wholesale Price*]

Answering question No. 5, if the retailer buys directly from a manufacturer at 2% less than ordinary, he must, under the provisions of the act, sell at a price 6% above the cost to him which, of course, would alow him to sell 2% cheaper than a competitor.

[*Cost Price*]

Answering question No 6, this matter presents a question of first impression in Idaho, but an examination of section 3 subsection (f) indicates that it is obvious, as provided therein, that the cost price must be a bona fide cost price. However, as to the proper interpretation of subsection (f)

it is perhaps proper to say that it may require a judicial determination in our own courts before a satisfactory solution may be had. However, one court in another state has spoken on this matter.

[*Foreign Interpretation*]

In the case of *Rust v. Griggs,* 1938 Tenn., 113 S. W. 2d 733, it was held that an unlawful burden on interstate commerce is not imposed by a statute prohibiting sales below cost, and providing that cost to the retailer and cost to the wholesaler must be bona fide costs, and that sales to retailers and wholesalers at prices which cannot be justified by existing market conditions "within this state" shall not be used as a basis for computing costs with respect to sales by retailers and wholesalers. Answering a contention that the retailer or wholesaler was denied the right to use invoice cost on goods purchased in another state on a market lower than that existing in Tennessee as a basis for his selling price, even though a fair profit could thereby be made, the court said:

"Market conditions in the subsection just quoted refer to conditions upon which the wholesaler and the retailer in this state can purchase goods. The subsections deal with cost to the retailer and cost to the wholesaler. Marketing includes buying as well as selling. The language quoted is no attempt at regulation of the sale of goods in Tennessee by the retailer or by the wholesaler. The language quoted merely means that in computing his cost or purchsae price the local merchant cannot use as a basis some exceptional sale price made to him, either in this or another state, not justified by market conditions."

In this particular case the complaint charges that the defendant sold fruit jars for less than they cost him, and sold sugar for less than cost and cost of distribution; it appears that the poster advertising the sugar and jars also advertised many other articles for sale, and that the defendant was taking a loss on the two loss leaders, namely, sugar and jars, and on the other articles some were advertised and sold at market prices and some at prices above market prices; the defendant was enjoined from so violating the act.

[*Comparison of Statutes*]

One of the errors assigned in the case is that the statute, as heretofore explained, was a burden on interstate commerce, and that the retailer or wholesaler was denied the right to use invoice cost on goods purchased in another state on a market lower than that existing in Tennessee as a basis for his selling price, even though a fair profit could thereby be made. Such argument was founded on section 1 subsection (c) of the Tennessee Act, which is quite similar to section 3 subsection (f) of our statute, and for the purpose of permitting you to draw your comparison between the two sections, they are hereinbelow set forth as follows:

"Section 1 (subsection c). (TENNESSEE) The term 'cost' to the retailer and 'cost' to the wholesaler must be bona fide costs, and sales to retailers and wholesalers at prices which cannot be justified by existing market conditions within this state shall not be used as a basis for computing costs with respect to sales by retailers and wholesalers."

"Section 3 (subsection f). (IDAHO) The terms 'cost to the retailer' and 'cost to the wholesaler' as defined in subsections (a) and (b) of this section shall mean bona fide costs; and purchases made by retailers and wholesalers at prices which cannot be justified by prevailing market conditions within this state shall not be used in determining cost to the retailer, and cost to the wholesaler."

In the Tennessee case the court said:

"Market conditions in the subsection just quoted refer to conditions upon which the wholesaler and retailer in this state can purchase goods. The subsection deals with cost to the retailer and cost to the wholesaler. Marketing includes buying as well as selling. The language quoted is no attempt at regulation of the sale of goods in Tennessee by the retailer or by the wholesaler. The language quoted merely means that in computing his cost or purchase price the local merchant cannot use as a basis some exceptional sale price made to him, either in this state or another state, not justified by market conditions."

The court further said:

"In consideration of this statute we may first observe that it is not a price fixing law."

[*Legislative History*]

Similar "selling below cost" acts have been enacted by at least eighteen states, which are: Arizona, Arkansas, California, Colorado, Kentucky, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New Jersey, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia and Wyoming. While a few states have passed laws of a similar nature but limited to particular businesses such as retail drug store, bakeries and petroleum industries, a very clear cut exhaustive collation of authorities will be found in 118 A. L. R. 506.

In the case of *People v. Kahn* (Calif.) 50 Pac. 2d 596, the Tennessee case was cited with approval and it was also cited with approval in the case of *Wholesale Tobacco Dealers v. National Candy Co.* (Calif.) 82 Pac. 2d 3. In the *Wholesale Tobacco* case the court made the following statements in the syllabus:

[*Constitutionality of Foreign Acts*]

"25. The provisions of the Unfair Practices Act as amended in 1935 prohibiting the sale of commodities below cost as defined in the act for the purpose of injuring competitors and destroying competition is not unconstitutional on ground that lack of uniformity arising because of ability of large chain and department stores to buy for less than smaller merchants defeated purpose of act to prevent monopoly, since whether provision of statute was reasonably adapted to effectuate object thereof dealt with reasonably debatable economic problem, and hence was for Legislature. Gen. Laws Supp 1935, Act 8781, sec. 3; Const. art. 1, sec. 11."

"27. The provision of the Unfair Practices Act as amended in 1935 prohibiting the sale of the commodities below cost as defined in the act for purpose of injuring competitors and destroying competition is not unconstitutional as discriminatory in operation because of disparity in amount of costs at which commodities are obtainable by large and small dealers since discrimination, if any, is in result and not in the operation of the statute and especially in view of exemption from operation of statute of endeavor in good faith to meet prices of competitors. Gen. Laws Supp. 1935, Act. 8781, sec. 3; Const. art. 1, sec. 11."

In the case of *State v. Langley* (Wyo.), 84 Pac. 2d. 767, several of the features of similar acts in other states were exhaustively discussed and sustained, and the court on page 778 made this pertinent statement:

"Nor can we say that they are inappropriate. The court in *Balzer v. Caler, supra,* thought that the statute in question tends to encourage monopolies and destroy competition rather than the contrary, on account of the fact that large industrial concerns can at all times undersell merchants with limited capital. We do not think that the legislature was compelled to accept that view as conclusive. The court in that case considered merely the question of prices. It overlooked the factor of good will. The independent, or any other, merchant may be able to maintain himself on account of such good will, notwithstanding the fact that others undersell him to some extent, provided they do not undersell him too much. See further on this subject *Wholesale Tobacco Dealers v. National Candy Co., supra.*"

In many of the cases found in 118 A. L. R., the defendant evidently pleaded guilty, or if suit was one for injunctive relief he filed a demurrer, and in either event only constitutional questions were raised, and such, of course, obviated the necessity of passing on the merits of many conditions, urging that the particular acts lacked certainty in arriving at cost. See also *Hammond v. Bayless Mkt.* (Ariz.) not reported, *Associated Merchants of Montana v. Oremsher,* 86 Pac. (2) 1031.

[*Intent Not Determinative*]

In connection with the matter of drop shipments from out of state directly to the retailer, perhaps many difficult and inequitable situations may develop. However, there is some protection in this direction by virtue of the fact that all the states surrounding Idaho, with the exception of Washington and Nevada, have a similar law which, of course, would be a check upon the wholesalers within those respective states to sell at a price less than is provided by the particular state law. However, time only will permit us to properly evaluate the benefit of similar laws in adjoining states. It is common knowledge that larger industries with unlimited capital are able to purchase commodities on the open market at wholesale for much less than they can generally be purchased by small independent merchants, for the reason that the former may procure such articles in greater quantities and distribute them among many retail stores under their management; furthermore, large industries or chain store groups are able to allocate overhead expenses, such as advertising, among its numerous stores and thus the wholesale cost to the larger institutions, especially of staple articles, is much less than the cost of those similar articles to a small merchant, yet under the act it seems apparent that the larger stores may undersell the small merchant without necessarily violating the act. Further discussing the subject, some state statutes contain a flat prohibition against sales below cost without reference to the intent of the seller in making such sales and irrespective of their effect. Idaho apparently has such a statute, while other statutes provide that such sales must be made with "wrongful intent" or "injurious effect." One cannot say whether the courts of Idaho will read into our statute a requirement of "wrongful intent" or "injurious effect." Our act (sections 2, 4 and 5) briefly and plainly makes it a misdemeanor to sell below cost whether with or without "wrongful intent" or with or without "injurious effect," and I have not studied an act in my search which is identical to that of Idaho in this respect.

[*Exceptions*]

Certain exceptions are noted under section 7 of our act, which are as follows:

"Section 7. The provisions of this Act shall not apply to sales retail or sales at wholesale

(a) where perishable merchandise must be sold promptly in order to forestall loss;

(b) where merchandise is imperfect or damaged or is being discontinued and is advertised, marked or sold as such;

(c) where merchandise is sold upon the final liquidation of any business;

(d) where merchandise is sold for charitable purposes or to relief agencies;

(e) where merchandise is sold on contract to

departments of the government or governmental agencies;

(f) where merchandise is sold by any officer acting under the order or direction of any court."

These same exceptions appear in practically every other state act I have examined, and practically all other states which have three other exceptions, to-wit:

(a) Merchandise sold in meeting the legal price of competitors;

(b) Isolated transactions;

(c) Bona fide clearance sales.

[*Constitutional Effect*]

It is obvious that these additional exceptions under the terms of the respective statutes make them more easily sustainable if attacked.

I have added some additional comment to the inquiries, as you will note, which was done with the thought that it might be helpful to those concerned.

[¶ 55,247] Willie Nickelson v. Nestles Milk Products Corporation, Inc., et al.

United States Circuit Court of Appeals, Fifth Circuit. Decided November 8, 1939.

Appeal from the United States District Court, Southern District of Alabama.

An allegation that parties defendant in a civil proceeding under the Alabama anti-trust laws refused, in furtherance of an agreement in restraint of trade, to purchase milk offered for sale by plaintiff dairyman creates an issue of fact for submission to a jury.

W. R. Withers, Greensboro, Alabama; J. E. Wilkinson, Jr., Selma, Alabama; Attorneys for Appellant.

Fleetwood Rice, J. Gordon Madison, Hyman Rosenfeld, Tuscaloosa, Alabama; Fred S. Ball, Jr., Montgomery, Alabama; Attorneys for Appellees.

Before HUTCHESON, HOLMES and McCORD, Circuit Judges.

[*Statement of Case*]

HOLMES, Circuit Judge: This is an action for damages filed in the state court by appellant, Willie Nickelson, against the appellees, Nestles Milk Products Corporation and Swift & Company. The case was removed to the federal court, a motion to remand overruled, and, on motion of the defendants in the court below, a summary judgment was rendered against the plaintiff.

[*Jurisdictional Issues*]

The question of jurisdiction demands our first consideration. Diversity of citizenship sufficient to warrant removal is clear and conceded, but it is contended that the requisite amount in controversy is lacking. Appellant seeks to recover penalties and damages under the anti-trust laws of Alabama. See sections 5697, 6826, 6827 (as amended by Acts of 1931, page 641) of the 1923 Code of Alabama. At the time the petition for removal was filed, there were seven counts in the complaint or declaration, each claiming five hundred dollars against each of the defendants, or a total of much more than three thousand dollars.

[*Each Count a Separate Cause*]

The rule in Alabama is that each count in a complaint is considered as the statement of a different cause of action.[1] The case of *Nashville Railway Company v. Hill*, 146 Ala. 240, relied upon by appellant, is clearly distinguishable. It involved the death of the plaintiff's intestate, and, although there were several counts in the complaint, the court took the view that inasmuch as the plaintiff's intestate could be killed but once, each count was for the same cause of action, namely, the wrongful death of the decedent. That was a different case from the one before us, where the appellant is suing to recover penalties and damages accruing from alleged violations of the anti-trust laws, each claim being set forth in a separate count, there being nothing in the complaint to rebut the presumption that each count is for a separate cause of action, and the Alabama rule being that, under the pleadings, he may recover the total of the various amounts asked in each count, that total being more than three thousand dollars.

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[1] *Bryant v. Southern Railway Company*, 137 Ala. 488.

[*Reduction of Amount Not Determinative*]

There is nothing to suggest bad faith of the pleader in asserting an excessive amount in order to confer federal jurisdiction, but there is basis for the argument that, in order to defeat it, an effort was made to reduce the amount in controversy after removal. If this was the purpose of the amended complaint, it must fail, first, because federal jurisdiction once acquired cannot be defeated by reducing the amount below the sum originally claimed in good faith,[2] and, secondly, because the amendment does not in fact reduce the amount but leaves intact the original counts numbered 1 to 7, and simply adds two additional counts which are designated A and C.

In ascertaining the total amount in controversy, the appellant should not complain if we take his viewpoint and determine the value to him of the rights which he in good faith asserted in his pleadings at the time the petition for removal was filed.[3] Since he sought to recover the aggregate of the amounts claimed in all counts, and might have done so, it is clear that the amount specified by the federal statute to warrant removal was involved and the motion to remand was properly overruled.[4]

[*Alleged Anti-Trust Violation*]

The appellant's contention, as disclosed by the amended complaint and the affidavits before the court on the motion for a summary judgment, is that he was engaged in hauling milk for himself and others in Hale County, Alabama; had established a regular trade route; had numerous customers, whose milk he delivered; that appellees for a while purchased milk from both said customers and appellant; that said hauling and purchases of milk were terminated, and further sales of milk by said customers and appellant were prohibited, by an unlawful trust, combine, agreement, and conspiracy entered into by and between the appellees in violation of the statutes of the State of Alabama; that thereafter appellant offered to sell his own milk and to deliver the milk of his customers to appellees which they and each of them refused to buy or receive because of said unlawful conspiracy in restraint of trade; that he was thereby entirely prevented from hauling or selling milk to either of appellees, and was deprived of revenue from the hauling of the milk of his customers as well as from the sale of his own milk, to his great damage.

[*Existence of Issue*]

No answer to the complaint having yet been filed by the defendants, we shall not undertake to shape the issues for the parties. We simply hold that the complaint presents at least one issue of fact which should be met by an answer on the part of the defendants, that issue being whether or not the defendants refused to buy milk from the plaintiff in pursuance of the alleged agreement entered into by them in restraint of trade. Number 56 of the Federal Rules of Civil Procedure not being applicable because there was presented by the complaint a genuine issue as to material facts, we think appellant is entitled to have a joinder of the issues, and, when joined, is entitled to have such issues as may be raised by the pleadings submitted to a jury

Because he was denied the right of a jury trial, the judgment of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

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[2] *Kirby v. American Soda Fountain Co.,* 194 U. S. 141; *Cooke v. United States,* 2 Wall. 218; *Kanouse v. Martin,* 15 How. 198, 208; *Roberts v. Nelson,* 8 Blatchf. 74, 20 Fed. Cas. No. 11,907; *Mutual Life Ins. Co. of New York v. Rose,* 294 Fed. 122.

[3] *Pullman Co., et al. v. Jenkins, et al.,* 305 U. S. 534; *Dobie's Federal Procedure,* pp. 133 and 152.

[4] *Vance v. W. A. Vandercook Co.,* 170 U. S. 468, 472; *Scott v. Donald,* 165 U. S. 58, 89; *Barry v. Edmonds,* 116 U. S. 550; *Hampton Stave Co. v. Gardner,* 154 Fed. 805. *Thompson v. Southern Ry. Co.,* 116 Fed. 890. *Cf. North American, etc., Co. v. Morrison,* 262 U. S. 262, 266 and 267; *Howard v. Carroll,* 195 Fed. 646.

[¶ 55,248] **El Moro Cigar Company, a Corporation, v. Federal Trade Commission.**

United States Circuit Court of Appeals, Fourth Circuit. Decided November 6, 1939.

On petition for review of an order of the Federal Trade Commission.

Inclusion of the word "Havana" upon a domestic cigar label constitutes an unfair trade practice which is not remedied by a small type accurate description of the product, and use of the improper brand over an extended period of time vests no right in the user.

Philip S. May (J. T. G. Crawford on brief); Attorney for Petitioner.

Marshall Morgan, Special Attorney, and Martin A. Morrison, Assistant Chief Counsel, Federal Trade Commission (W. T. Kelley, Chief Counsel, and James W. Nichol, Attorney, Federal Trade Commission, on brief); Attorneys for Respondent.

Before PARKER and NORTHCOTT, Circuit Judges, and DOBIE, District Judge.

Affirming the order of the Federal Trade Commission (1939) FTC Complaint No. 2603.

[*Order of FTC*]

NORTHCOTT, C. J.: Petitioner seeks to review and to set aside or modify that portion of an order entered against it by the Federal Trade Commission on February 21, 1939, relating to the use of the word "Havana" in describing, designating, or referring to cigars not made from tobacco grown on the Island of Cuba and reading in its pertinent part as follows:

"It is ordered that the respondent, El Moro Cigar Company, a corporation, its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of cigars in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from—

1. Using the word 'Havana,' or any other words, terms, or picturizations indicative of Cuba, alone or in conjunction with any other word or words to describe, designate, or in any way refer to cigars which are not made from tobacco grown on the Island of Cuba.

* * * * * * *

It is further ordered that the respondent shall, within sixty days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order."

[*Business of Petitioner*]

Petitioner is a North Carolina corporation, engaged in manufacturing, selling and distributing various brands of cigars, with its place of business in the city of Greensboro, and is in competition with others engaged in the same business in various states.

[*Statement of Facts*]

In the year 1931 the petitioner acquired from a Pennsylvania concern the trade name "Havana Counts" that had been used since the year 1906, and began the manufacture and sale of a cigar under that label. On the boxes containing the cigars the words "Havana Counts" appeared in large letters and, until the year 1935, the words "Guaranteed Hand Made Imported and Domestic Stock." In the year 1935, the use of these latter words was discontinued and words "Domestic Filler Domestic Wrapper" substituted. The cigars, which retailed at two for five cents, were in a wrapper with the words "Havana Counts" printed on it and were packed in boxes containing fifty or one hundred. They were made in the United States entirely of domestic tobacco.

[*Findings of Commission*]

The Commission found that a very fine quality of tobacco used in the manufacture of cigars is grown on the Island of Cuba, near Havana, that the word "Havana" has acquired a special meaning and significance with manufacturers and users of cigars, and is understood to mean that the cigar to which the name is applied is made of tobacco that is grown on the Island of Cuba.

The Commission further found that words "Notice: These cigars are made in the United States entirely and only of domestic tobacco," placed in much smaller type than that used in the words "Havana Counts," did not qualify or explain the use of the word "Havana" so as to put a prospective purchaser upon notice, but that the two phrases were contradictory.

The Commission also held that the use of the word "Havana" in regard to a cigar that contained no Cuban tobacco was false and misleading and an unfair trade practice with respect to petitioner's competitors engaged in the cigar business in interstate commerce, within the meaning of the Federal Trade Commission Act passed September 26, 1914, (15 U. S. C. A. Sec. 41).

[*Bases of Review*]

In asking that the order of the Commission directing it to cease using the word "Havana" in connection with a cigar made in the United States from domestic tobacco only, the petitioner contends that it is a fact well known to both the trade and consumer that a cigar with any appreciable amount of Cuban tobacco in it could not be sold at retail for two for five cents and that therefore the use of the word could not deceive or mislead anybody and was not unfair; that having purchased the brand "Havana Counts," and having used it for a number of years, the petitioner had acquired a property interest by the use of the name that the Commission had no authority to take from it; and that the brand in question had been used for more than thirty-three years and was acquired by the petitioner more than seventeen years after the establishment of the Commission, which had not, in that time questioned the propriety of its use, and that therefore the use of the brand should not be interfered with.

Hearings were held at which numerous witnesses were examined.

[*Trade Meaning of "Havana"*]

A study of the voluminous testimony taken shows conclusively that the word "Havana" has acquired a special meaning or significance in the cigar trade when applied to a cigar. It has come to mean that the cigar labeled with a phrase in which the word is used, is made, at least in part, from tobacco grown in Cuba. This being true, it necessarily follows that the word cannot properly be used in describing a cigar made entirely of domestic tobacco. In the case of *Hensmer & Son v. Federal Trade Commission,* decided August 10, 1939, the Circuit Court of Appeals for the Third Circuit said in considering a similar question:

"The difficulty of petitioner's position lies in the fact that the implication of the word 'Havana' is totally false. The purchaser can be guided by either label or legend, but not by both. * * *"

The Third Circuit has also held to the same effect with regard to the word "Havana," in the second decision in the *Bayuk* case handed down June 26, 1939, and a similar holding was approved in the Second Circuit. (*F. T. C. v. Edwin Cigar Co.,* 68 Fed. (2d) 993).

Webster's New International Dictionary, Ed. 1934, defines "Havana" as an adjective meaning "of tobacco, grown in Cuba, of a cigar made in Cuba or from Cuban tobacco."

Having acquired this meaning the use of the word to describe something different constitutes an unfair trade practice. *F. T. C. v. Walkers New River Mining Co.,* 79 Fed. (2d) 457; *Lighthouse Rug Co. v. F. T. C.,* 35 Fed. (2d) 163; *F. T. C. v. Maisel Trading Post, Inc.,* 77 Fed. (2d) 163.

Nor can the impropriety of the use of the word "Havana" be cured by the sentence, "These cigars are made in the United States entirely and only of domestic tobacco," in smaller type than is used in the words "Havana Counts." *F. T. C. v. Army and Navy Trading Co.,* 88 Fed. (2d) 776.

[*Laches Inapplicable*]

Long use of a misleading brand can vest no right in the user. As was said by Mr. Justice Cardoza, in *F. T. C. v. Algoma Lumber Co.,* 291 U. S. 67:

"* * * The Federal Trade Commission was not organized till 1914, its jurisdiction then as now confined to interstate and foreign commerce. Silence up to that time is not even a faint token that the misapplied name had the approval of the industry. It may well have meant no more than this, that the evil was not great, or that there was no champion at hand to put an end to the abuse. Even silence thereafter will not operate as an estoppel against the community at large, whatever its effect upon individuals asserting the infringement of proprietary interests. *French Republic v. Saratoga Vichy Co.,* 191 U. S. 427. There is no bar through lapse of time to a proceeding in the public interest to set an industry in order by removing the occasion for deception or mistake * * *."

[*Public Interest*]

It cannot be successfully contended that the interest of the public is not involved. As we said in the *Walkers New River Mining* Case, *supra:*

"That the public interest is involved cannot be doubted. It is manifestly in the interest of the public to prevent the continuance of an unfair practice which tends to deceive the public and divert trade from competitors."

[*Conclusiveness of Findings*]

The findings of the Commission, if supported by substantial evidence, are conclusive. *F. T. C. v. Walkers New River Mining Co., supra. F. T. C. v. Algoma Lumber Co., et al., supra.*

[*Effectiveness of Order*]

It has been urged on behalf of the petitioner that, should the Commission's order be enforced, a reasonable time should be allowed before it becomes effective, so that petitioner's labels and advertising matter could be changed. This matter is more properly within the province of the Commission rather than the courts. We are of the opinion that we have no power to order any delay in the putting into effect of a lawful order of the Commission.

[*Conclusion*]

The findings of fact made by the Commission are supported by the great weight of the evidence. The order made was a proper one and an order will be entered enforcing it.

[¶ 55,249] Gene McCann v. New York Stock Exchange, et al.

United States Circuit Court of Appeals, Second Circuit. Decided November 13, 1939.

Appeal from the United States District Court, Southern District of New York.

Publication of information concerning the criminal record of a business man does not establish a conspiracy within the federal Anti-Trust Acts on the part of the publicizer, a Better Business Bureau, and other parties where no motive is proven other than a purpose to rid business of unscrupulous operators.

Gene McCann, *pro se.*

Charles H. Tuttle, Attorney for Appellees.

Before L. HAND, SWAN and AUGUSTUS N. HAND, Circuit Judges.

[*Statement of Case*]

L. HAND, C. J.: This is an appeal from a judgment, entered upon the verdict of a jury for the defendants. The action was to recover treble damages against the defendants under the Anti-Trust Acts, for destroying the plaintiff's business as a stockholder in the City of New York. The theory of the complaint was that the defendant, Better Business Bureau of New York, in conjunction with the New York Stock Exchange, its officers and members, and a large number of other persons, conspired to drive the plaintiff out of business in order to rid themselves of his competition. To do so they spread broadcast by letters and leaflets that he was a person unreliable morally and financially, with a record of criminal convictions. The case was tried to a jury and, as a verdict was taken, nothing is open upon this appeal but the supposed errors in the conduct of the trial. These were of three kinds: (1) the summation of the defendants' counsel; (2) an instruction given to the jury by the judge; (3) certain rulings in the admission and exclusion of evidence.

[*Propriety of Summation*]

It is true that the summation was extremely denunciatory, but the passages objected to consisted for the most part of vehement comments upon the plaintiff's conduct in the past which had been undubitably proven. Not only did the plaintiff not object at the time, or after the speech was concluded, but he has not assigned any part of it as error. While we may take notice, *nostra sponte,* under Rule 10, of "plain error" which is not assigned, we are certainly not disposed to exercise that power in this case. Indeed, we cannot find anything which could be thought to have gone beyond tolerable limits, unless it be the argument that the jury should discredit the plaintiff because he did not shield his brother by keeping information about him from the public authorities. Most people would probably regard it as shameful to betray so near a relative, and it was at least open to doubt—whatever the legal duty to disclose the information—whether the argument was not permissible. However that may be, it would be wholly unwarranted after so long a trial to reverse the judgment upon such an objection, neither raised at the time, nor assigned a year later when manifold other assignments were prepared.

[*Test of Defamation*]

The next objection has more substance. As we have said, the action was for damages growing out of a conspiracy to destroy the plaintiff's business. The judge in his charge stated the law correctly in a general way, but in one passage, in speaking of information given out by the Bureau of the plaintiff's "criminal record," he said that "if that information was true, the Better Business Bureau, regardless of its purpose in disseminating the information, would not be liable, is not liable, because no person or firm can be liable for telling or publishing the truth." Later on he repeated more to the same effect. When he had finished, the plaintiff took no exception to this, or to anything else, but made the following request: "May I ask your Honor to charge that by 'truth' you mean a substantially fair and full-fact comment on matters referred to?" To this the judge answered: "No. I will charge you again, gentlemen, that no person or firm is liable, regardless of the purpose with which it

is published, for publishing facts that are true." Whereupon the plaintiff then replied: "I take an exception to that statement." The judge could only have understood the exception as directed to his refusal to qualify his original charge; that is, to add that the defendants, besides stating the bare facts, should have made full and fair comment upon them. That request was rightly refused. Apparently it was based upon the doctrine in defamation that if one comments upon another's conduct in such a way as to defame him, it will not be an excuse that the facts commented upon are true, unless the comment itself expresses one's real opinion and is not uttered merely to injure him. Restatement of Torts, § 606. The doctrine did not apply to the case at bar, even if it had been an action for defamation, because the Bureau did not comment upon the plaintiff's conduct at all, but confined itself to a bare statement of the facts. It may sometimes indeed be true that one may defame another by stating so little as in the end to leave a false impression. Perhaps this was what the request was meant to reach; that is, that if the Bureau broadcast the plaintiff's convictions for stealing, it should have added that these were committed when he was eighteen and twenty-four years old. But the statements were not by themselves misleading; and there was no duty to palliate the plaintiff's crimes, which had been several and grave. The request assumed the applicability of the test in dafamation, and was as out of place as indeed the original charge had been in an action of this kind. *Swift & Co. v. United States,* 196 U. S. 375, 396; *Duplex Co. v. Deering,* 354 U. S. 443, 465, 466; *Lamar v. United States,* 260 Fed. 561 (C. C. A. 2). But the plaintiff cannot complain that the original was not proper for he raised no such question; and it does not inevitably follow that, if the judge had been asked to reconsider this part of what he said, he would have refused.

[*Lack of Evidence*]

Moreover, if what the Bureau did say about the plaintiff was true, it was not guilty anyway, not because truth is a defence in such actions, but because in this particular case there was no other evidence to support a verdict. To be actionable the combination or agreement must be unlawful in means, or in end; the only unlawful means possible were the utterances about the plaintiff, the truth of which the judge did leave to the jury. The end avowed—ridding the business of unscrupulous persons—was not only lawful, but commendable, and while the defendants *may* have had other motives, that had to be proved and could not be assumed. To spread abroad what it had learned did not tend to show that its true purpose was not what it avowed, if the facts were so; indeed the Bureau would have been recreant to its duty, if it had suppressed the information, which, *prima facie* at least, showed the plaintiff to be unfit for the business. It did not volunteer the information; it was not until the New York Times inquired of it, that it used it at all; and although the plaintiff swore that thereafter it repeated the charges, that was not alone enough to support a finding of improper motive. Nor is there any substance to the charge that the Bureau favored its members either in making charges, or in publishing such charges as it proved. It is true that the New York Stock Exchange did not after 1929 publish the names of those of its members whom it had itself disciplined, but there is not the slightest evidence that it had ever tried to prevent the Bureau from proceeding against any; and in several instances it was shown that the Bureau had pressed to a conclusion charges against its own members. Even if it drove out of business the Consolidated Exchange in New York and the Boston Curb Exchange, that too proved nothing, because, for aught that appears, it was desirable to do so. Thus, even if any objection had in fact been taken to the charge about "truth," it would not have justified a reversal.

[*Admission of Records*]

There remain the objections to the admission and exclusion of evidence. The first is that the judge refused to compel the New York Stock Exchange to produce "records * * * concerning any investigations asked by the Stock Exchange or any of its members." The hope was apparently that these would show that the Stock Exchange favored its members, and used the Bureau only to eliminate competitors. The Exchange did produce a very large number of documents, including all "literature" which it had received from the Bureau. Probably we should not assume that "literature" included any answers of the Bureau to requests made for investigations, if any were made; and we must own that we do not see why the judge should have refused to comply with the plaintiff's request, though it is the merest speculation that compliance would have changed the result. It was natural enough, however, that he should have called a halt to the plaintiff's endless demands for documents on the mere chance that something might be turned up that would be useful. If the refusal was an error, it was at least no ground to reverse the judgment.

The next objection was that the plaintiff was not allowed to show how widespread was the publication of the defamatory material; that is, that it went very generally to brokers and dealers in securities, including some who dealt with him. This might have been relevant, had the jury found in his favor; but as it went only to the extent of his damages, it was immaterial. He also objected to the judge's refusal to let him prove that the Exchange did not publish the fact that several of its members had paid financial writers on the New York papers; the implication once more being that it favored its own members, and had not been actuated by a sincere desire to better business. This information came out—according to the plaintiff's offers of proof—at a public hearing before a Congressional committee in Washington, and was published widely in the newspapers; it is difficult to see what service the Exchange and the Bureau would have done by adding to this publicity. Even were we to suppose that it might have helped by emphasizing what was already known, the inference of bad motive from the failure to do so was so tenuous as to make the error, if it was an error, of slight importance.

The next objection was the refusal to admit in evidence an editorial in "Printers' Ink" which very mildly criticized the Bureau, and suggested possible changes in its methods. On what theory this could have been competent passes our comprehension. The same applies to the exclusion of a number of the Congressional Record containing a brief of one, Hardeman, printed by the request of Senator Brookhart.

The next objection was to the exclusion of reports and broadsides of the Better Business Bureau of St. Louis, of the same general character as those of the New York Bureau. Since the St. Louis Bureau was acting in concert with the New York Bureau, it is argued that these were the acts of a conspirator in pursuance of the conspiracy. Theoretically, this may be true, but the documents would have added nothing probative unless it was to show the combination, and that was otherwise amply proved. If they were otherwise admissible, it could only have been as to the extent of the publication, and therefore as to the damage done.

The next objection was to the denial of the plaintiff's right to testify that his customers said that they would not deal with him because of the publications of the Bureau. Assuming that this hearsay was competent under any of the recognized exceptions, again, the worst that can be said is that it went only to the damages. The same applies to the reasons given by the New York Times for discontinuing his advertising, except that in this case the testimony was of the person who himself talked to the plaintiff.

[*Limitations upon Inspection*]

The last objection is to the limited admission of the minutes of the Better Business Bureau. This book was produced in court and submitted to the judge, who ruled that the plaintiff could not inspect it, but that any parts of it which the witness on the stand found to concern the plaintiff should be read. The plaintiff wished to examine the whole book, but, although he was entitled to inspection at the trial, he was not, before the New Rules, entitled to a general inspection. § 636, Title 28, U. S. Code. *Keenan v. Texas Production Co.*, 84 Fed. (2d) 826 (C. C. A. 10); *Pressed Steel Car Co. v. Union Pacific R. R. Co.*, 241 Fed. 964, 967. Since the inspection was then permitted only at trial, the proper course was to submit the document to the judge to decide whether it was pertinent. We of course have power to review his ruling, but there is nothing to show that there were material parts of the minutes which were excluded but which should have been admitted.

[*Conclusion*]

In general the plaintiff was given the utmost latitude throughout the trial; the documents introduced fill eighteen volumes of the record; the typewritten narrative covers more than 800 pages; the case took three weeks to try. The plaintiff's principal witness was himself, most of the others being hostile. The jury had ample means of gauging the truth of what he said, and the motives which actuated the defendants; their verdict was amply sustained by the evidence, and it would be a patent miscarriage of justice to disturb it.

[*Affirmance of Judgment*]

Judgment affirmed.

[¶ 55,250] **United States v. The Borden Company, Charles L. Dresel, Harry M. Reser, et al.**

Supreme Court of the United States. No. 397, October Term, 1939. December 4, 1939.

Appeal from the District Court of the United States for the Northern District of Illinois.

The Agricultural Adjustment Act as reenacted and amended by the Agricultural Marketing Agreement Act affords no ground for construing the Sherman Act as inapplicable to unreasonable restraints upon interstate commerce of milk. There is no suggestion in the Agricultural Act that in the absence of agreements and orders validly made by the Secretary of Agriculture, and apart from such qualified authorization and such requirements as they contain, the commerce in agricultural commodities is stripped of the safeguards set up by the Anti-Trust Act. The explicit references to the anti-trust laws in Sections 3(d) and 8(b) of the Agricultural Act show beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inapplicable.

The Capper-Volstead Act provides no-immunity to cooperative agricultural organizations for combinations and conspiracies in violation of the Sherman Anti-Trust Act. The right of agricultural producers to unite in preparing for market and in marketing their products cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade.

The contention that the Sherman Act does not apply to labor unions or labor union activities is not open on this appeal.

Reversing in part the judgment of the United States District Court for the Northern District of Illinois, 28 Fed. Supp. 177,

Mr. Chief Justice HUGHES delivered the opinion of the Court.

[*Facts of Case*]

The Government appeals from a judgment of the District Court sustaining demurrers and dismissing an indictment charging combination and conspiracy in violation of Section one of the Sherman Anti-Trust Act. 28 F. Supp. 177.

The trade and commerce alleged to be involved is the transportation to the Chicago market of fluid milk produced on dairy farms in Illinois, Indiana, Michigan and Wisconsin and the distribution of the milk in that market. The Government divides the defendants into five groups,—(1) distributors and allied groups which include a number of corporations described as major distributors and their officers and agents, the Associated Milk Dealers, Inc., a trade association of milk distributors, and its officers and agents, and the Milk Dealers Bottle Exchange, a corporation controlled by the major distributors; (2) the Pure Milk Association, a cooperative association of milk producers incorporated in Illinois, and its officers and agents; (3) the Milk Wagon Drivers Union, Local 753, engaged in the distribution of milk in Chicago, and certain labor officials; (4) municipal officials, including the president of the Board of Health of Chicago and certain subordinate officials; (5) two persons who arbitrated a dispute between the major distributors and the Pure Milk Association, fixing the price of milk to be paid to the members of the association.

The indictment, which was filed in November, 1938, contains four counts. The several defendants challenged it by demurrers and motions to quash on various grounds. The District Court held with respect to counts one, two and four, that the production and marketing of agricultural products, including milk, are removed from the purview of the Sherman Act by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246); also with respect to all four counts, according to the formal terms of its judgment, that the Pure Milk Association, as an agricultural cooperative association, its officers and agents, are exempt from prosecution under Section one of the Sherman Act by Section 6 of the Clayton Act (15 U. S. C. 17), Sections one and two of the Capper-Volstead Act (7 U. S. C. 291, 292), and the Agricultural Marketing Agreement Act. With respect to count three, the District Court held that it was duplicitous, in the view that it charged several separate conspiracies and also that it did not definitely charge a restrain of interstate commerce.

The judgment expressly overruled the demurrers and motions to quash so far as they challenged the constitutionality of the Sherman Act or the sufficiency of the al-

legations of unlawful conspiracy, and also so far as it was contended that interstate commerce was not involved in counts one, two and four. The court added that it overruled all the defendants' contentions which it had not specifically overruled or sustained. The judgment ends by dismissing the indictment as to all defendants.

[*Question of Jurisdiction*]

The first question presented concerns our jurisdiction. The exceptional right of appeal given to the Government by the Criminal Appeals Act is strictly limited to the instances specified.[1] The provision invoked here is the one which permits review where a decision quashing or sustaining a demurrer to an indictment or any of its counts is based upon the "construction of the statute upon which the indictment is founded." The decision below was not predicated upon invalidity of the statute.

[*Principles Governing Review*]

The established principles governing our review are these: (1) Appeal does not lie from a judgment which rests on the mere deficiencies of the indictment as a pleading, as distinguished from a construction of the statute which underlies the indictment. (2) Nor will an appeal lie in a case where the District Court has considered the construction of the statute but has also rested its decision upon the independent ground of a defect in pleading which is not subject to our examination. In that case we cannot disturb the judgment and the question of construction becomes abstract. (3) This Court must accept the construction given to the indictment by the District Court as that is a matter we are not authorized to review. (4) When the District Court holds that the indictment, not merely because of some deficiency in pleading but with respect to the substance of the charge, does not allege a violation of the statute upon which the indictment is founded, that is necessarily a construction of that statute. (5) When the District Court has rested its decision upon the construction of the underlying statute this Court is not at liberty to go beyond the question of the correctness of that construction and consider other objections to the indictment. The Government's appeal does not open the whole case.

[*No Review as to Deficiencies of Indictment*]

First. The first two of these principles, as the Government concedes, preclude our review of the decision below as to count three. For that count was held bad upon the independent ground that it is defective as a pleading, being duplicitous and also lacking in definiteness. *United States v. Keitel,* 211 U. S. 397-399; *United States v. Carter,* 231 U. S. 492, 493; *United States v. Hastings,* 296 U. S. 188, 192-194. The appeal as to count three must be dismissed.

[*Lower Court Construction of Indictment Binding*]

Second. After a general description of the averments of the indictment, which was explicitly founded on Section one of the Sherman Act, the District Court construed counts one, two and four as follows:

"Count 1 charges a conspiracy 'to arbitrarily fix, maintain and control artificial and non-competitive prices to be paid to all producers by all distributors for all fluid milk produced on approved dairy farms located in the states of Illinois, Indiana, Michigan and Wisconsin,' and shipped to Chicago."

"Count 2 charges a conspiracy 'to fix and maintain by common and concerted action, uniform, arbitrary and non-competitive prices for the sale by the distributors in the city of Chicago of fluid milk shipped into the said city from the states of Illinois, Indiana, Michigan and Wisconsin'."

"Count 4 charges a conspiracy 'to restrict, limit and control and to restrain and obstruct the supply of fluid milk moving in the channels of interstate commerce into the city of Chicago from the states of Illinois, Indiana, Michigan and Wisconsin'."

The District Court further summarized the allegations in these counts as to the methods by which the alleged conspiracies were intended to be effected. 28 F. Supp. pp. 179-181. This construction of the indictment is binding upon this Court on this appeal. *United States v. Patten,* 226 U. S. 525, 535, 540; *United States v. Colgate,* 250 U. S. 300, 301; *United States v. Schrader's Son,* 252 U. S. 85, 98; *United States v. Yugi-*

[1] This Act (18 Stat. 682, Jud. Code, Sec. 238, 28 U. S. C. 345) provides:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in criminal cases, in the following instances, to wit:

"From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

"From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy. . . .

"Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided,* That no appeal shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant."

novich, 256 U. S. 450, 461; *United States v. Hastings, supra,* p. 192.

[*Jurisdiction to Construe Sherman Act*]

Third. The District Court, thus construing counts one, two and four, held as a matter of substance that, because of the effect of the later statutes, these counts did not charge an offense under Section one of the Sherman Act. This was necessarily a construction of the Sherman Act. *United States v. Patten, supra; United States v. Birdsall,* 233 U. S. 223, 230; *United States v. Kapp,* 302 U. S. 214, 217. We are not impressed with the argument that the court simply construed the later statutes. The effect of those statutes was considered in determining whether the Sherman Act has been so modified and limited that it no longer applies to such combinations and conspiracies as are charged in counts one, two and four. Thus the Sherman Act was not the less construed because it was construed in the light of the subsequent legislation.

We have jurisdiction under the Criminal Appeals Act to determine whether the construction thus placed upon the Sherman Act is correct.

[*Statutes Involved*]

Fourth. In reaching its conclusion, the District Court referred to Section 6 of the Clayton Act, Sections 1 and 2 of the Capper-Volstead Act, and the Agricultural Adjustment Act of 1933, as amended in 1935, and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937.

[*Labor Organizations Not Immune from Prosecution*]

With respect to the Clayton Act,[2] the court said in its opinion: "By that act labor, agricultural or horticultural cooperative organizations were excepted from the broad and sweeping terms of the Sherman Act. Such cooperative organizations, in and of themselves, were not to be construed as illegal combinations or conspiracies in restraint of trade under the anti-trust laws." 28 F. Supp. 183. But the court did not hold that, by these provisions of the Clayton Act, either the defendants Pure Milk Association and its officers and agents or the defendants Milk Wagon Drivers Union, Local 753, and its officials, (albeit these organizations were not in themselves illegal combinations or conspiracies) were rendered immune from prosecution under the Sherman Act for their alleged participation in the combinations and conspiracies charged in counts one, two and four of the indictment. The Sherman Act was not construed by the District Court as having been limited to that extent by the Clayton Act.

[*Agricultural Cooperative*]

The court invoked the Capper-Volstead Act,[3] as its judgment shows, only in relation to certain defendants, that is, the Pure Milk Association, an agricultural cooperative organization, and its officers and agents. We shall consider later the effect of that statute upon the charge against those defendants.

[*Effect of Agricultural Marketing Agreement Act*]

The court dismissed the indictment as to *all* defendants, and we think it manifest that this ruling in its bearing upon counts one, two and four was due to the effect upon the Sherman Act which the court attributed to the Agricultural Marketing Agreement Act.[4]

(1). As to that Act, the court said:

"The Court holds that, by the Agricultural Marketing Agreement Act the Congress has committed to the Executive Department, acting through the Secretary of Agriculture, full, complete, and plenary power over the production and marketing, in interstate commerce, of agricultural products, including milk.

"To what extent he should act, the quantum of regulation is solely one for his judgment and decision. If conditions require, he must act; if they do not require action, then all marketing conditions are deemed satisfactory and the purpose of the act is effectuated. Non-action by the Secretary of Agriculture, in any given marketing area, is equivalent to a declaration that the policy of the act, in that area, is being carried out. If the policy of the act, in any given milk area, is being violated it becomes the duty of the Secretary of Agriculture to intervene and invoke the powers conferred upon him by the act.

"It results, from what has been said, that the power of regulation, supervision and control of the milk industry, in any given milk shed.

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[2] Section 6 of the Clayton Act (38 Stat. 730, 15 U. S. C. 17) provides:

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

[3] 42 Stat. 388, 7 U. S. C. 291, 292.

[4] The District Court referred, in passing, to the Cooperative Marketing Act of July 2, 1926 (44 Stat. 803, 7 U. S. C. 455), and to the provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended in 1935 (49 Stat. 750), which was followed by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246).

is, by the Agricultural Marketing Agreement Act of 1937, vested exclusively in the Secretary of Agriculture. It follows further that the Secretary of Agriculture cannot by his own action, or inaction, divest himself of this power so long as the statute remains in force. The marketing of the agricultural products, including milk, covered by the Agricultural Marketing Agreement Act, is removed from the purview of the Sherman Act. In other words, so far as the marketing of agricultural commodities, including milk, is concerned, no indictment will lie under section 1 of the Sherman Act." 28 F. Supp. p. 187.

It will be observed that the District Court attributes this effect to the Agricultural Marketing Agreement Act *per se*, that is, to its operation in the absence, and without regard to the scope and particular effect, of any marketing agreements made by the Secretary of Agriculture or of any orders issued by him pursuant to the Act. In the opinion of the court below, the existence of the authority vested in the Secretary of Agriculture, although unexercised, wholly destroys the operation of Section 1 of the Sherman Act with respect to the marketing of agricultural commodities.

[*Sherman Act Not Modified by Agricultural Act*]

We are of the opinion that this conclusion is erroneous. No provision of that purport appears in the Agricultural Act. While effect is expressly given, as we shall see, to agreements and orders which may validly be made by the Secretary of Agriculture, there is no suggestion that in their absence, and apart from such qualified authorization and such requirements as they contain, the commerce in agricultural commodities is stripped of the safeguards set up by the Anti-Trust Act and is left open to the restraints, however, unreasonable, which conspiring producers, distributors and their allies may see fit to impose. We are unable to find that such a grant of immunity by virtue of the inaction, or limited action, of the Secretary has any place in the statutory plan. We cannot believe that Congress intended to create "so great a breach in historic reemdies and sanctions."[5]

It is a cardinal principle of construction that repeals by implication are not favored. When there are to acts upon the same subject, the rule is to give effect to both if possible. *United States v. Tynen,* 11 Wall. 88, 92; *Henderson's Tobacco,* 11 Wall. 652, 657; *General Motors Corporation v. United States,* 286 U. S. 49, 61, 62. The intention of the legislature to repeal "must be clear and manifest." *Red Rock v. Henry,* 106 U. S. 596, 601, 602. It is not sufficient, as was said by Mr. Justice Story in *Wood v. United States,* 16 Pet. 342, 362, 363, "to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary." There must be "a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy." See, also, *Posados v. National City Bank,* 296 U. S. 497, 504.

The Sherman Act is a broad enactment prohibiting unreasonable restraints upon interstate commerce, and monopolization or attempts to monopolize, with penal sanctions. The Agricultural Act is a limited statute with specific reference to particular transactions which may be regulated by official action in a prescribed manner. The Agricultural Act[6] declares it to be the policy of Congress "through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural communities in the base period" described. To carry out that policy a particular plan is set forth. Farmers and others are not permitted to resort to their own devices and to make any agreements or arrangements they desire, regardless of the restraints which may be inflicted upon commerce. The statutory program to be followed under the Agricultural Act requires the participation of the Secretary of Agriculture who is to hold hearings and make findings. The obvious intention is to provide for what may be found to be reasonable arrangements in particular instances and in the light of the circumstances disclosed. The methods which the Agricultural Act permits to attain that result are twofold, marketing agreements and orders. To give validity to marketing agreements the Secretary must be an actual party to the agreements. Section 8b.[7] The orders are also to be made by the Secretary for the purpose of regulating the handling of the agricultural commodity to which the particular order relates. Section 8c

[5] See *General Motors Corporation v. United States,* 286 U. S. 49, 61.

[6] 7 U. S. C. Supp. IV, 602 (1).

[7] 7 U. S. C. Supp. IV, Sec. 608b.

(3) (4).[8] That the field covered by the Agricultural Act is not coterminus with that covered by the Sherman Act is manifest from the fact that the former is thus delimited by the prescribed action participated in and directed by an officer of government proceeding under the authority specifically conferred by Congress. As to agreements and arrangements not thus agreed upon or directed by the Secretary, the Agricultural Act in no way impinges upon the prohibitions and penalties of the Sherman Act, and its condemnation of private action in entering into combinations and conspiracies which impose the prohibited restraint upon interstate commerce remains untouched.

It is not necessary to labor the point, for the Agricultural Act itself expressly defines the extent to which its provisions make the antitrust laws inapplicable. That definition is found in Section 8 (b)[9] of the Agricultural Adjustment Act carried into the Agricultural Marketing Agreement Act in relation to marketing agreements, and provides as follows:

"In order to effectuate the declared policy of this chapter, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: *Provided,* That no such agreement shall remain in force after the termination of this chapter."

Another provision is found in Section 3 (d)[10] of the Agricultural Marketing Agreement Act, relating to awards or agreements resulting from the arbitration or mediation by the Secretary of Agriculture or by a designated officer or employee of the Department of Agriculture as provided in Section 3 (a),[11] and meetings for that purpose and awards or agreements resulting therefrom which have been approved by the Secretary of Agriculture as provided in Section 3 (b).[12] Section 3 (d) provides:

"No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the antitrust laws of the United States."

These explicit provisions requiring official participation and authorizations show beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inapplicable.[13] If Congress had desired to grant any further immunity, Congress doubtless would have said so.

An agreement made with the Secretary as a party, or an order made by him, or an arbitration award or agreement approved by him, pursuant to the authority conferred by the Agricultural Act and within the terms of the described immunity, would of course be a defense to a prosecution under the Sherman Act to the extent that the prosecution sought to penalize what was thus validly agreed upon or directed by the Secretary. Further than that the Agricultural Act does not go.

We have no occasion to decide whether in any particular case an indictment under the Sherman Act by reason of its particular terms would be subject to demurrer, or to a motion to quash, upon the ground that the indictment ran against the provisions of such an agreement or order. We have no such situation here. There is indeed a contention that there was a license (No. 30) issued by the Secretary of Agriculture in 1934, amended in January, 1935, and in force until March 2, 1935, which related to the marketing of milk in the Chicago area, and hence that defendants operating under that license were not subject to the charges of the conspiracies alleged to have begun in January, 1935. But the allegations of the indictment are that the unlawful conspiracies continued throughout all the period mentioned in the indictment, that is, up to the time of its presentment in November, 1938. This clearly imports that the conspiracies were operative after the license came to an end and thus in the absence of any license. A conspiracy thus continued is in effect renewed during each day of its continuance. *United States v. Kissel,* 218 U. S. 601, 607, 608; *Hyde v. United States,* 225 U. S. 347, 369; *Brown v. Elliott,* 225 U. S. 392, 400. It is also said that there is a recent marketing order under date of August 29, 1939,[14] which relates to the Chicago marketing area, and hence that this cause is moot. But that order affects a period subsequent to the time covered by the indictment. These contentions are unavailing in relation to the question before us.

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[8] 7 U. S. C. Supp. IV, Sec. 608c (3) (4).
[9] 7 U. S. C. Supp. IV, Sec. 608b.
[10] 50 Stat. 249.
[11] 50 Stat. 248.
[12] 50 Stat. 248.
[13] See 77 Cong. Rec., Pt. II, p. 1977; Pt. III, p. 3117.
[14] Federal Register, August 30, 1939, Order No. 41, Vol. 4, pp. 3764-3768, 3770.

Our conclusion is that the Agricultural Adjustment Act as reenacted and amended by the Agricultural Marketing Agreement Act affords no ground for construing the Sherman Act as inapplicable to the charges contained in counts one, two and four.

[*Sherman Act Not Modified by Capper-Volstead Act*]

(2) There remains the question whether the court below rightly held that the Capper-Volstead Act [15] had modified the Sherman Act so as to exempt the Pure Milk Association, a cooperative agricultural organization, and its officers and agents, from prosecution under these counts.

As to the Capper-Volstead Act the Court said:

"This Act legalizes price fixing for those within its purview. To that extent it modifies the Sherman Act. It removes from the Sherman Act those organizations, cooperative in their nature, which come within the purview of the Capper-Volstead Act. Prior to the Capper-Volstead Act farmers were treated no differently than others under the antitrust laws, so far as price fixing was concerned. . . .

"The Capper-Volstead Act does not condemn any kind of monopoly or restraint of trade, or any price fixing, unless such monopoly or price fixing unduly enhances the price of an agricultural product. The Act then, by section 2 thereof, commits to an officer of the executive department, the Secretary of Agriculture, the power of regulation and visitation.

"Under this act farmers are favored under the antitrust laws in that they are given a qualified right, free from any criminal liability, to combine among themselves to monopolize and restrain interstate trade and commerce in farm products and to fix and enhance the price thereof.

". . . The court deduces from the Capper-Volstead Act that the Secretary of Agriculture has exclusive jurisdiction to determine and order, in the first instance, whether or not farmer cooperatives, in their operation, monopolize and restrain interstate trade and commerce 'to such an extent that the price of any agricultural product is unduly enhanced'. Until the Secretary of Agriculture acts, the judicial power can not be invoked". 28 Supp., pp. 183, 184.

We are unable to accept that view. We cannot find in the Capper-Volstead Act, any more than in the Agricultural Act, an intention to declare immunity for the combinations and conspiracies charged in the present indictment. Section 6 of the Clayton Act, enacted in 1914,[16] had authorized the formation and operation of agricultural organizations provided they did not have capital stock or were conducted for profit, and it was there provided that the antitrust laws should not be construed to forbid members of such organizations "from lawfully carrying out the legitimate objects thereof." They were not to be held illegal combinations. The Capper-Volstead Act, enacted in 1922,[17] was made applicable as well to cooperatives having capital stock. The persons to whom the Capper-Volstead Act applies are defined in Section one as producers of agricultural products, "as farmers, planters, ranchmen, dairymen, nut or fruit growers." They are authorized to act together "in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce" their products. They may have "marketing agencies in common," and they may make "the necessary contracts and agreements to effect such purposes."

The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise. In this instance, the conspiracy charged is not that of merely forming a collective association of producers to market their products but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others, in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk produced in Illinois and neighboring States and marketed in the Chicago area, and thus in effect, as the indictment is construed by the court below, "to compel independent distributors to exact a like price from their customers" and also to control "the supply of fluid milk permitted to be brought to Chicago." 28 F. Supp. 180-182. Such a combined attempt of all the defendants, producers, distributors and their allies, to control the market finds no justification in Section one of the Capper-Volstead Act.

Nor does the court below derive its limitation of the Sherman Act from Section one. The pith of the court's conclusion is that under Section two an exclusive jurisdiction with respect to the described cooperative associations is vested, in the first instance, in the Secretary of Agriculture, and that, until the Secretary acts, the judicial power to entertain a prosecution under the Sherman Act cannot be invoked. Section two of the Capper-Volstead Act does provide a special procedure in a case where the Secretary of Agriculture has reason to believe that any such association "monopolizes" or restrains interstate trade "to such an extent that the price of any agricultural

[15] 42 Stat. 388, 7 U. S. C. 291, 292.

[16] 38 Stat. 731.

[17] 42 Stat. 388.

product is unduly enhanced." Thereupon the Secretary is to serve upon the association a complaint, stating his charge with notice of hearing. And if upon such hearing the Secretary is of the opinion that the association "monopolizes," or does restrain interstate trade to the extent above mentioned, he then is to issue an order directing the association "to cease and desist" therefrom. Provision is made for judicial review.

We find no ground for saying that this limited procedure is a substitute for the provisions of the Sherman Act, or has the result of permitting the sort of combinations and conspiracies here charged unless or until the Secretary of Agriculture takes action. That this provision of the Capper-Volstead Act does not cover the entire field of the Sherman Act is sufficiently clear. The Sherman Act authorizes criminal prosecutions and penalties. The Capper-Volstead Act provides only for a civil proceeding. The Sherman Act hits at attempts to monopolize as well as actual monopolization. And Section two of the Capper-Volstead Act contains no provision giving immunity from the Sherman Act in the absence of a proceeding by the Secretary. We think that the procedure under Section two of the Capper-Volstead Act is auxiliary and was intended merely as a qualification of the authorization given to cooperative agricultural producers by Section one, so that if the collective action of such producers, as there permitted, results in the opinion of the Secretary in monopolization or unduly enhanced prices, he may intervene and seek to control the action thus taken under Section one. But as Section one cannot be regarded as authorizing the sort of conspiracies between producers and others that are charged in this indictment, the qualifying procedure for which Section two provides is not to be deemed to be designed to take the place of, or to postpone or prevent, prosecution under Section one of the Sherman Act for the purpose of punishing such conspiracies.

[*Review Confined to Construction of Lower Court*]

Fifth. Having dealt with the construction placed by this court below upon the Sherman Act, our jurisdiction on this appeal is exhausted. We are not at liberty to consider other objections to the indictment or questions which may arise upon the trial with respect to the merits of the charge. For it is well settled that where the District Court has based its decision on a particular construction of the underlying statute, the review here under the Criminal Appeals Act is confined to the question of the propriety of that construction. *United States v. Keitel, supra; United States v. Kissel, supra,* p. 606; *United States v. Miller,* 223 U. S. 599, 602; *United States v. Carter, supra; United States v. Colgate, supra*; *United States v. Schrader's Son, supra; United States v. Hastings, supra.* The case of *United States v. Curtiss-Wright Corporation,* 299 U. S. 304, is not opposed, as there the decision of the District Court was not based upon a particular construction of the underlying statute, but upon its invalidity, and the jurisdiction of this Court extended to the consideration of the rulings of the District Court which dealt with that question.

[*Questions of Interstate Commerce Not Involved*]

The limitation applicable in the instant case to the question of the District Court's construction of the Sherman Act disposes of the contention urged by some of the defendants that counts two and four do not show such a direct restraint upon interstate commerce as to bring the acts charged within the statute. The District Court said in its opinion that, in view of its rulings (above discussed) as to counts one, two and four, it was unnecessary to decide "whether or not the allegations of the indictment show that interstate commerce was or was not restrained." 28 U. S. C., p. 187. In its judgment the court formally overruled all objections to these counts so far as the objections rested on the ground that interstate commerce was not involved. If these rulings be treated as dealing merely with the construction of the indictment, they must be accepted here. *United States v. Patten, supra; United States v. Colgate, supra; United States v. Hastings, supra.* But, apart from that, the District Court certainly has not construed the Sherman Act as inapplicable upon the ground that interstate commerce is not involved, and the question of the bearing upon that commerce of the acts charged is not before us.

[*Applicability of Sherman Act to Labor Unions Not on Appeal*]

Similarly, the contention of the defendants who are labor officials that the Sherman Act does not apply to labor unions or labor union activities is not open on this appeal. The District Court did not construe the Sherman Act as inapplicable to these defendants and the Government's appeal,

under the restriction of the Criminal Appeals Act, does not present that question.

[*Conclusion*]

The appeal as to count three is dismissed. The judgment is reversed as to counts one, two and four, and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

It is so ordered.

[¶ 55,251] Opinion of the Attorney-General, State of Kentucky.

Addressed to the Office Equipment Company, Louisville, Kentucky. October 30, 1939.

The advertising for sale of goods in Kentucky at a price fixed by the owner under the Fair Trade Act is not prohibited by the Kentucky Unfair Practices Act unless at less than cost for the purpose of destroying competition or unless at reduced prices in one locality for the sole purpose of destroying competition.

[*Question*]

Dear Sir: We have your letter of October 16, 1939, and the circular attached thereto in regard to advertising of certain commodities in Kentucky and your request for an opinion as to whether or not such advertising violates the Kentucky Unfair Trade Practice Law.

[*Holding*]

It is the opinion of this department, after very careful examination of the Kentucky Unfair Trade Practice Act that this sort of advertising does not violate the provisions of said act. You will note that under the provisions of the Unfair Trade Practice Act beginning at section 4748h-1 Carroll's Kentucky Statutes, 1936 edition, it is provided that if such advertising for sale of commodities is for the purpose of destroying competition and the articles are sold for less than cost or sold at a different price in one locality than in another locality for the purpose of destroying competition, the advertising shall constitute a violation of the law. The amendment to the Unfair Trade Practice Act was passed at the 1938 session of the General Assembly and is now found at section 4748i-1 et seq. of the 1938 supplement to the statute. It provides as follows:—

"No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the Commonwealth of Kentucky by reason of any of the following provisions which may be contained in said contract: (1) That a buyer will not resell any such commodity except at the price stipulated by the vendor. (2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not in turn resell except at the price stipulated by such producer or vendee. Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases * * *"

It will readily be seen that none of these provisions prohibit the advertising for sale of goods in Kentucky at a price fixed by the owner thereof unless the sale of such goods shall be done for the purpose of destroying competition and that the sale must be made at less than cost for this purpose, or the commodity must be sold at a reduction in price in one locality from that of another locality, the reduction in price being for the sole purpose of destroying competition. The advertising as contained in the pamphlet which was attached to the letter does not indicate that this is the purpose of the advertising and offering for sale of the commodity offered for sale therein, nor does it indicate that it was done for the purpose of destroying competition.

Therefore, it is the opinion of this department that this advertising is legal and does not violate the Kentucky Unfair Trade Practice Act.

Very truly yours,

A. E. Funk, Assistant Attorney General.

[¶ 55,252] Educators Association, Inc., Leo L. Tully, et al. v. Federal Trade Commission.

United States Circuit Court of Appeals, Second Circuit, December 18, 1939.

Petition to review an order of the Federal Trade Commission.

A book publisher's use of corporate and trade names which create an erroneous belief among purchasers as to the nature of the business organization affords a basis for enforcement of a cease and desist order by the Federal Trade Commission, modified to permit use of the names coupled with additional words which dispel the misleading impression.

Affirming as modified Federal Trade Commission Complaint No. 3139.

Townsend, Kindleberger & Campbell (E. Crosby Kindleberger, of Counsel); Attorneys for Petitioners.

W. T. Kelley, Chief Counsel, Federal Trade Commission, Martin A. Morrison, Assistant Chief Counsel, William L. Penecke, James W. Nichol, Special Attorneys; Attorneys for Respondent.

Before SWAN, CHASE and CLARK, Circuit Judges.

[*Nature of Proceeding*]

CHASE, C. J.: The Federal Trade Commission issued a complaint against the petitioners and, after hearings thereon, made an order requiring them to cease and desist from the use of certain sales practices which were found to amount to unfair methods of competition in interstate commerce in violation of section 5 of the Federal Trade Commission Act (38 Stat. 717, 15 U. S. C. A. 45). This petition was brought to review that order.

[*Business of Petitioners*]

During the proceedings certain facts were stipulated and, from those facts supplemented by evidence taken as to others, it was shown that Educators Association, Inc., is a New York corporation with its principal office in the City of New York which publishes a reference book suitable for use by school children which is called The Volume Library. This book is sold in interstate commerce in many of the states in competition with others selling similar books.

[*Reference Service*]

Educators Association, Inc., sells its entire output of The Volume Library to petitioner Leo F. Tully who is its president and owns 95% of its stock. He does business under the trade name Educators Association and maintains offices at the address of Educators Association, Inc. He either sells the books outright to the other petitioners who in turn sell them to the public or has them sold to the public by the other petitioners acting as sales agents. In either event, the sales are ostensibly made to the public by Educators Association. In connection with each sale of a book the purchaser is given a certificate of membership in Educators Association, which in fact is only a trade name, that bears a facsimile of the corporate seal of Educators Association, Inc., and the signatures of L. L. Tully, President; E. E. Richards, Vice-President; and M. L. Kelley, Secretary. It states in part that

"* * * the person to whom this certificate is addressed and immediate family are members of Educators Association. Said membership becomes effective when 'The Volume Library' is fully paid for, and gives full privileges for ten years of consulting our Bureau of Research and Service regarding any practical question whose answer does not appear in 'The Volume Library.'"

This service is given without cost provided a self-addressed stamped envelope was enclosed with the inquiry. It is mainly done by having a clerk answer the questions received though some are referred to others and Mr. Tully has an arrangement whereby forty questions a year may be referred to Encyclopedia Britannica for answer.

[*Sales Practices*]

Sales people, employed on a commission basis with certain guarantees, are instructed in the methods of selling to be used and if they follow instructions, which include learning several pages of a composition called a sales talk, are entitled to the refund of a deposit, after working a designated time, which they are required to make to obtain a sample book and supplies. In making sales, they are expected to call at the homes of people having children in school and enlist their interest in the book by showing how it can be used by the children in their studies. Formerly, some parts of this sales talk may have indicated to parents that the sales agents were connected in some way with the school their children attended or

that use of The Volume Library was a school requirement but that method of selling had been stopped before the complaint in these proceedings was issued. There was also evidence to show that sales people had been induced to sign contracts of employment without being fully advised as to the conditions of those contracts but that practice, too, had been discontinued before the issuance of the complaint.

[*Cease and Desist Order*]

Originally, people who did qualify as Educators had had an association which compiled the matter that first was published but had been superseded by the corporate publisher and the contributors, many of them well-known educators, were not associated together at any time after petitioner Tully began to do business under the trade name Educators Association. The order under review provided that petitioners should cease and desist:

"(1) From representing through the use of the term 'Educators Association' in any corporate or trade name or through any other means or device, that they or any of them, constitute a group of educators or teachers formed into an association or that the business operated by them, or any of them, is anything other than a private business enterprise for profit.

(2) Representing to prospective representatives that they will refund deposits or pay any specific sums of money or salaries to such representatives until and unless they fully and adequately disclose all of the terms and conditions upon which refunds or payments are actually made.

(3) From representing or implying that they or their representatives, agents or canvassers are connected in any manner with public schools or other educational institutions, or that said Volume Library, or any other and similar publication is prescribed as a text book or required to be used in connection with school work."

[*Jurisdiction*]

The nature of the business in which the petitioners are engaged clearly makes the Federal Trade Commission Act applicable and if the findings are supported by substantial evidence they are conclusive. *Federal Trade Comm. v. Winstead Co.*, 258 U. S. 483, 491; *Federal Trade Comm. v. Curtis Co.*, 260 U. S. 268, 280; *Trade Comm. v. Education Society*, 302 U. S. 112, 117; *Fioret Sales Co. v. Federal Trade Comm.*, 100 Fed. (2) 358 (C. C. A. 2).

[*Erroneous Impression Created*]

Having found upon substantial evidence that Educators Association, Inc., and Educators Association were both business enterprises organized and existing solely to make profits from the sale of the book and that they did not comprise a group of teachers or educators properly so-called, the Commission found further that the corporate and trade names used did mislead a substantial portion of prospective purchasers into the erroneous belief that a group of teachers and educators were united to sell the book

"for a common purpose other than financial gain and have the capacity and tendency to induce members of the public under such false and erroneous belief to make purchases of said volume which they would not make except for such erroneous and false belief."

The part of the finding above quoted, was, we think, sufficiently supported by the evidence. The selling procedure in connection with the use of those names was designed to give the impression that the paramount purpose to be achieved by the seller was not profit to be gained in business but instead the attainment by a group of learned people of their purpose to serve the cause of education. The natural tendency of such an erroneous concept would be to induce parents to buy the book when they would not have done so had they known the truth. The purchasing public is entitled to be protected against that kind of deception and a proper order to that end is in the public interest. *Fed. Trade Comm. v. Milling Co.*, 288 U. S. 212, 217.

[*Modification Authorized on Review*]

Of course the interest of the public must be specific and substantial. *Fed. Trade Comm. v. Raladam Co.*, 283 U. S. 643. In this instance that interest is in not being deceived by the use of the corporate and trade names in connection with attempts to sell the book. The use of those names in a manner which did not mislead the purchasing public would not be unfair and certainly would not be unfair competition. Perhaps paragraph (1) of the order was not intended to prevent the use of either of those names. But we have the power to modify such orders, *Fed. Trade Comm. v. Balme*, 23 Fed. (2) 615, 618, and for the sake of clarity that part of the order should be modified to provide that the names may be used if coupled with other words which do away with their tendency to create a false impression by revealing the true character of the business conducted. *Fed. Trade Comm. v. Army and Navy Trading Co.*, 88 Fed. (2) 776.

[*Discontinuance of Conduct Raises No Defense*]

The other two paragraphs of the order are based upon adequate findings which are supported by the evidence. Both findings and evidence, however, are to the effect that the petitioners had ceased to violate

Sec. 5 of the Act in the respects forbidden before the complaint was filed. Because of this, it is argued that paragraphs two and three of the order should be set aside. We do not understand that discontinuance of practices violative of the Act will alone deprive the Commission of power to make an order otherwise justified. The Act in express terms requires the Commission to issue a complaint if it shall appear to it that such a proceeding would be to the interest of the public whenever "* * * any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, * * *". 15 U. S. C. A. Sec. 45 (b). Past as well as present practices give the Commission cause for action and their discontinuance is no defense. *Fed. Trade Comm. v. A. McLean & Son* 84 Fed. (2) 910, 913; *Fed. Trade Comm. v. Wallace,* 75 Fed. (2) 733, 738.

[*Conclusion*]

Order modified as above and, as modified, affirmed.

[¶ 55,253] United States of America v. Voluntary Code of the Heating, Piping and Air Conditioning Industry for Allegheny County, Pennsylvania, Heating and Piping Contractors Pittsburgh Association, Paul J. Heenan, United Association of Steam, Hot Water, Refrigeration, Pneumatic Tube, Hydraulic, Air, Oil, Gasoline, Gas and Process Pipe Fitters, Welders and Helpers Local Union No. 449 of Pittsburgh, Pennsylvania, United Heating Co., Baker Smith & Co., Inc., Bartley-O'Neill Co., Wm. M. Clark & Co., Jos. C. Meyer Co., F. E. Geisler & Co., Inc., The G. F. Higgins Co., Iron City Heating Co., Langdon-Kaschub Co., McGinness, Smith & McGinnes Co., Moss & Blakeley Plumbing Co., W. N. Sauer Co., George H. Soffel Co., Wayne Crouse, Inc., The Huffman-Wolfe Co., Eastern Plumbing & Heating Co., Frank A. Sprague, Norman S. Sprague, Jr., Robert E. Daume, William J. Graham, William S. Wilson, Thomas King, Edward F. Cass, Paul G. Cass, Adolph C. Matter, Louis J. Matter, George B. Stewart, W. C. Niebaum, Fred E. Hubbs, John M. Cuddyre, F. P. Madigan, Joseph G. Hertweck, J. H. Clark, Chas. A. Devlin, Albert Johns, Thomas E. Kinsella, John J. Morrison, Albert J. Neidenberger, Howard Thompson, Harry Haigmeir, John A. McGuire, Leo A. Green, Frank R. Johnston, James Ahearn and Joseph C. O'Toole.

United States District Court for the Western District of Pennsylvania. December 8, 1939.

A consent decree enjoins participation in a bid depository to fix prices or limit competition in bidding on heating installation, enjoins participation in a trade association of contractors or builders used to discriminate against persons not members of the association, enjoins agreements to limit employment of members of a labor union to members of a trade association, and enjoins acceptance of payments for the procurement of labor for persons not members of the voluntary code or of the trade association.

George Mashank, Acting United States Attorney for the Western District of Pennsylvania, M. Niel Anderson, Special Assistant to the Attorney General.

Clyde P. Bailey, Counsel for Defendant Local 449, United Heating Co. and their defendant representatives.

Paul J. Heenan, Counsel for all other defendants.

Judgment

SCHOONMAKER.—This cause coming on to be heard on the 8th day of December, 1939, and the defendants having waived process and service and having appeared herein,

And counsel for the plaintiff and for the defendants having consented to the making and entering of this judgment,

Now, therefore, without taking any testimony or evidence and in accordance with said consent of counsel, it is hereby

Ordered, adjudged, and decreed as follows:

[*Jurisdiction*]

1. That the Court has jurisdiction of the subject matter and of all the parties hereto; that the complaint states a cause of action against the defendants under the Act of Congress of July 2, 1890, entitled "An Act To Protect trade and commerce against unlawful restraints and monopolies", and the acts amendatory thereof and supplemental thereto.

[*Company Dissolved*]

2. That United Heating Co. be dissolved not later than March 1, 1940.

[*Code Dissolved*]

3. That the Voluntary Code of the Heating, Piping and Air Conditioning Industry

for Allegheny County, Pennsylvania, hereinafter referred to as the Voluntary Code, be dissolved forthwith.

[*Acts Enjoined*]

4. That the defendants and each of them and all of their respective officers, directors, agents, servants, employees, and all persons acting or claiming to act on behalf of the defendants or any of them, and all members of defendant United Association of Steam, Hot Water, Refrigeration, Pneumatic Tube, Hydraulic Air, Oil Gasoline, Gas and Process Pipe Fitters, Welders and Helpers Local Union No. 449 of Pittsburgh, Pennsylvania hereinafter referred to as Local 449, be and they hereby are perpetually enjoined and restrained.

A. From in any way engaging in, maintaining, extending, continuing, or reviving, either directly or indirectly, in whole or in part, by any means whatsoever, the combination and conspiracies in restraint of trade and commerce in heating materials, parts, supplies, apparatus and equipment used in connection with heating and ventilating systems, described in the complaint herein, as follows:

16. Beginning on or about August 4, 1937, the defendants or some of them, have engaged in an unlawful combination and conspiracy to restrain and burden, and pursuant thereto to have actually restrained and burdened, the aforesaid interstate trade and commerce in heating equipment, in violation of the Act of Congress approved July 2, 1890, entitled "An Act To protect trade and commerce against the unlawful restraints and monopolies," and acts amendatory thereof and supplementary thereto, in the manner and by the means as follows:

17. Local 449, Leo A. Green, Frank R. Johnston, Howard Thompson, the Contractors Association, E. J. Deere, J. J. Sneider, H. E. Kaschub, Chas. F. Ruege, Wm. J. Graham and Jacob Soffel, caused the organization of the Voluntary Code as aforesaid, on or about October 6, 1937. Shortly after such organization the Voluntary Code formulated and placed into effect its constitution and by-laws which provided, among other things, (a) that no member of the Voluntary Code could take any heating contract at less than the estimated cost of the heating equipment and labor used, exclusive of cash discounts, (b) that members of the Voluntary Code must submit copies of all heating and ventilating bids, other than bids on Public Works Administration projects, to a bid depository operated by said Voluntary Code, to be opened, tabulated, and made available to the other members of the Voluntary Code, (c) that each member of the Voluntary Code pay as fees and dues to said Voluntary Code an amount equal to ½ of 1% of each contract or order for work exceeding $250.00, other than contracts financed by the Public Works Administration, and (d) that violations of said provisions be punishable by any monetary fine which the Board of Directors may levy, and by suspension from participation in the Voluntary Code. Said provisions have been enforced so as to prevent contractor members from freely making their estimates for heating equipment and installation services, from lowering their prices therefor after their bids have been submitted, and from fully competing with one another in the sale at competitive prices of heating equipment moving in interstate commerce.

18. Upon the organization of the Voluntary Code as described above, Local 449 entered into an agreement with the Voluntary Code and its members, and the Contractors Association and its members, to limit employment of the members of Local 449 to the members of the Voluntary Code, to the exclusion of all other heating contractors and all other persons, firms and corporations, irrespective of the readiness of such other contractors to adhere to union requirements respecting wages, hours, conditions of employment and collective bargaining. The purpose and effect of said agreement has been to force substantially all heating contractors doing business in Pittsburgh to submit to the unreasonable code provisions, fees and restraints enumerated above, or to make payments to contractor members for avoidance of said unreasonable provisions, fees and restraints.

19. On or about April 20, 1936, Local 449, Leo A. Green, Wm. J. Kinsella, John M. Cuddyre, John L. Curley and John A. McGuire caused to be formed defendant United Heating Co., for the purpose of entering into a non-profit heating contracting business. Since such organization and continuously up to and including the time of filing this complaint, said company has been wholly owned and operated by Local 449. The said United Heating Co. has consistently submitted bids on heating equipment and installations against contractors and builders who are not members of the Voluntary Code, at prices below cost. The said bids have been submitted and the operations of the United Heating Co. generally have been carried on not for the purpose of obtaining profit but to compel contractors and builders to become members of the Voluntary Code and to drive out of business those contractors and builders who purchase heating equipment directly from manufacturers or from dealers who are not members of the Voluntary Code.

20. The defendants have conspired together as aforesaid with the purpose and intent of unlawfully (a) monopolizing for the benefit of the members of the Voluntary Code, and of the Contractors Association to the exclusion of substantially all other heating contractors, the sale and installation of heating equipment in the City of Pittsburgh, (b) raising prices of heating equipment and installation services, as described above, (c) obstructing and eliminating the purchase of heating equipment by general contractors or builders direct from manufacturers or from dealers who are not members of the Voluntary Code, (d) preventing heating contractors having their principal place of business outside the Commonwealth of Pennsylvania from coming into the City of Pittsburgh; competing therein for the business of furnishing heating equipment and services, and transporting heating equipment in interstate commerce into the said city, and (e) interfering with and restraining interstate trade and commerce in heating equipment.

B. From entering into or carrying out, directly or indirectly, by any means what-

soever, any combination or conspiracy of like or similar character or effect, and

C. From doing, performing, agreeing upon, entering upon, or carrying out (without limitation of the foregoing) any of the following things:

(a) Creating, operating or participating in the operation of any association of heating contractors maintaining a bid depository or similar device designed to maintain or to fix the prices of heating equipment or to limit competition in bidding on heating installations, or having the effect of maintaining or fixing prices of heating equipment or of limiting competition in bidding on heating installations.

(b) Operating or participating in the operation of United Heating Co., or creating, operating or participating in the operation of any like or similar organization, company, firm or corporation used to discriminate, as described in the complaint herein, against contractors, builders, or other persons who are not members of an association such as is described in sub-paragraph (a) hereof, or against contractors, builders, or other persons who purchase heating equipment directly from manufacturers or from dealers who are not members of such an association.

(c) Agreeing to limit or limiting employment of members of Local 449 to contractors, builders or other persons who are members of an association of heating contractors such as is described in sub-paragraph (a) hereof, or otherwise discriminating against any contractor, builder or other person who is not a member of such an association or who purchases heating equipment directly from manufacturers or from dealers who are not members of such an association.

(d) Accepting or contracting for any fees, dues, moneys, payments, or other property, the consideration for which is the procurement of or a promise to procure labor for contractors or others who are not members of the Voluntary Code, of the Contractors Association, or of any other like or similar association.

[*Provisions Relating to Bid Depository Void*]

5. That all constitutions, by-laws, resolutions and agreements of and between Local 449, the Voluntary Code and the Contractors Association in so far as they authorize, provide for or relate to a bid depository, or authorize, provide for or relate to any limitation of employment of members of Local 449 to members of the Voluntary Code or to members of the Contractors Association, are hereby declared illegal, void, and of no force and effect.

[*Persons Bound By Decree*]

6. That the terms of this judgment shall be binding upon and shall extend to each and every one of the successors in interest of any and all of the defendants herein, and to any and all corporations, partnerships, firms and individuals who may acquire the ownership or control, directly or indirectly, of the property, business and assets of the defendants or any of them, whether by purchase, merger, consolidation, reorganization, or otherwise.

[*Procedure for Securing Compliance*]

7. That for the purpose of securing compliance with the judgment, authorized representatives of the Department of Justice shall, upon the request of the Attorney General or an Assistant Attorney General, be permitted access, within the office hours of the defendants, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or control of the defendants or any of them, relating to any of the matters contained in this judgment; that any authorized representative of the Department of Justice shall, subject to the reasonable convenience of the defendants, be permitted to interview officers or employees of defendants, without interference, restraint, or limitation by defendants; that defendants, upon the written request of the Attorney General, shall submit such reports with respect to any of the matters contained in this judgment as may from time to time be necessary for the proper enforcement of this judgment.

[*Jurisdiction Retained*]

8. That jurisdiction of this cause and of the parties hereto is retained for the purpose of giving full effect to this judgment and for the enforcement of strict compliance therewith, and for the further purpose of making such other and further orders and judgments or taking such other action as may from time to time be necessary.

[¶ 55,254] **Doris H. Goodman v. United States of America.**

United States Circuit Court of Appeals for the Ninth Circuit. Filed December 15, 1939.

Upon appeal from the District Court of the United States for the Northern District of California, Southern Division.

An order adjudging a witness before a grand jury, in connection with an investigation of alleged violations of the anti-trust laws, in contempt for refusing to take an oath of secrecy is affirmed, as it is within the discretionary power of the court to impose an oath of secrecy upon witnesses as well as upon grand jurors.

Hon. A. F. St. Sure, D. J. Chalmers G.; Graham and Felix T. Smith (Clarence G. Morse, Truman R. Young and Pillsbury, Madison & Sutro, of Counsel) all of San Francisco, Calif., attorneys for appellant.

Thurman W. Arnold, Asst. Atty. Gen. of Washington, D. C., James V. Hayes, Morris R. Clark, Samuel E. Neel, John V. Leddy, E. Compton Timberlake, George F. Fisher, Jr., Spec. Assts. to the Atty. Gen., and Frank J. Hennessy, U. S. Atty. all of San Francisco, California, attorneys for appellee.

Before: WILBUR, DENMAN and HEALY, Circuit Judges.

HEALY, Circuit Judge.—Involved here are appeals from an order of the District Court directing appellant to take an oath of secrecy before the grand jury convened in the district, and from a later order adjudging her in contempt for refusing to take the oath.

Four appeals have been prosecuted, two from the order directing the taking of the oath, and two from the judgment in contempt. The duplicate appeals were precautionary, counsel being in doubt whether the orders are civil or criminal in nature. The Government has moved to dismiss the appeals from the order directing the taking of the oath and the motions must be sustained. *Palmuth et al. v. United States*, 9 Cir., — F. (2d) —, decided November 28, 1939. The appeals from the judgment in contempt remain to be disposed of.

The grand jury investigation is said to be concerned with activities possibly violative of the Sherman Antitrust Act. Appellant, a stenographer in the office of one Samuel Goodman, her father, was under subpoena to attend before that body. Upon her appearance the foreman tendered her the following oath: "You do solemnly swear that you will keep secret the testimony you are about to give before the grand jury and that you will testify to the truth, the whole truth and nothing but the truth."

Appellant declined to take this oath because of its requirement of secrecy. The grand jury, through its foreman, orally reported the occurrence to the court and presented the witness for contumacy; whereupon the court directed appellant to take the oath, and upon her refusal to do so she was adjudged guilty of contempt and directed to be imprisoned for thirty days in the county jail.

[*Arguments Against Oath*]

It is argued, in support of the position taken by appellant, that the federal grand jury system is based upon the practice existing under the English common law; that at common law, while the grand jurors took an oath of secrecy, witnesses before them did not; that the federal courts have followed this practice and that there is no statutory authority for the requirement of an oath of secrecy on the part of a witness; and that none of the various reasons which have been advanced for the secrecy of grand jury investigations justifies the administration of such an oath. It is further contended that to require the oath would deprive appellant of the constitutional guaranties of freedom of speech, of protection from self-incrimination, and of the right to have the assistance of counsel, as provided in the First, Fifth and Sixth Amendments.

[*Meaning of Oath Agreed*]

In a preliminary way it may be observed that there is no difficulty in understanding what the oath means. The parties are agreed that a witness who takes it is not deprived of the right to use his knowledge, but is precluded merely from disclosing what his testimony was—in other words, from revealing what occurred in the grand jury room. See *State v. Kemp* (Conn.), 1 Atl. (2d) 761, 763-764.

[*Historical Background*]

(a) The practice in grand jury investigations in this country deviates in many respects from the English mode, *Hale v. Henkel*, 201 U. S. 43;[1] and there is no ground for believing that in America the system suffers from arrested growth. De-

[1] See also *United States v. Reed*, 27 Fed. Cas. 727, No. 16134 (in which Circuit Justice Nelson pointed out the difference between the English and American practice in the finding of bills of

viations in method have continued, partly as the result of statutory enactments and in part through the evolution of local custom or usage. While in England an oath of secrecy seems not to have been exacted of grand jury witnesses, nevertheless the rule there, as stated by good authority, was that any person present before the grand jury was bound not to disclose what transpired. 1 Chitty Cr. Law 317; *State v. Fassett, supra;* 12 R.C.L. 1037. In this country the administration of such an oath to witnesses is by no means unheard of. In some of the states it has been required by statute[2] or by usage.[3] Counsel for the Government say that in thirty-seven districts in the federal jurisdiction it is the practice to require such oaths.[4] The grand jury minutes in the Northern District of California, we are told, disclose that an oath identical with the one involved here has been administered to witnesses since at least as early as 1919.[5]

Grand juries have been aptly characterized as "the voice of the community accusing its members." In re Kittle, 180 Fed. 946. From earliest times it has been the policy of the law to shield the proceedings of these bodies from public scrutiny, and to this end the grand jurors themselves have always been sworn to keep their own counsel and that of the state or of the King.[6] Courts and text writers have advanced various reasons for this rule of privacy.[7] In part the purpose is to protect grand jurors, complainants and witnesses, so that the jurors may deliberate and vote without fear that their conduct will be disclosed elsewhere, and that those who testify may feel free to speak the truth without reserve. Other reasons for the rule are that if the accused should learn that his conduct is under investigation he is likely to flee arrest or to tamper with witnesses; and that one who is unjustly accused, but is exonerated by the refusal of the grand jury to indict, may not suffer injustice by a disclosure that he has been under investigation for the commission of a crime.

Further, the evidence taken before grand juries is confidential matter, to which the accused person has no right of access. *Metzler v. United States*, 9 Cir., 64 F. (2d) 203; *United States v. American Medical Assn.*, 26 F. Supp. 429; *United States v. Providence Tribune Co.*, 241 Fed. 524; *State v. Broughton*, 29 N.C. 79, 7 Ired. 96 (1846).[8] So strict was the requirement of secrecy in this re-

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indictment); *United States v. Amazon Industrial Chem. Corp.*, 55 F. (2d) 254 (dealing with the Act of June 30, 1906, 34 Stat. 1816, authorizing the designation of special counsel to conduct grand jury proceedings, and with the practice of having stenographers in grand jury rooms); *State v. Fassett*, 16 Conn. 457. From the case last cited it appears that in Connecticut it was the practice to have witnesses sworn in the grand jury room by a justice of the peace or other magistrate, whereas at that time (1844) the procedure both in England and in the courts of the United States was to swear grand jury witnesses in open court. By § 1 of the act of Congress of March 3, 1865 (13 Stat. 500, 28 USCA § 420) the court was relieved of this burden and the power of swearing the witnesses was delegated to the foreman.

[2] See *Gutgesell v. State* (Tex.), 43 S. W. 1016; *Misso v. State* (Tex.), 135 S. W. 1173; *Addison v. State* (Tex.), 211 S. W. 225; *Ex parte Wellborn* (Mo.), 141 S. W. 31.

[3] See *State v. Kemp* (Conn.), 1 Atl. (2d) 761.

[4] The districts named by counsel are: Ala., Middle D.; Ala., N. D.; Ariz.; Ark., E. D.; Cal., N. D.; Cal., S. D.; Colo.; Fla., N. D.; Fla., S. D.; Idaho; Ill., N. D.; Ind., S. D.; Kans.; La., E. D.; La., W. D.; Mich., E. D.; Mich., W. D.; Minn.; Miss., N. D.; Miss., S. D.; Mo., E. D.; Mo., W. D.; Neb.; Nev.; Ohio, N. D.; Okla., E. D.; Okla., N. D.; Okla., W. D.; Oregon; Tex., E. D.; Tex., N. D.; Tex., S. D.; Tex., W. D.; Utah; Wash., W. D.; Wisc., E. D.; Wisc., W. D.

Counsel for appellant tell us that a similar survey made two years ago showed grand juries in thirty-three federal districts imposed the oath of secrecy upon witnesses, while fifty-two did not.

[5] Minutes for prior years are said not to be available. On the hearing below Judge St. Sure observed that "we have established a rule here that our proceedings before our grand juries are secret, and if custom has established, as a rule, that an oath shall be administered such as the foreman directed you to take, it seems to me you should have taken it * * *."

[6] Consult Wigmore on Evidence, (2d Ed.), vol. 5, § 2360, p. 146. As there given, a form of the English oath was that the grand jurors shall "diligently inquire and true presentment make of all such matters and things as shall be given you in charge; the King's counsel, your fellows', and your own, you shall keep secret; you shall present no one for envy, hatred or malice; but you shall present all things truly as they come to your knowledge, according to the best of your understanding. So help you God." Substantially the same oath was approved by Justice Field in Charge To Grand Jury, 2 Sawyer 667, Fed. Cas. No. 18255.

[7] Wigmore on Evidence (2d Ed.), vol. 5, § 2360, p. 151; *State v. Broughton*, 29 N. C. 79, 80-81; *United States v. Providence Tribune Co.*, 241 Fed. 524; *United States v. American Medical Assn.* (D. C., D. C.), 26 F. Supp. 429; *United States v. Amazon Industrial Chem. Corp., supra.*

[8] In that case Chief Justice Ruffin remarked: "We think, too, that in furtherance of justice, the law may have intended to forbid a grand juror from giving aid to one indicted, and thus found to be probably guilty, in his efforts to defeat the prosecution, by publishing the evidence before the grand jury, and thus enabling him to counteract it, perhaps by foul means, after he knew where the case pinched. That would be betraying 'the State's counsel', which is necessarily opened to the grand jury."

spect that anciently a grand juror who disclosed to an indicted person the evidence that had been given against him was held to be an accessory to the crime, if the crime was a felony, and a principal if the crime was treason; and later such conduct appears to have been denounced as a high misprision. 4 Bl. Com. 126; 1 Chitty Cr. L. 317. Nowadays, in the absence of special statute providing a different method of punishment,[9] a grand juror may be held in contempt for disclosing grand jury proceedings to an outsider. In re Summerhayes (D.C. N.D. Cal.) 70 Fed. 769; cf. *United States v. Providence Tribune Co., supra;* 28 USCA § 385.

[*Policy of Secrecy*]

The practice of requiring witnesses to take an oath of secrecy is a logical method of effecting the general policy of secrecy in respect of the proceedings of these bodies. In a broad sense grand jurors themselves are witnesses; for a grand jury may act upon knowledge acquired either from their own observations or from the evidence of witnesses given before them. *Hale v. Henkel, supra.* As is well known, in investigations of corporate offenses under the Sherman Act the Government often finds it necessary to summon as witnesses officers and employees of the parties whose conduct is the subject of the inquiry. If witnesses are free to broadcast their testimony after leaving the grand jury room, or if they may, under pressure, disclose it to those under investigation or to their attorneys, grand jury proceedings would in large measure be shorn of their traditional privacy.

[*Discretionary Power of Court*]

There is no federal statute prescribing the form of oath, either of grand jurors or of witnesses, and none requiring either to take an oath of secrecy. In relation to the powers of district courts of the United States, § 268 of the Judicial Code (28 USCA § 385) provides:

"The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule decree, or command of the said courts."

It would seem to be well within the discretionary power of the court to impose an oath of secrecy not alone upon grand jurors, but upon the witnesses, if the court believes the precaution necessary in the investigation of crime.[10] More particularly is this true where the grand jury has itself requested the imposition of the oath on the witness; for these semi-autonomous bodies are entitled to have the privacy of their investigations insured by all reasonable means.

[*Freedom of Speech Not Violated*]

(b) The contention that the oath violates the right of the witness to freedom of speech is specious. The right is not absolute. *Schenck v. United States,* 249 U.S. 47. Cf. *Gitlow v. New York,* 268 U.S. 52; *Schneider v. Town of Irvington,* — U.S. —, decided Nov. 22, 1939. It has never been supposed that grand jurors are deprived of the constitutional right of free speech through the oath of secrecy which they make; and a witness summoned to appear before them is in no better case. Through their participation in the proceedings both grand jurors and witnesses occupy a special relationship to the state; and for reasons grounded in public policy, as we have seen, the testimony taken in these proceedings is privileged and confidential. Considerations of mere convenience or even of downright hardship on the part of the witness do not outweigh the policy of secrecy in respect of grand jury investigations.

Appellant disclaims the right to make disclosures to the world at large, but insists that she has the right to confide in her employer and her attorney. The former, however, has no more right to be advised of what has occurred before the grand jury than has any other member of the general public; and one of the purposes of the oath is to protect the witness against the importunities of her employer. The right of the witness to communicate with her attorney stands on a different footing, but whatever that right may be it is not grounded in the First Amendment.

[*Self-Incrimination; Right to Counsel*]

(c) It is contended that the oath violates the guaranty of the Fifth Amendment that no person shall be compelled in a criminal

[9] Both Texas and Missouri appear to have statutes making it a misdemeanor for a witness to disclose grand jury matters. See Texas cases cited in Note 2, supra; Rev. Statutes of Missouri (1929) § 3518.

[10] "At the foundation of our federal government the inquisitional function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States." *Blair v. United States,* 250 U. S. 273, 279.

case to be a witness against himself, nor be deprived of life, liberty or property without due process of law. Also that it violates the Sixth Amendment in that it deprives appellant of the right to communicate with and obtain the aid, assistance and advice of counsel. The Government, on the other hand, contends that the oath does not infringe any recognized constitutional right guaranteed by these amendments.

We have heretofore indicated our view that the court had authority, in its discretion, to impose an oath of secrecy upon the witness; but it is not to be assumed that the court intended through the imposition of the oath to deprive appellant of her legal right to consult with her attorney. Clearly, an oath of this character, like a statute, should if possible be given such construction as will harmonize it with the fundamental law. We find no difficulty in holding that this oath can—and that it must— be so construed as not to disable a person who takes it from exercising in a proper situation his right freely and in confidence to advise with his counsel. We do not have before us any situation in which that right has been infringed; and it is neither necessary nor appropriate here to consider all possible circumstances in which the right freely to consult counsel may become essential to the protection of the appellant.

[*Court May Absolve Oath of Secrecy*]

It is proper to add that the court may at any time in the furtherance of justice remove the seal of privacy from grand jury proceedings. *Metzler v. United States, supra; United States v. Farrington,* 5 Fed. 343; *Brzezinski v. United States,* 2 Cir., 198 Fed. 65; *Carrol v. United States,* 2 Cir., 16 F. (2d) 951, cert. den. 273 U. S. 763; 12 R.C.L. § 23, p. 1039; *People v. Goldberg* (Ill.), 135 N. E. 84. The court may absolve a witness, as it may a grand juror, from his oath of secrecy; and, where that course is requested by the witness, it would be a clear abuse of discretion to deny it if the course is deemed essential to the witness' protection. However, the right of a person to avail himself of recognized constitutional safeguards does not depend upon the court's indulgence.

[*Orders Adjudging Contempt Affirmed*]

Affirmed.

[¶ 55,255] Ben Williamson, Jr., Trustee of Inland Gas Corporation v. Columbia Gas & Electric Corporation.

United States Circuit Court of Appeals, Third Circuit, December 21, 1939.

Appeal from the United States District Court, District of Delaware.

Civil proceedings for the recovery of damages authorized under the Clayton Anti-Trust Act, sound in tort and, under the classification of actions of trespass on the case are properly dismissed where instituted subsequent to the running of the applicable state statute of limitations; as the unliquidated and speculative nature of the damages sought prevent bringing of the cause as an action of debt on a specialty to secure the advantage of a longer period of limitations.

Marvel, Morford & Logan, Wilmington, Delaware, counsel for appellant.

Ward & Gray, Wilmington, Delaware. Cravath deGersdorff, Swaine & Wood, New York, counsel for appellee.

Before MARIS, BIDDLE and JONES, Circuit Judges.

[*Statement of Case*]

MARIS, C. J.: This is an appeal by Ben Williamson, Jr., Trustee of Inland Gas Corporation, from an order of the District Court for the District of Delaware dismissing his complaint against Columbia Gas & Electric Corporation. The plaintiff was appointed trustee of Inland under Sec. 77B of the Bankruptcy Act and filed his complaint September 16, 1938. The allegations of the complaint are fully stated in the opinion of the district court, 27 F. Supp. 198, and need not be repeated here. It is sufficient to say that the acts of Co-

lumbia complained of are alleged to be in violation of section 7 of the Clayton Act (15 U. S. C. § 18) which provides in part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corportion whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce . . ."

[*Damages Claimed*]

The plaintiff claims threefold damages in accordance with the provisions of section 4 of the Clayton Act (15 U. S. C. § 15) which provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[*Complaint Dismissed*]

Columbia moved to dismiss the complaint for failure to state a claim upon which relief could be granted. Its motion was based on the ground that the plaintiff's cause of action did not accrue within a period of three years prior to the commencement of the action. The parties agreed by a stipulation which accompanied the motion to dismiss that the right of action accrued not later than January 1, 1931. The motion was sustained and the complaint dismissed by the district court.

[*Applicability of Statute of Limitations*]

To determine the applicable period of limitation we must resort, as the district court did, to the laws of Delaware, for the rule is well established that where an act of Congress does not fix a limitation of time for commencing actions to enforce it the state statute of limitations is applicable.[1]

The Delaware statute of limitations, Revised Code of Delaware (1935) § 5129, provides in part:

"No action of trespass, no action of replevin, no action of detinue, no action of debt not found upon a record or specialty, no action of account, no action of assumpsit, and no action upon the case shall be brought after the expiration of three years from the accruing of the cause of such action; . . ."

It is apparent that the statute does not apply to actions of debt on a record or specialty. As to such actions the courts of Delaware have said that the only limitation is the presumption of satisfaction after twenty years.[2]

[*Nature of Action*]

It is the contention of the plaintiff that his action is in the nature of an action of debt on a specialty and is therefore not barred, having been brought within twenty years. Columbia argues, however, that the complaint set forth a cause in tort for which an action of trespass on the case was the only remedy, and that, since the suit was brought more than three years after the cause of action had accrued, recovery was barred by the statute. We are, therefore, called upon to determine whether an action in the nature of debt on a specialty at common law may be brought to recover damages for injuries to business resulting from acts forbidden by section 7 of the Clayton Act; or whether an action in the nature of common law trespass on the case is the sole remedy of the aggrieved party. The answer to this question obviously depends upon the nature of the cause of action granted by the statute and asserted in the complaint.

The purchase of stock control by one corporation in another so as to lessen competition, restrain trade and effect a monopoly would have been a wrong to the public at common law as is shown by the fact that the courts early declared agreements having such results against public policy and unenforceable.[3] The antitrust legisla-

[1] Revised Statutes Sec. 721 (28 U. S. C. 725); *Campbell v. Haverhill*, 155 U. S. 610; *McClaine v. Rankin*, 197 U. S. 154; *Pufahl v. Estate of Parks*, 299 U. S. 217; *Donald v. Bird*, 85 F. (2d) 663; and with especial reference to the antitrust laws, *Glenn Coal Co. v. Dickinson Fuel Co.*, 72 F. (2d) 885.

[2] *Farmers' Bank v. Gardner's Adm'rs.*, 4 Harr. (4. Del.) 430, 433 "But where the right of action is fixed, permanent, and so certain, that it cannot be changed, misconstrued, or misunderstood, as in the case of a specialty or a record, the act of limitation is silent, and leaves the case to the common law presumption of payment or satisfaction after the lapse of twenty years."

[3] The granting of monopolies, which was a prerogative of the sovereign, was early declared to be contrary to common law as well as to many acts of Parliament. The reasons given were that monopolies tended to increase prices, deteriorate the quality of commodities and reduce artificers to idleness and beggary. The *Case of Monopolies*, 11 Coke 84b. Acts which resulted in a partial or complete control over victuals were made crimes by statutes relating to engrossing, regrating and forestalling. 5 and 6 Edward VI, cap. 14 (1552) repealed by 12 George III, cap. 71 (1772) and 7 and 8 Victoria, cap. 24 (1844). ("Engross.—To buy up such large quantities of an article as to obtain a monopoly of it for the

tion extended this protection to the individual, and gave him a right of action for injuries sustained by him which up to that time had received no judicial recognition. An analogous situation arises in cases in which a right of action is given for death by wrongful act by a statute such as § 4155, Revised Code of Delaware, 1935. No such right existed at common law. The Delaware courts have determined that the cause of action sounds in tort. So in *Homiewicz v. Orlowski,* 34 Del. 66, 143 A. 250, the court said: "If the injured person dies as a result of his injuries, there springs into being by virtue of the cited statute, a new right of action on behalf of the statutory parties. This new right of action is based upon the same cause of action the injured person had, *viz.* the original tort . . . " In *Hazzard v. Alexander,* 36 Del. 212, 173 A. 517, the court determined that the right given by the statute was for a tort. We are of the opinion that the cause of action given by Section 7 of the Clayton Act fits into that broad field of tort law which protects a man's business from wrongful interference. Restatement, Torts, Division 9. The statute simply makes an addition to this group of recognized torts. Our analysis leads to the conclusion that the allegations of the complaint are that Columbia committed a tort and that Inland was harmed thereby.

[*Common Law*]

At common law one injured by a tort for which there was no customary remedy could resort to an action upon the case, for, as was stated by Blackstone, "This action of *trespass,* or transgression, *on the case,* is a universal remedy, given for all personal wrongs and injuries without force . . ." [4] And in Stephen on Pleadings, Sec. 17 it is said "The action of trespass upon the case lies where a party sues for damages for any wrong or cause of complaint to which . . . trespass will not apply." [5] Thus trespass on the case was held the proper action in *Bowen v. Hall,* 6 Q. B. D. 333, for recovery of damages sustained by the plaintiff by reason of a breach of contract by a third person to manufacture glazed bricks for the plaintiff, the breach having been caused by the defendant. The court said "That wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie . . . "

So also it appears that at common law an action on the case might be brought even though the right to damages was given by statute. It is stated in 1 Chitty on Pleading 148 that "Actions on the case are founded on the common law or upon acts of parliament, and lie generally to recover damages for torts not committed with force, actual or implied."

This principle of the common law was given application by the Superior Court of Delaware as far back as 1840 in the case of *Ross v. Horsey,* 3 Harr. (3 Del.) 60, in ruling upon the right to the recovery of double damages and costs allowed by the Delaware act of February 1, 1819 (5 Del. Laws 389) for the preservation of mill property. The relevant portion of the act, which is codified as Sec. 4220 of the Revised Code of Delaware 1935, provides: ". . . and for omitting or neglecting to give such due and reasonable notice, the offender shall, on due proof thereof being made, forfeit and pay double the amount of all damages, with costs of suit, which may be sustained by the owner, possessor or keeper of any such lower mill as aforesaid; to be recovered as debts of a like amount are or may

purpose of selling at an unreasonable price." "Regrating.—Every practice or device, by act, conspiracy, words, or news, to enhance the price of victuals or other merchandise, is so denominated. Co. 3d Inst. 196; 1 Russell, Cr. 169, Whart. Cr. Law 1849." "Forestalling the Market.—Buying victuals on their way to the market before they reach it, with the intent to sell again at a higher price. Cowell; Blount; 4 Bla. Com. 158. Every device or practice, by act, conspiracy, words, or news, to enhance the price of victuals or other provisions; Co. 3d Inst. 196; 1 Russ. Cr. 169; 4 Bla. Com. 158. See 13 Viner, Abr. 430; 1 East 132; 3 M. & S. 67." Bouvier's Law Dictionary.) Even prior to the passage of the federal anti-trust laws of English and American courts ruled that agreements among individuals or corporations which resulted in a restrain of trade were detrimental to the public. (For a full discussion of the development of the law of monopoly and restraint of trade see *Standard Oil Co. v. United States,* 221 U. S. 1, opinion by Chief Justice White, 51-59). The public was afforded some protection from these harmful results through the refusal of the courts to enforce such agreements. *Mill and Lumber Co. v. Hayes,* 76 Cal. 387, 18 P. 391; *Anderson v. Jett, etc.,* 89 Ky. 375, 12 S. W. 670; *India Bagging Association v. B. Kock & Co.,* 14 La. Ann. 168; *Richardson v. Buhl,* 77 Mich. 632, 43 N. W. 1102; *Arnot v. Pittston and Elmira Coal Co.,* 68 N. Y. 558.

[4] 3 Bl. Com. 122.

[5] For additional common law decisions to the effect that action on the case will lie see *Garrett v. Taylor,* Cro. Jac. 567 (K. B. 1621); *Tarleton v. McGawley,* Peaks N. P. 270 (K. B. 1793); *Wise v. Western Union Telegraph Co.,* 36 Del. 155, 172 A. 757; *Garber v. Whittaker,* 36 Del. 272; 174 A. 34, 36 "It is difficult to give a general definition of a tort that would be satisfactory in all cases, but it is clear that, generally speaking, any act done or omitted to be done, contrary to the obligation of the law, is a tort and the damages suffered may be recovered in an action on the case."

be recoverable by the laws of this State." In spite of this reference to an action for the recovery of debt the court ruled that trespass on the case was the proper form of action for recovery of the double damages and costs allowed by the statute.

[*Conclusion Supported*]

Our conclusion that the cause of action sounds in tort and the appropriate form of action is trespass on the case is fully supported by our recent decision in *H. J. Jaeger Research Laboratories v. Radio Corporation*, 90 F. 2d 826 in which we affirmed a decision of the District Court of New Jersey holding that violations of the antitrust laws are torts for which actions of trespass on the case will lie.

This conclusion, however, does not dispose of the controversy, for as was stated by Justice Story sitting the Circuit Court in *Bullard v. Bell*, 1 Mason 243, Fed. Cases No. 2121 ". . . it is not sufficient, . . . for the defendant to establish affirmatively, that an action of assumpsit or case might well lie; but negatively, that an action of debt will not." As we have indicated, the plaintiff has strongly pressed upon us the contention that under the common law of Delaware the remedy of debt upon a specialty would have been available to him. We think, however, that such a remedy is incompatible with the wrong for which redress is sought in the present case. An action of debt at common law would lie only where the sum claimed was certain or could readily be reduced to a certainty by mathematical computation. *Young and Ashburnsham's Case*, 3 Leon. 161 (C. P. 1587). In *Bullard v. Bell, supra*, Justice Story said: "For the remedy follows the nature of the case, and debt lies only when, by analogy to the rules of the common law the duty or penalty lies not in unliquidated damages, but is capable of being reduced to a certainty." In 1 Chitty on Pleadings 127, 132, the statement is made, "Debt, however, is not in any case sustainable, unless the demand is for a sum certain, or for a pecuniary demand . . . which can readily be reduced to a certainty . . though debt is sustainable upon a simple contract, a specialty, a record, or a statute, yet it lies only for the recovery of a sum of money *in numero*, and not where the damages are unliquidated and incapable of being reduced by averment to a certainty;" The Supreme Court in *Carrol v. Green*, 92 U. S. 509, 513, stated "The action of debt lies on a statute where it is brought for a sum certain, or where the sum is capable of being readily reduced to a certainty. It is not sustainable for unliquidated damages." This common law rule is followed in Delaware. 2 Woolley, Delaware Practice, 993, 994; *Ogden-Howard Co. v. Brand*, 7 Boyce (30 Del.) 482.

[*Unliquidated Damages*]

The present case presents a perfect illustration of damages which are unliquidated and which are determinable at best by approximation and by the exercise of judgment by the trier of the facts. The claim for loss of profits is highly speculative, dependent upon factors of cost of production, labor, transportation, and quantities of gas sold. The plaintiff goes even further and claims that not only should Inland be reimbursed for loss of profits, but should be given damages in an amount equal to its bonds, other debts and dividends, all of which he alleges, would have been paid had Inland made the anticipated profits. The claim need but be stated to make its speculative character obvious.

The unliquidated character of a claim for damages under the antitrust laws was recognized by the Supreme Court in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 552.

The plaintiff calls our attention to many actions of debt on a specialty in which, he says, the amounts were uncertain. In many of those cases it was possible to ascertain the damages with mathematical exactness even prior to trial[6] whereas in the present case as we have already indicated they can be determined only by the exercise of judgment by the trier of facts. The decisions in others were based upon the provision in the statute which allowed damages that recovery might be had by an action of debt.[7]

[*Test as to Whether Debt on a Specialty Will Lie*]

The plaintiff contends that the test as to whether debt on a specialty will lie is not whether the amount sought to be recovered is certain, but whether the action is given by the statute or is upon the statute, and offers the English decisions in *Cork and Bandon Ry. Co. v. Goode*, 13 C. B. D. 826 and *Gutsell v. Reeve*, 1 K. B. D. 272 (1936) as illustrations. We add to these the more recent case of *Pratt v. Cook, Sm. & Co.*, (St. Paul's) Ld., 2 K. B. D. 51 (1938) which he did not cite. If, in establishing this test, the English courts no longer require certainty as to amount they have clearly departed from the ancient rule of the common law which became and has remained the law of Delaware.

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[6] *United States v. Chamberlain*, 219 U. S. 250; *Stockwell v. United States*, 13 Wall. 531; *United States v. Younger*, 92 F. 672; *Andrews v. Bacon*, 38 F. 777; *U. S. v. Colt*, Fed. Cas. No. 14,839; *Cowenhoven v. Freeholders*, 44 N. J. L. 232; *Outwater v. City of Passaic*, 51 N. J. L. 428.

[7] *Reed v. David, et al.*, 8 Pick. (Mass.) 514; *Orne v. Roberts*, 51 N. H. 110.

The plaintiff contends since the "civil action" provided for by the Federal Rules of Civil Procedure has abolished all distinctions in the forms of actions the state statutes of limitations based upon differences in forms of action no longer apply. Exactly the same contention was made in England, after the abolition of forms of action by the Judicature Act of 1873. In *Gibbs v. Guild* (1882) 9 Q. B. D. 59, Brett, L. J. said (p. 67): "It was said that inasmuch as the names of actions are altered, and there is no longer an action on the case, or an action of trespass, the Statute of Limitations did no longer apply; but I am of opinion that the Judicature Act, 1873, did not alter or touch the Statute of Limitations at all, and that the statute still applies to the circumstances which constituted the actions named in it, that is to say, that if the circumstances would have constituted an action on the case, or an action of trespass, although the action which involves the remedy sought would not now be called an action on the case or an action of trespass, yet, notwithstanding the Statute of Limitations applies to it, if the facts are such as would have supported an action on the case or an action of trespass."

[*Limitation Period for Tort Actions*]

In *Kirkman v. Philip's Heirs*, 54 Tenn. 222, the limitation period for tort actions was three years, for contract actions six years. The court analyzed the pleadings to determine which cause of action was involved. The court said "This right is not interfered with by the provisions of the Code abolishing the distinctions in the forms of actions. The statute of limitations applicable to the cause depends upon the nature and character of the action, and not upon its form."

We fully agree with the views expressed by the Circuit Court of Appeals of the Fifth Circuit, in *City of El Paso v. West et al.*, 104 F. 2d 96, in which that court disposed of a similar argument with the statement "Even under the new rules when limitation depends on the State law and that law refers to a form of action as determinative it will be necessary to ascertain what sort of case the pleader is presenting." We find no evidence in the Federal Rules of Civil Procedure or in the notes thereto of an intent to cover the field of limitations of actions. The state statutes accordingly remain applicable under the Rules of Decision Act (28 U. S. C. § 725).

[*Determination of Action*]

In order to apply a statute of limitations, such as that of Delaware, which reads in terms of common law actions, to a civil action brought in a district court it is necessary for the court through a consideration of the nature of the cause of action disclosed in the complaint to determine the form of action which would have been brought upon it at common law. It is evident that the complaint in the case before us discloses a cause of action which, under the common law of Delaware, would be enforceable in an action on the case and not in an action of debt on a specialty. The district court, therefore, properly held that the action was barred by the Delaware statute of limitations.

[*Conclusion*]

The order of the district court is affirmed.

[¶ 55,256] United States of America v. Plumbing and Heating Industries Administrative Association, Inc., Joseph G. Hildebrand, John M. Botts, J. H. McCarthy, Elmond J. Ewing, Joseph A. High, Theo. R. Newman, Mark Moran, W. Howard Gottlieb, Maurice R. Colbert, Frank J. Lucas, Edgar O. Olson.

United States District Court, District of Columbia, December 22, 1939.

A decree will issue upon consent of the parties in an action under the Sherman Anti-Trust Act prohibiting concerted interference by plumbing and heating contractors with competitive bidding upon construction projects and dissolving a combination allegedly operated in restraint of trade where the jurisdiction of the court is properly invoked and entry of the decree affords a suitable measure of relief.

Before PROCTOR, District Judge.

Judgment

PROCTOR, D. J.: This cause came on to be heard on this 22nd day of December 1939, the complainant being represented by David A. Pine, United States Attorney for the District of Columbia, and Gordon Dean, Special Assistant to the Attorney General, and the defendants being represented by their counsel, said defendants having appeared voluntarily and generally and having waived service of process.

[*Consent to Judgment*]

It appears to the Court that the defendants have consented in writing to the making and entering of this judgment;

[*Sufficiency of Relief*]

It further appears to the Court that this judgment will provide suitable relief concerning the matters alleged in the complaint, and that by reason of the aforesaid consent of the parties it is unnecessary to proceed with the trial of the cause, or to take testimony therein, or that any adjudication be made of the facts.

[*Consent Decree*]

Now, therefore, upon motion of complainant, without taking any testimony or evidence, and without making any adjudication of the facts, and in accordance with said consent, it is hereby

ORDERED, ADJUDGED, and DECREED—

[*Nature of Action*]

1. That the Court has jurisdiction of the subject matter set forth in the complaint and of all the parties hereto with full power and authority to enter this judgment and that the complaint alleges a combination in restraint of trade and commerce in the District of Columbia in the restriction and elimination of competitive bidding among plumbing and heating contractors in violation of the Act of Congress approved July 2, 1890, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Antitrust Act, and states a cause of action under said Act.

[*Dissolution Provided*]

2. That defendant corporation, Plumbing and Heating Industries Administrative Association, Inc. be dissolved by action of the defendant officers and members of said corporation.

[*Restraints Imposed*]

3. That the defendants and each of them and each and all of their respective officers, directors, agents, servants, and employees, and all persons acting or claiming to act on behalf of the defendants or any of them be and they are hereby perpetually enjoined and restrained from engaging in, carrying out, maintaining, or extending, directly or indirectly, any combination to restrain trade or commerce in the District of Columbia in the restriction and elimination of competitive bidding among plumbing and heating contractors such as is alleged in the complaint, and from entering into or carrying out, directly or indirectly, by any means whatsoever, any combination of like character or effect, and more particularly (but the enumeration following shall not detract from the inclusiveness of the foregoing) from doing, performing, agreeing upon, entering upon, or carrying out any of the following acts or things:

(a) Operating any organization or engaging in any plan or procedure whereby the elimination or restriction of low bids on any project is accomplished;
(b) Interfering or agreeing to interfere in any way with free and open competitive bidding on any and all construction projects in the District of Columbia.

[*Inspection of Books*]

4. That for the purpose of securing compliance with the judgment authorized representatives of the Department of Justice shall, upon the request of the Attorney General or an Assistant Attorney General, be permitted access, within the office hours of the defendants, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or control of defendants, relating to any of the matters contained in this judgment; that any authorized representative of the Department of Justice shall, subject to the reasonable convenience of the defendants, be permitted to interview officers or employees of defendants, without interference, restraint, or limitation by defendants; that defendants, upon the written request of the Attorney General, shall submit such reports with respect to any of the matters contained in this judgment as may from time to time be necessary for the proper enforcement of this judgment.

[*Jurisdiction Retained*]

5. That jurisdiction of this cause and of the parties hereto is retained for the purpose of giving full effect to this judgment and for the enforcement of strict compliance therewith, and for the further purpose of making such other and further orders and judgments or taking such other action as may from time to time be necessary.

[*Recovery of Costs*]

6. And that complainant recover its costs.

[¶ 55,257] United States of America v. Union Painters Administrative Association, Inc., W. H. Sheehan, Thomas H. Reid, F. Y. Denson, Edward W. Minte Co., Inc., Edward W. Minte, F. J. Rice, A. William Dunbar.

United States District Court, District of Columbia, December 22, 1939.

A decree will issue upon consent of the parties in an action under the Sherman Anti-Trust Act prohibiting concerted interference by painting contractors with competitive bidding upon construction projects and dissolving a combination allegedly operated in restraint of trade where the jurisdiction of the court is properly invoked and entry of the decree affords a suitable measure of relief.

Before PROCTOR, District Judge.

Judgment

[*History of Case*]

This cause came on to be heard on this 22nd day of December 1939, the complaint being represented by David A. Pine, United States Attorney for the District of Columbia, and by Gordon Dean, Special Assistant to the Attorney General, and the defendants being represented by their counsel, said defendants having appeared voluntarily and generally and having waived service of process.

[*Consent to Judgment*]

It appears to the Court that the defendants have consented in writing to the making and entering of this judgment.

[*Sufficiency of Relief*]

It further appears to the Court that this judgment will provide suitable relief concerning the matters alleged in the complaint and that by reason of the aforesaid consent of the parties it is unnecessary to proceed with the trial of the cause or to take testimony therein or that any adjudication be made of the facts.

[*Consent Decree*]

Now, therefore, upon motion of complaint, without taking any testimony or evidence, and without making any adjudication of the facts and in accordance with said consent, it is hereby

ORDERED, ADJUDGED, and DECREED—

[*Nature of Action*]

1. That the Court has jurisdiction of the subject matter set forth in the complaint and of all the parties hereto with full power and authority to enter this judgment and that the complaint alleges a combination in restraint of trade and commerce in the District of Columbia in the elimination of competitive bidding among painting contractors in violation of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Antitrust Act, and states a cause of action under said Act.

[*Forfeiture of Charter*]

2. That charter of the defendant corporation, Union Painters Administrative Association, Inc. is hereby forfeited.

[*Restraints Imposed*]

3. That the defendants and each of them and each and all of their respective officers, directors, agents, servants, and employees, and all persons acting or claiming to act on behalf of the defendants or any of them be and they are hereby perpetually enjoined and restrained from engaging in, carrying out, maintaining, or extending, directly or indirectly, any combination to restrain trade or commerce in the District of Columbia in the elimination of competitive bidding among painting contractors such as is alleged in the complaint and from entering into or carrying out, directly or indirectly, by any means whatsoever, any combination of like character or effect and more particularly (but the enumeration following shall not detract from the inclusiveness of the foregoing) from doing, performing, agreeing upon, entering upon, or carrying out any of the following acts or things:

a. Operating any organization or engaging in any device or scheme such as that commonly known as a bid depository whereby the elimination or restriction of low bids on any project in the District of Columbia is accomplished;

b. Interfering or agreeing to interfere in any way with free and open competitive bidding on any and all construction projects in the District of Columbia.

[*Inspection of Books*]

4. That for the purpose of securing compliance with the judgment authorized representatives of the Department of Justice shall, upon the request of the Attorney General or any Assistant Attorney General,

be permitted access, within the office hours of the defendants, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or control of defendants, relating to any of the matters contained in this judgment; that any authorized representatives of the Department of Justice shall, subject to the reasonable convenience of the defendants, be permitted to interview officers or employees of the defendants, without interference, restraint, or limitation by defendants; that defendants, upon the written request of the Attorney General, shall submit such reports with respect to any of the matters contained in the judgment as may from time to time be necessary for the proper enforcement of this judgment.

[*Jurisdiction Retained*]

5. That jurisdiction of this cause and of the parties hereto is retained for the purpose of giving full effect to this judgment and for the enforcement of strict compliance therewith, and for the further purpose of making such order and further orders and judgments or taking such other action as may from time to time be necessary.

[*Recovery of Costs*]

6 And that complainant recover its costs.

[¶ 55,258] United States of America v. Excavators Administrative Association, Inc., Logan Pingree Co., Inc., M. Cain Co., Inc., Crane Service Co., Inc., Raymond Hartzell, Herman Morover, Raymond Morover, James Parreco, Theodore Parreco, William Parreco, Edward Parreco, Logan Pingree, F. J. Rice, M. Cain.

United States District Court, District of Columbia, December 22, 1939.

A decree will issue upon consent of the parties in an action under the Sherman Anti-Trust Act prohibiting concerted interference by excavators with competitive bidding upon construction projects and dissolving a combination allegedly operated in restraint of trade where the jurisdiction of the court is properly invoked and entry of the decree affords a suitable measure of relief.

Before PROCTOR, District Judge.

Judgment

[*History of Case*]

This cause came to be heard on this 22nd day of December, 1939, the complainant being represented by David A. Pine, United States Attorney for the District of Columbia, and Gordon Dean, Special Assistant to the Attorney General and the defendants being represented by their counsel, said defendants having appeared voluntarily and generally and having waived service of process.

[*Consent to Judgment*]

It appears to the Court that the defendants having consented in writing to the making and entering of this judgment;

[*Sufficiency of Relief*]

It further appears to the Court that this judgment will provide suitable relief concerning the matters alleged in the complaint, and that by reason of the aforesaid consent of the parties it is unnecessary to proceed with the trial of the cause, or to take testimony therein, or that any adjudication be made of the facts.

[*Decree*]

Now, therefore, upon motion of complainant, without taking any testimony or evidence, and without making an adjudication of the facts, and in accordance with said consent, it is hereby ORDERED, ADJUDGED, and DECREED—

[*Nature of Action*]

1. That the Court has jurisdiction of the subject matter set forth in the complaint and of all the parties hereto with full power and authority to enter this judgment, and that the complaint alleges a combination in restraint of trade and commerce in the work of excavating and the competitive bidding thereon in violation of the Act of Congress approved July 2, 1890, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Antitrust Act, and states a cause of action under said Act.

[*Dissolution of Corporate Defendant*]

2. That defendant corporation, Excavators Administrative Association, Inc., be and the same is hereby dissolved.

[*Restraints Imposed*]

3. That the defendants and each of them and each and all of their respective officers, directors, members, agents, servants and

employees, and all persons acting or claiming to act on behalf of the defendants, or any of them, be and they are hereby perpetually enjoined and restrained from engaging in, carrying out, maintaining or extending, directly or indirectly, any combination to restrain trade and commerce in the work of excavating and the competitive bidding thereon, such as is alleged in the complaint, and from entering into or carrying out, directly or indirectly, by any means whatsoever, any combination of like character or effect and more particularly (but the enumeration following shall not detract from the inclusiveness of the foregoing) from doing, performing, agreeing upon, entering upon or carrying out any of the following acts or things:

(a) Operating any organization or engaging in any plan or procedure such as that commonly known as a bid depository whereby the elimination or restriction of low bids on any project in the District of Columbia is accomplished;

(b) Interfering or agreeing to interfere in any way with free and open competitive bidding on any and all construction projects in the District of Columbia.

[*Inspection of Books*]

4. That for the purpose of securing compliance with the judgment authorized representatives of the Department of Justice shall, upon the request of the Attorney General or an Assistant Attorney General be permitted access within the office hours of the defendants, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or control of defendants, relating to any of the matters contained in this judgment; that any authorized representative of the Department of Justice shall, subject to the reasonable convenience of the defendants, be permitted to interview officers or employees of defendants, without interference, restraint, or limitation by defendants; that defendants, upon the written request of the Attorney General shall submit such reports with respect to any of the matters contained in this judgment as may from time to time be necessary for the proper enforcement of this judgment.

[*Jurisdiction Retained*]

5. That jurisdiction of this case and of the parties hereto be and it hereby is, retained by the Court, for the purpose of giving full effect to the judgment and for the enforcement of a strict compliance therewith, and for the further purpose of making such other and further orders and judgments or taking such other action as may from time to time be necessary.

[*Recovery of Costs*]

6. And that complainant recover its costs.

[¶ 55,259] Opinion of the Attorney General of the State of Wisconsin.

Addressed to the District Attorney, Manitowoc, Wisconsin, December 13, 1939.

Under the Wisconsin Unfair Sales Act, prohibiting sales below cost, a merchant may offer commodities for sale or sell at a price not lower than invoice or replacement cost, whichever is the lower. Using the higher of the two as a standard would not constitute a violation of the Act.

With reference to Ch. 56, Laws of 1939, creating sec. 110.15 of the statutes, you state a case as follows:

"Take for example the case of a certain merchant who purchased certain merchandise at $1.00 a dozen on the first of July, 1939; this merchandise has not been disposed of by the first of December, 1939. May said retail merchant use the actual invoice cost of $1.00 per dozen which he paid in July as the basis for determining his selling price or is he forced to use the cost at which said merchandise could have been replaced at any time thirty days prior to the first of December?"

In reference to the stated case, you state:

"It is my opinion that the above sections of the said law mean that the actual invoice cost no matter when purchased can be used by the retailer in computing his selling price. Section A provides 'cost to retailer' means invoice cost."

You request our opinion.

At the outset, it may be observed that the chapter in question is not a price-fixing statute except in so far as it fixes a minimum price below which the seller may not go in selling or offering articles or commodities for sale.

Subsec. (3) of the act, entitled "Illegality of Loss Leaders" provides:

"Any advertising, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this section, * * * are unfair competition and contrary to public policy and the policy of this section, * * *."

'Cost of retailer" is defined in subsec. (2), subdiv. (a) which reads:

" 'Cost to retailer' means the invoice cost of the merchandise to the retailer, or the replacement cost of the merchandise to the retailer, whichever is lower; * * *."

The "replacement cost" is defined in subsec. (2), subdiv. (c) of the act and provides:

" 'Replacement cost' means the cost per unit at which the merchandise sold or offered for sale could have been bought by the seller at any time within thirty days prior to the date of sale or the date upon which it is offered for sale by the seller if bought in the same quantity or quantities as the seller's last purchase of the said merchandise."

It seems perfectly apparent that the retailer in the case which you state may use either invoice cost or "replacement cost" as above defined, whichever is the lower. In so doing, he will not be violating the law but will be within the strict letter of it so long as either cost is a bona fide cost within the meaning of subdiv. (d) of subsec. (2) of the act which provides as follows:

" 'Cost to retailer' and 'cost of wholesaler' as defined in paragraphs (a) and (b) of this section mean bona fide costs; and purchases made by retailers and wholesalers at prices which cannot be justified by prevailing market conditions within this state shall not be used in determining cost to the retailer and cost to the wholesaler."

The act fixes no maximum, it merely fixes a minimum. It is aimed at selling or offering for sale the so-called "leaders" at below either invoice or "replacement cost" as those terms are defined in the act.

There is obviously no reason why, in the case that you put, the merchant may not use invoice cost as defined in the act as a standard below which he may not sell without violating the act. If he uses invoice cost as a standard and that cost is lower than "replacement cost," there can be no violation of the act as the act specifically provides that he may use such lower cost without violating the terms thereof. If he uses invoice cost as a standard and that cost is higher than "replacement cost," there would be no violation of the act, as the act by its express terms would have permitted him to use the lower figure as the standard. One cannot violate the terms of this act by using the higher figure as a standard, as the act is not concerned with maximum prices but rather with minimum prices below which commodities may not be sold or offered for sale.

Very truly yours,
John E. Martin Attorney General.

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